

**This volume was donated to LLMC  
to enrich its on-line offerings and  
for purposes of long-term preservation by**

**Northwestern University School of Law**

THE  
FEDERAL REPORTER.

VOLUME 65.

---

CASES ARGUED AND DETERMINED

IN THE

CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

---

FEBRUARY—APRIL, 1895.

---

ST. PAUL:  
WEST PUBLISHING CO.  
1895.



**COPYRIGHT, 1895,**  
**BY**  
**WEST PUBLISHING COMPANY.**

FEDERAL REPORTER, VOLUME 65.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE  
CIRCUIT AND DISTRICT COURTS.

---

FIRST CIRCUIT.

HON. HORACE GRAY, CIRCUIT JUSTICE.  
HON. LE BARON B. COLT, CIRCUIT JUDGE.  
HON. WILLIAM L. PUTNAM, CIRCUIT JUDGE.  
HON. NATHAN WEBB, DISTRICT JUDGE, MAINE.  
HON. EDGAR ALDRICH, DISTRICT JUDGE, NEW HAMPSHIRE.  
HON. THOMAS L. NELSON, DISTRICT JUDGE, MASSACHUSETTS.  
HON. GEORGE M. CARPENTER, DISTRICT JUDGE, RHODE ISLAND.

SECOND CIRCUIT.

HON. HENRY B. BROWN, CIRCUIT JUSTICE.  
HON. WILLIAM J. WALLACE, CIRCUIT JUDGE.  
HON. E. HENRY LACOMBE, CIRCUIT JUDGE.  
HON. NATHANIEL SHIPMAN, CIRCUIT JUDGE.  
HON. WILLIAM K. TOWNSEND, DISTRICT JUDGE, CONNECTICUT.  
HON. ALFRED C. COXE, DISTRICT JUDGE, N. D. NEW YORK.  
HON. ADDISON BROWN, DISTRICT JUDGE, S. D. NEW YORK.  
HON. CHARLES L. BENEDICT, DISTRICT JUDGE, E. D. NEW YORK.  
HON. HOYT H. WHEELER, DISTRICT JUDGE, VERMONT.

## THIRD CIRCUIT.

HON. GEORGE SHIRAS, JR., CIRCUIT JUSTICE.  
HON. MARCUS W. ACHESON, CIRCUIT JUDGE.  
HON. GEORGE M. DALLAS, CIRCUIT JUDGE.  
HON. LEONARD E. WALES, DISTRICT JUDGE, DELAWARE.  
HON. EDWARD T. GREEN, DISTRICT JUDGE, NEW JERSEY.  
HON. WILLIAM BUTLER, DISTRICT JUDGE, E. D. PENNSYLVANIA.  
HON. JOSEPH BUFFINGTON, DISTRICT JUDGE, W. D. PENNSYLVANIA.

## FOURTH CIRCUIT.

HON. MELVILLE W. FULLER, CIRCUIT JUSTICE.  
HON. NATHAN GOFF, CIRCUIT JUDGE.  
HON. CHARLES H. SIMONTON, CIRCUIT JUDGE.  
HON. THOMAS J. MORRIS, DISTRICT JUDGE, MARYLAND.  
HON. AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA.  
HON. ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.  
HON. WILLIAM H. BRAWLEY, DISTRICT JUDGE, E. AND W. D. SOUTH CAROLINA.  
HON. ROBERT W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.  
HON. JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.  
HON. JOHN J. JACKSON, JR., DISTRICT JUDGE, WEST VIRGINIA.

## FIFTH CIRCUIT.

HON. EDWARD D. WHITE, CIRCUIT JUSTICE.  
HON. DON A. PARDEE, CIRCUIT JUDGE.  
HON. A. P. MCCORMICK, CIRCUIT JUDGE.  
HON. JOHN BRUCE, DISTRICT JUDGE, M. AND N. D. ALABAMA.  
HON. HARRY T. TOULMIN, DISTRICT JUDGE, S. D. ALABAMA.  
HON. CHARLES SWAYNE, DISTRICT JUDGE, N. D. FLORIDA.  
HON. JAMES W. LOCKE, DISTRICT JUDGE, S. D. FLORIDA.  
HON. WILLIAM T. NEWMAN, DISTRICT JUDGE, N. D. GEORGIA.  
HON. EMORY SPEER, DISTRICT JUDGE, S. D. GEORGIA.  
HON. CHARLES PARLANGE, DISTRICT JUDGE, E. D. LOUISIANA.  
HON. ALECK BOARMAN, DISTRICT JUDGE, W. D. LOUISIANA.  
HON. HENRY C. NILES, DISTRICT JUDGE, N. AND S. D. MISSISSIPPI.  
HON. DAVID E. BRYANT, DISTRICT JUDGE, E. D. TEXAS.  
HON. JOHN B. RECTOR, DISTRICT JUDGE, N. D. TEXAS.  
HON. THOMAS S. MAXEY, DISTRICT JUDGE, W. D. TEXAS.

## SIXTH CIRCUIT.

HON. HOWELL E. JACKSON, CIRCUIT JUSTICE.  
HON. WILLIAM H. TAFT, CIRCUIT JUDGE.  
HON. HORACE H. LURTON, CIRCUIT JUDGE.  
HON. JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.  
HON. HENRY H. SWAN, DISTRICT JUDGE, E. D. MICHIGAN.  
HON. HENRY F. SEVERENS, DISTRICT JUDGE, W. D. MICHIGAN.  
HON. AUGUSTUS J. RICKS, DISTRICT JUDGE, N. D. OHIO.  
HON. GEORGE R. SAGE, DISTRICT JUDGE, S. D. OHIO.  
HON. CHARLES D. CLARK, DISTRICT JUDGE, E. AND M. D. TENNESSEE.  
HON. D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE.<sup>2</sup>  
HON. ELI S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

## SEVENTH CIRCUIT.

HON. JOHN M. HARLAN, CIRCUIT JUSTICE.  
HON. WILLIAM A. WOODS, CIRCUIT JUDGE.  
HON. JAMES G. JENKINS, CIRCUIT JUDGE.  
HON. JOHN W. SHOWALTER, CIRCUIT JUDGE.<sup>3</sup>  
HON. PETER S. GROSSCUP, DISTRICT JUDGE, N. D. ILLINOIS.  
HON. WILLIAM J. ALLEN, DISTRICT JUDGE, S. D. ILLINOIS.  
HON. JOHN H. BAKER, DISTRICT JUDGE, INDIANA.  
HON. WILLIAM H. SEAMAN, DISTRICT JUDGE, E. D. WISCONSIN.  
HON. ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN.

## EIGHTH CIRCUIT.

HON. DAVID J. BREWER, CIRCUIT JUSTICE.  
HON. HENRY C. CALDWELL, CIRCUIT JUDGE.  
HON. WALTER H. SANBORN, CIRCUIT JUDGE.  
HON. AMOS M. THAYER, CIRCUIT JUDGE.  
HON. JOHN A. WILLIAMS, DISTRICT JUDGE, E. D. ARKANSAS.  
HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.  
HON. MOSES HALLETT, DISTRICT JUDGE, COLORADO.  
HON. OLIVER P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.  
HON. JOHN S. WOOLSON, DISTRICT JUDGE, S. D. IOWA.  
HON. CASSIUS G. FOSTER, DISTRICT JUDGE, KANSAS.  
HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.  
HON. HENRY S. PRIEST, DISTRICT JUDGE, E. D. MISSOURI.  
HON. JOHN F. PHILIPS, DISTRICT JUDGE, W. D. MISSOURI.  
HON. ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA.  
HON. ALFRED D. THOMAS, DISTRICT JUDGE, NORTH DAKOTA.  
HON. ALONZO J. EDGERTON, DISTRICT JUDGE, SOUTH DAKOTA.  
HON. JOHN A. RINER, DISTRICT JUDGE, WYOMING.

<sup>1</sup> Commissioned January 21, 1895.

<sup>2</sup> Resigned January 21, 1895.

<sup>3</sup> Commissioned March 1, 1895.

## NINTH CIRCUIT

HON. STEPHEN J. FIELD, CIRCUIT JUSTICE.

HON. JOSEPH MCKENNA, CIRCUIT JUDGE.

HON. WILLIAM B. GILBERT, CIRCUIT JUDGE.

HON. ERSKINE M. ROSS, CIRCUIT JUDGE.<sup>4</sup>

HON. WM. W. MORROW, DISTRICT JUDGE, N. D. CALIFORNIA.

HON. ERSKINE M. ROSS, DISTRICT JUDGE, S. D. CALIFORNIA.<sup>4</sup>

HON. OLIN WELLBORN, DISTRICT JUDGE, S. D. CALIFORNIA.<sup>5</sup>

HON. HIRAM KNOWLES, DISTRICT JUDGE, MONTANA.

HON. CORNELIUS H. HANFORD, DISTRICT JUDGE, WASHINGTON.

HON. THOMAS P. HAWLEY, DISTRICT JUDGE, NEVADA.

HON. CHARLES B. BELLINGER, DISTRICT JUDGE, OREGON.

HON. JAMES H. BEATTY, DISTRICT JUDGE, IDAHO.

HON. WARREN TRUITT, DISTRICT JUDGE, ALASKA.

<sup>4</sup>Commissioned Circuit Judge February 22, 1895.

<sup>5</sup>Commissioned March 1, 1895.

# CASES REPORTED.

	Page		Page
Abrahamson v. The Canonicus (D. C.)....	525	Borgmeyer, Idler v. (C. C. A.).....	910
Adelina, The, v. The Gulf of Taranto (D. C.) .....	622	Bradstreet Co., Shepherd v. (C. C.).....	142
Adirondack Match Co., Diamond Match Co. v. (C. C.).....	803	Bredt v. United States (C. C.).....	496
Advance, The (D. C.).....	245	Brow, Wabash Western Ry. v. (C. C. A.)..	941
Allianca, The (D. C.).....	245	Brown v. Cranberry Iron & Coal Co. (C. C. A.) .....	636
Allis Co. v. Columbia Mill Co. (C. C. A.)..	52	Brown v. Proceeds of The Seguranca (D. C.)	245
Alturas County, Savings & Loan Ass'n v. (C. C.) .....	677	Brown, Hebert v. (C. C.).....	2
American Bell Tel. Co., United States v. (C. C.).....	86	Brown, Vermilya v. (C. C.).....	149
American Fire Ins. Co. v. Charleston Bridge Co. (C. C. A.).....	634	Bryant, Chicago, St. P., M. & O. R. Co. v. (C. C. A.) .....	969
American Steamship Co., United States v. (C. C.).....	787	Buffington's Iron Bldg. Co. v. Eustis (C. C.) .....	92
American Straw-Board Co., Indianapolis Water Co. v. (C. C.).....	534	Buffington's Iron Bldg. Co. v. Eustis (C. C. A.) .....	804
American Surety Co., Lombard Investment Co. v. (C. C.).....	476	Burrill v. Crossman (D. C.).....	104
Andrews v. Miller (C. C. A.).....	897	Bush & Sons Co. v. Thompson (C. C. A.)...	812
Anglo-Florida Phosphate Co. v. McKibben (C. C. A.).....	529	Butler v. Machen (C. C. A.).....	901
Arbogast v. Seawall (C. C. A.).....	742	Cabot v. McMaster (C. C. A.).....	533
Armstrong, Chemical Nat. Bank of New York v. (C. C. A.).....	573	Calumet & Chicago Canal & Dock Co., Laughlin v. (C. C. A.).....	441
Armstrong, Merchants' Nat. Bank v. (C. C.)	932	Camp, Baltimore & O. R. Co. v. (C. C. A.)	952
Augusta, T. & G. R. Co., Kittel v. (C. C.)	859	Camp, Gay Manuf'g Co. v. (C. C. A.).....	794
Baltimore & O. R. Co. v. Camp (C. C. A.)	952	Campbell v. United States (C. C. A.).....	777
Baltimore & O. R. Co., Wills v. (C. C.)..	532	Candler, United States v. (D. C.).....	308
Barker v. Northern Pac. R. Co. (C. C.)...	460	Cannon, German Sav. & Loan Soc. v. (C. C.) .....	542
Barrett, United States v. (C. C.).....	62	Canonicus, The, Abrahamson v. (D. C.).....	525
Barrow v. Milliken (C. C.).....	888	Capitol Electric Co., Thomson-Houston Electric Co. v. (C. C. A.).....	341
Basuier, Second Nat. Bank of Aurora v. (C. C. A.).....	58	Carter v. Thompson (C. C.).....	329
Baughman v. Seawall (C. C. A.).....	742	Central Transp. Co. v. Pullman Palace-Car Co. (C. C.).....	158
Baxter v. International Contracting Co. (D. C.).....	250	Central Trust Co. v. Richmond & D. R. Co. (C. C.).....	336
Bear Valley Irr. Co., Foster v. (C. C.).....	836	Central Trust Co. of New York v. Charlotte, C. & A. R. Co. (C. C.).....	257
Beck v. Flournoy Live-Stock & Real-Estate Co. (C. C. A.).....	30	Central Trust Co. of New York v. Charlotte, C. & A. R. Co. (C. C.).....	264
Bell, The Hattie (D. C.).....	119	Central Trust Co. of New York v. East Tennessee, V. & G. R. Co. (C. C.).....	332
Bennett v. McKinley (C. C. A.).....	505	Charleston Bridge Co., American Fire Ins. Co. v. (C. C. A.).....	634
Berry v. Seawall (C. C. A.).....	742	Charleston Bridge Co., Phenix Ins. Co. v. (C. C. A.).....	628
Bird, Standard Paint Co. v. (C. C.).....	509	Charlotte, C. & A. R. Co., Central Trust Co. of New York v. (C. C.).....	257
Black Diamond Coal Co. v. O'Neil (D. C.)	111	Charlotte, C. & A. R. Co., Central Trust Co. of New York v. (C. C.).....	264
Bloomington, Edison Electric Light Co. v. (C. C.).....	212	Chattanooga Union R. Co., Davis v. (C. C.)	359
Bloomington, Edison Electric Light Co. v. (C. C.).....	615	Chattanooga Union R. Co., Farmers' Loan & Trust Co. v. (C. C.).....	359
Blount, Wadley v. (C. C.).....	667	Chemical Nat. Bank of New York v. Armstrong (C. C. A.) .....	573
Bohn, New Hampshire Fire Ins. Co. v. (C. C. A.).....	165	Chesapeake, O. & S. W. R. Co., Lloyd v. (C. C.).....	351
Bohn, Syndicate Ins. Co. v. (C. C. A.).....	165	Chesapeake & O. R. Co., Hukill v. (C. C.)	138
Bonsack Mach. Co. v. Hulse (C. C. A.).....	864		
Booth v. Denike (C. C.).....	43		
Borgefeldt, In re (C. C.).....	791		

	Page		Page
Chesapeake & O. R. Co., Powers v. (C. C.)	129	Dinniny v. The Sam Sloan (D. C.)	125
Chicago, B. & Q. R. Co., Miller v. (C. C.)	305	Doheny, Gillette v. (C. C.)	715
Chicago Directory Co., Chicago Dollar Directory Co. v. (C. C. A.)	463	Drake, Front St. Cable R. Co. v. (C. C.)	539
Chicago Dollar Directory Co. v. Chicago Directory Co. (C. C. A.)	463	Dreutzer v. Frankfort Land Co. (C. C. A.)	642
Chicago, M. & St. P. R. Co., Kirtley v. (C. C.)	386	Dunham Manuf'g Co. v. Coburn Trolley Track Manuf'g Co. (C. C.)	98
Chicago, St. P., M. & O. R. Co. v. Bryant (C. C. A.)	969	Durland, United States v. (D. C.)	408
Chicago & A. R. Co., Martin v. (C. C.)	384	Dyer, Muhlenberg County v. (C. C. A.)	634
Chin Yuen Sing, In re (C. C.)	571	East Tennessee, V. & G. R. Co., Central Trust Co. of New York v. (C. C.)	332
Chin Yuen Sing, In re (C. C.)	572	East & West R. Co. of Alabama, Coe v. (C. C.)	16
Chin Yuen Sing, In re (C. C.)	788	Eastern Building & Loan Ass'n v. Denton (C. C. A.)	569
Chisholm v. Radford Brick Co. (C. C. A.)	1	Economy Feed Water-Heater Co. v. Lamprey Boiler Furnace-Mouth Protector Co. (C. C. A.)	1000
Citizens' Nat. Bank, Muhlenberg County (C. C.)	537	Eddie Garrison, The, Sherridan v. (D. C.)	253
City of Fergus Falls, Fergus Falls Water Co. v. (C. C.)	586	Edgewater, The, McCaldin v. (D. C.)	527
City of Marceline, Prickett v. (C. C.)	469	Edison Electric Light Co. v. Bloomingdale (C. C.)	212
City of Wilmington, Robinson v. (C. C. A.)	856	Edison Electric Light Co. v. Bloomingdale (C. C.)	615
Clark, The Henry (D. C.)	815	Edison Electric Light Co. v. Goelet (C. C.)	612
Clark v. Five Hundred and Five Thousand Feet of Lumber (C. C. A.)	236	Edison Electric Light Co. v. Goelet (C. C.)	613
Clark, Moore v. (C. C.)	526	Edison Electric Light Co. of New York, Philadelphia Trust, Safe-Deposit & Insurance Co. v. (C. C. A.)	551
Cleveland & M. V. R. Co., Tod v. (C. C. A.)	145	Edward P. Allis Co. v. Columbia Mill Co. (C. C. A.)	52
Cleverly, Cutter Electrical & Manuf'g Co. v. (C. C.)	94	Elgin Wind Power & Pump Co. v. Nichols (C. C. A.)	215
Clinton Wire-Cloth Co. v. Wright & Colton Wire-Cloth Co. (C. C.)	425	Ellis v. The McCaldin Bros. (D. C.)	527
Clyde v. Richmond & D. R. Co. (C. C.)	336	Elsas, National Folding-Box & Paper Co. v. (C. C.)	1001
Clyde v. Richmond & D. R. Co. (C. C.)	482	Emery, Rhino v. (C. C.)	826
Coburn Trolley Track Manuf'g Co., Dunham Manuf'g Co. v. (C. C.)	98	Equitable Mortg. Co., New York Security & Trust Co. v. (C. C.)	12
Cockley, Gary v. (C. C. A.)	497	Ertel Co. v. Stahl (C. C. A.)	517
Coe v. East & West R. Co. of Alabama (C. C.)	16	Ertel Co. v. Stahl (C. C. A.)	519
Colby v. Village of La Grange (C. C.)	554	Eureka Specialty Co., Heaton-Peninsular Button-Fastener Co. v. (C. C.)	619
Columbia Mill Co., Edward P. Allis Co. v. (C. C. A.)	52	Eustis, Buffington's Iron Bldg. Co. v. (C. C.)	92
Columbus, C. & I. C. R. Co., Long Island Loan & Trust Co. v. (C. C.)	455	Eustis, Buffington's Iron Bldg. Co. v. (C. C. A.)	804
Columbus, The, Munn v. (D. C.)	430	Ewing, Sagadahoc Land Co. v. (C. C. A.)	702
Commercial Bank of Cincinnati, Covington City Nat. Bank v. (C. C.)	547	Fanny Skolfield, The, Crooks v. (D. C.)	814
Commissioners of Circuit Court, In re (C. C.)	314	Farmers' Loan & Trust Co. v. Chattanooga Union R. Co. (C. C.)	359
Cotting v. Grant St. Electric R. Co. (C. C.)	545	Farmers' Loan & Trust Co. v. Grape Creek Coal Co. (C. C. A.)	717
Covington City Nat. Bank v. Commercial Bank of Cincinnati (C. C.)	547	Farmers' Loan & Trust Co. of New York v. Forest Park & C. R. Co. (C. C. A.)	882
Cranberry Iron & Coal Co., Brown v. (C. C. A.)	636	Fergus Falls Water Co. v. City of Fergus Falls (C. C.)	586
Crawford v. Seawall, two cases (C. C. A.)	398	Field v. Hastings & Bradley Co. (C. C.)	279
Crooks v. The Fanny Skolfield (D. C.)	814	Five Hundred and Five Thousand Feet of Lumber, Clark v. (C. C. A.)	236
Crossman, Burrill v. (D. C.)	104	Fleece Hygienic Underwear Co., Jaros Hygienic Underwear Co. v. (C. C.)	424
Cummings, United States v. (C. C.)	495	Florence, The, Thomas v. (D. C.)	248
Cushing, The Mary L. (C. C. A.)	528	Flournoy Live-Stock & Real-Estate Co., Beck v. (C. C. A.)	30
Cushing, Koch v. (C. C. A.)	528	Forest Park & C. R. Co., Farmers' Loan & Trust Co. of New York v. (C. C. A.)	882
Cutter Electrical & Manuf'g Co. v. Cleverly (C. C.)	94	Foster v. Bear Valley Irr. Co. (C. C.)	836
Daniels v. Lazarus (C. C.)	718	Frank v. Wm. P. Mockridge Manuf'g Co. (C. C.)	521
Davis v. Chattanooga Union R. Co. (C. C.)	359	Frankfort Land Co., Dreutzer v. (C. C. A.)	642
Davis v. Davis (C. C.)	380		
Debs, United States v. (D. C.)	210		
De Leon v. Leitch (D. C.)	1002		
Denike, Booth v. (C. C.)	43		
Denton, Eastern Building & Loan Ass'n v. (C. C. A.)	569		
Diamond Match Co. v. Adirondack Match Co. (C. C.)	803		

# CASES REPORTED.

ix

	Page		Page
Franklin Brass Co. v. Phoenix Assur. Co. (C. C. A.).....	773	Indianapolis Water Co. v. American Straw-Board Co. (C. C.) .....	534
Front St. Cable R. Co. v. Drake (C. C.)..	539	International Contracting Co., Baxter v. (D. C.).....	250
Gabriel v. United States (C. C.).....	422	Jackson, Gulf, C. & S. F. R. Co. v. (C. C. A.) .....	48
Garrison, The Eddie (D. C.).....	253	Jackson Iron Co. v. Negaunee Concentrat- ing Co. (C. C. A.).....	298
Gary v. Cockley (C. C. A.).....	497	Jacot v. United States (C. C. A.).....	415
Gay Manuf'g Co. v. Camp (C. C. A.)....	794	Jahn, United States v. (C. C. A.).....	792
George Ertel Co. v. Stahl (C. C. A.).....	517	Jaros Hygienic Underwear Co. v. Fleece Hygienic Underwear Co. (C. C.).....	424
George Ertel Co. v. Stahl (C. C. A.).....	519	Johnson v. The Hattie Bell (D. C.).....	119
George W. Bush & Sons Co. v. Thompson (C. C. A.) .....	812	Jonathan Mills Manuf'g Co. v. Whitehurst (C. C.).....	996
German Sav. & Loan Soc. v. Cannon (C. C.)	542	Jones v. Newport News & M. V. Co. (C. C. A.) .....	736
Gilchrist v. Lumberman's Min. Co. (C. C. A.) .....	1005	Jordan, The Mabel (D. C.).....	123
Gillette v. Doheny (C. C.).....	715	Kansas City v. National Waterworks Co. (C. C.) .....	691
Gladisfen. The (D. C.).....	123	Katie O'Neil, The (D. C.).....	111
Gleason, Hoyt v. (C. C.).....	685	Keats v. National Heeling Mach. Co. (C. C. A.).....	940
Globe Co., Office Specialty Manuf'g Co. v. (C. C.).....	599	Kelly, Smith v. (C. C.).....	16
Glotin v. Oswald (C. C.).....	151	Kirtley v. Chicago, M. & St. P. R. Co. (C. C.) .....	386
Goelet, Edison Electric Light Co. v. (C. C.)	612	Kittel v. Augusta, T. & G. R. Co. (C. C.) ..	859
Goelet, Edison Electric Light Co. v. (C. C.)	613	Klever v. Seawall (C. C. A.).....	373
Goldenberg, Weld v. (C. C. A.).....	466	Klever v. Seawall (C. C. A.).....	393
Grant St. Electric R. Co., Cotting v. (C. C.)	545	Knox County, Morton v. (C. C.).....	369
Grape Creek Coal Co., Farmers' Loan & Trust Co. v. (C. C. A.).....	717	Koch v. Cushing (C. C. A.).....	528
Gregg v. Sanford (C. C. A.).....	151	Kuhn, Meyer v. (C. C. A.).....	705
Greve, United States v. (D. C.).....	488	Lake Erie & W. R. Co. v. Indianapolis Nat. Bank (C. C.).....	690
Grim, L. Schreiber & Sons Co. v. (C. C.)	220	Lamprey Boiler Furnace-Mouth Protector Co., Economy Feed Water-Heater Co. v. (C. C. A.).....	1000
Griswold v. Wagner (C. C.).....	513	Lancaster County, Madden v. (C. C. A.) ..	188
Guinn, Holton v. (C. C.).....	450	Laughlin v. Calumet & Chicago Canal & Dock Co. (C. C. A.).....	441
Gulf, C. & S. F. R. Co. v. Jackson (C. C. A.)	48	Lazarus, Daniels v. (C. C.).....	718
Gulf of Taranto, The, The Adelina v. (D. C.) .....	622	Lefavour v. Whitman Shoe Co. (C. C.).....	785
Hager v. McDonald (C. C.).....	200	Lehigh Val. R. Co., Price v. (C. C.).....	825
Hall Signal Co., Union Switch & Signal Co. v. (C. C.).....	625	Leitch, De Leon v. (D. C.).....	1002
Hanson v. The Scottish Dale (D. C.).....	810	Lloyd v. Chesapeake, O. & S. W. R. Co. (C. C.).....	351
Hard v. Proceeds of The Advance (D. C.)	245	Lloyd, Pratt v. (C. C.).....	800
Hartman, United States v. (D. C.).....	490	Lockard, Playford v. (C. C.).....	870
Hasbrouck, Rothschild v. (C. C.).....	283	Lockwood, Wickes v. (C. C.).....	610
Hastings & Bradley Co., Field v. (C. C.)..	279	Lombard Investment Co. v. American Sure-ty Co. (C. C.).....	476
Hattie Bell, The, Johnson v. (D. C.).....	119	Lombard Inv. Co., New York Security & Trst Co. v. (C. C.).....	271
Haughey, Prescott v. (C. C.).....	653	London Assur. Co. v. Proceeds of The Al- lianca (D. C.).....	245
Hays v. Seawall (C. C. A.).....	742	Long Island Loan & Trust Co. v. Colum- bus, C. & I. C. R. Co. (C. C.).....	455
Haytian Republic, The, United States v. (D. C.).....	120	Lorillard Co. v. Peper (C. C.).....	597
Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. (C. C.).....	619	Lotta, The, Roxbury v. (D. C.).....	319
Heaton-Peninsular Button Fastener Co. v. Rooney (C. C.).....	96	Louisville & N. R. R., St. Louis Drayage Co. v. (C. C.).....	39
Hebert v. Brown (C. C.).....	2	Lowenthal v. United States (C. C.).....	420
Henderson v. Travelers' Ins. Co. (C. C.)..	438	L. Schreiber & Sons Co. v. Grim (C. C.)..	220
Henry Clark, The, v. O'Brien (D. C.)....	815	Lumberman's Min. Co., Gilchrist v. (C. C. A.) .....	1005
Hernandez, Underhill v. (C. C. A.).....	577	Lyon, Marine v. (C. C. A.).....	992
Hoe v. Scott (C. C.).....	606	Mabel Jordan, The, v. The Illinois (D. C.)	123
Holton v. Guinn (C. C.).....	450		
Horse Springs Cattle Co., Schofield v. (C. C.) .....	433		
Howell, United States v. (D. C.).....	402		
Hoyt v. Gleason (C. C.).....	685		
Hudson, United States v. (D. C.).....	68		
Hukill v. Chesapeake & O. R. Co. (C. C.)..	138		
Hulse v. Bonsack Mach. Co. (C. C. A.)....	864		
Idler v. Borgmeyer (C. C. A.).....	910		
Illinois, The, The Mabel Jordan v. (D. C.)	123		
Indianapolis Nat. Bank, Lake Erie & W. R. Co. v. (C. C.).....	690		



	Page		Page
McCaldin v. The Edgewater (D. C.).....	527	Newport News & M. V. Co., Jones v. (C. C. A.).....	736
McCaldin, Bros. The, Ellis v. (D. C.).....	527	New York Air-Brake Co., Westinghouse Air-Brake Co. v. (C. C.).....	99
McDonald, Hager v. (C. C.).....	200	New York Daily News v. United States (C. C. A.).....	493
MacDonald, United States v. (D. C.).....	486	New York Security & Trust Co. v. Equitable Mortg. Co. (C. C.).....	12
Machen, Butler v. (C. C. A.).....	901	New York Security & Trust Co. v. Lombard Inv. Co. (C. C.).....	271
McKee v. Shaffer (C. C.).....	447	Nichols, Elgin Wind Power & Pump Co. v. (C. C. A.).....	215
McKibben, Anglo-Florida Phosphate Co. v. (C. C. A.).....	529	Northern Pac. R. Co., Barker v. (C. C.).....	460
McKinley, Bennett v. (C. C. A.).....	505	Northwestern Mut. Life Ins. Co., Wilson v. (C. C. A.).....	38
McKinley, Williams v. (C. C.).....	4	Obdyke, Ritchie v. (C. C.).....	222
McMahon, United States v. (C. C. A.).....	976	Obdyke, Ritchie v. (C. C. A.).....	224
McMaster, Cabot v. (C. C. A.).....	533	O'Brien, The Henry Clark v. (D. C.).....	815
McSorley, United States v. (C. C. A.).....	492	Office Specialty Manufg Co. v. Globe Co. (C. C.).....	599
McWilliams, In re (D. C.).....	251	One Hundred and Thirty-Two Packages of Spirituous Liquors, United States v. (D. C.).....	980
Madden v. Lancaster County (C. C. A.).....	188	O'Neil, The Katie (D. C.).....	111
Manhattan Trust Co. v. Sioux City & N. R. Co. (C. C.).....	559	O'Neil, Black Diamond Coal Co. v. (D. C.).....	111
Mansberger, Terre Haute & I. R. Co. v. (C. C. A.).....	196	Oswald, Glotin v. (C. C.).....	151
Marine v. Lyon (C. C. A.).....	992	Owosso Sav. Bank v. Walsh (C. C.).....	783
Markwood v. Southern R. Co. (C. C.).....	817	Peper, P. Lorillard Co. v. (C. C.).....	597
Martin v. Chicago & A. R. Co. (C. C.).....	384	Pheux Ins. Co. v. Charleston Bridge Co. (C. C. A.).....	628
Mary L. Cushing, The (C. C. A.).....	528	Phenix Ins. Co. of Brooklyn v. Wilcox & Gibbs Guano Co. (C. C. A.).....	724
Mast, Snow v. (C. C.).....	995	Philadelphia Trust, Safe-Deposit & Insurance Co. v. Edison Electric Light Co. of New York (C. C. A.).....	551
Mast, Snow v. (C. C.).....	996	Philadelphia & R. R. Co., Platt v. (C. C.).....	660
Matheson & Co. v. United States (C. C.).....	422	Philadelphia & R. R. Co., Platt v. (C. C.).....	872
Melick, Travelers' Ins. Co. of Hartford v. (C. C. A.).....	178	Phoenix Assur. Co., Franklin Brass Co. v. (C. C. A.).....	773
Merchants' Nat. Bank v. Armstrong (C. C.).....	932	Phoenix Assur. Co., Summerfield v. (C. C.).....	292
Mergenthaler Linotype Co. v. Ridder (C. C.).....	853	Platt v. Philadelphia & R. R. Co. (C. C.).....	660
Meyer v. Kuhn (C. C. A.).....	705	Platt v. Philadelphia & R. R. Co. (C. C.).....	872
Miller v. Chicago, B. & Q. R. Co. (C. C.).....	305	Playford v. Lockard (C. C.).....	870
Miller, Andrews v. (C. C. A.).....	897	P. Lorillard Co. v. Peper (C. C.).....	597
Milliken v. Barrow (C. C.).....	888	Pollard v. Reardon (C. C. A.).....	848
Mills Manufg Co. v. Whitehurst (C. C.).....	996	Powers v. Chesapeake & O. R. Co. (C. C.).....	129
Minnesota Railway Transfer Co., Wetzel v. (C. C. A.).....	23	Pratt v. Lloyd (C. C.).....	300
Missouri Pac. R. Co., United States v. (C. C.).....	903	Pratt v. Wright (C. C.).....	99
Mockridge Manufg Co., Frank v. (C. C.).....	521	Prescott v. Haughey (C. C.).....	653
Moore v. Clark (C. C.).....	526	Price v. Lehigh Val. R. Co. (C. C.).....	825
Morris v. Receivers of Richmond & D. R. Co. (C. C.).....	584	Prickett v. City of Marcelline (C. C.).....	469
Morton v. Knox County (C. C.).....	369	Proceeds of The Advance, Hard v. (D. C.).....	245
Morton, United States v. (C. C. A.).....	204	Proceeds of The Allianca, London Assur. Co. v. (D. C.).....	245
Muhlenburg County v. Citizens' Nat. Bank (C. C.).....	537	Proceeds of The Seguranca, Brown v. (D. C.).....	245
Muhlenberg County v. Dyer (C. C. A.).....	634	Provident Sav. Life Assur. Soc. of New York, Smith v. (C. C. A.).....	765
Munn v. The Columbus (D. C.).....	430	Pullman Palace-Car Co. v. Central Transp. Co. (C. C.).....	158
National Folding-Box & Paper Co. v. Elsas (C. C.).....	1001	Purcell, Jr., The Thomas (D. C.).....	251
National Heeling Mach. Co., Keats v. (C. C. A.).....	940	Radford Brick Co., Chisholm v. (C. C. A.).....	1
National Life Ins. Co., New Hampshire Fire Ins. Co. v. (C. C. A.).....	165	Balston v. Washington & C. R. R. Co. (C. C.).....	557
National Life Ins. Co., Syndicate Ins. Co. v. (C. C. A.).....	165	Reardon v. Pollard (C. C. A.).....	848
National Meter Co., Thomson Meter Co. v. (C. C. A.).....	427	Receivers of Richmond & D. R. Co., Morris v. (C. C.).....	584
National Waterworks Co. v. Kansas City (C. C.).....	691	Rheinstrom, Smith v. (C. C. A.).....	984
Negaunee Concentrating Co., Jackson Iron Co. v. (C. C. A.).....	298		
Newark Watch-Case Material Co. v. Wilmot & Hobbs Manufg Co. (C. C. A.).....	507		
New Hampshire Fire Ins. Co. v. Bohn (C. C. A.).....	165		
New Hampshire Fire Ins. Co. v. National Life Ins. Co. (C. C. A.).....	165		

	Page		Page
Rhino v. Emery (C. C.).....	826	Syndicate Ins. Co. v. National Life Ins. Co. (C. C. A.).....	165
Richmond & D. R. Co., Central Trust Co. v. (C. C.).....	336	Terre Haute & I. R. Co. v. Mansberger (C. C. A.).....	196
Richmond & D. R. Co., Clyde v. (C. C.)..	336	Thomas v. The Florence (D. C.).....	248
Richmond & D. R. Co., Clyde v. (C. C.)..	482	Thomas Purcell, Jr., The (D. C.).....	251
Ridder, Mergenthaler Linotype Co. v. (C. C.).....	853	Thomson-Houston Electric Co. v. Capitol Electric Co. (C. C. A.).....	341
Ritchie v. Obdyke (C. C.).....	222	Thomson-Houston Electric Co. v. Western Electric Co. (C. C.).....	615
Ritchie v. Obdyke (C. C. A.).....	224	Thomson Meter Co. v. National Meter Co. (C. C. A.).....	427
Robinson v. City of Wilmington (C. C. A.)	856	Thompson, Carter v. (C. C.).....	329
Rogers, United States v. (C. C.).....	787	Thompson, George W. Bush & Sons Co. v. (C. C. A.).....	812
Rooney, Heaton-Peninsular Button Fastener Co. v. (C. C.).....	96	Three Hundred Packages of Coconut Oil, Skolfield v. (D. C.).....	814
Rothschild v. Hasbrouck (C. C.).....	283	Tiffany v. United States (C. C.).....	494
Roxbury v. The Lotta (D. C.).....	319	Tindall v. Wesley (C. C. A.).....	731
Roza v. Smith (D. C.).....	592	Tod v. Cleveland & M. V. R. Co. (C. C. A.)	145
Sagadahoc Land Co. v. Ewing (C. C. A.)..	702	Town of San Buenaventura, Santa Ana Water Co. v. (C. C.).....	323
St. Louis Drayage Co. v. Louisville & N. R. R. (C. C.).....	39	Travelers' Ins. Co., Henderson v. (C. C.)..	438
Sam Sloan, The, Dinniny v. (D. C.).....	125	Travelers' Ins. Co. of Hartford v. Melick (C. C. A.).....	178
Sanford, Gregg v. (C. C. A.).....	151	Underhill v. Hernandez (C. C. A.).....	577
Santa Ana Water Co. v. Town of San Buenaventura (C. C.).....	323	Union Switch & Signal Co. v. Hall Signal Co. (C. C.).....	625
Savings & Loan Ass'n v. Alturas County (C. C.).....	677	United States v. American Bell Tel. Co. (C. C.).....	86
Schofield v. Horse Springs Cattle Co. (C. C.)	433	United States v. American Steamship Co. (C. C.).....	787
Schreiber & Sons Co. v. Grim (C. C.).....	220	United States v. Barrett (C. C.).....	62
Scott, Hoe v. (C. C.).....	606	United States v. Candler (D. C.).....	308
Scottish Dale, The, Hanson v. (D. C.)..	810	United States v. Cummings (C. C.).....	495
Scows Nos. 6, 8, 11, and 12, The, (D. C.)..	430	United States v. Debs (D. C.).....	210
Seawall, Arbogast v. (C. C. A.).....	742	United States v. Durland (D. C.).....	408
Seawall, Baughman v. (C. C. A.).....	742	United States v. Greve (D. C.).....	488
Seawall, Berry v. (C. C. A.).....	742	United States v. Hartman (D. C.).....	490
Seawall, Crawford v., two cases (C. C. A.)	398	United States v. Howell (D. C.).....	402
Seawall, Hays v. (C. C. A.).....	742	United States v. Hudson (D. C.).....	68
Seawall, Klever v. (C. C. A.).....	373	United States v. Jahn (C. C. A.).....	792
Seawall, Klever v. (C. C. A.).....	393	United States v. MacDonald (D. C.).....	486
Seawall, Shepherd v. (C. C. A.).....	742	United States v. McMahon (C. C. A.).....	976
Seawall, Vesey v., two cases (C. C. A.)..	398	United States v. McSorley (C. C. A.).....	492
Second Nat. Bank of Aurora v. Basnier (C. C. A.).....	58	United States v. Missouri Pac. R. Co. (C. C.).....	903
Seguranca, The (D. C.).....	245	United States v. Morton (C. C. A.).....	204
Shaffer, McKee v. (C. C.).....	447	United States v. One Hundred and Thirty-Two Packages of Spirituous Liquors (D. C.).....	980
Shepherd v. Bradstreet Co. (C. C.).....	142	United States v. Rogers (C. C.).....	787
Shepherd v. Seawall (C. C. A.).....	742	United States v. Swan (C. C. A.).....	647
Sherridan v. The Eddie Garrison (D. C.)..	253	United States v. The Haytian Republic (D. C.).....	120
Sioux City & N. R. Co., Manhattan Trust Co. v. (C. C.).....	559	United States v. Van Leuven (D. C.).....	78
Sirius, The, Williams v. (D. C.).....	226	United States v. Weiller (C. C. A.).....	418
Skolfield, The Fanny (D. C.).....	814	United States v. Wetherell (C. C. A.).....	987
Skolfield v. Three Hundred Packages of Coconut Oil (D. C.).....	814	United States, Bredt v. (C. C.).....	496
Sloan, The Sam (D. C.).....	125	United States, Campbell v. (C. C. A.).....	777
Smith v. Kelly (C. C.).....	16	United States, Gabriel v. (C. C.).....	422
Smith v. Provident Sav. Life Assur. Soc. of New York (C. C. A.).....	765	United States, Jacot v. (C. C. A.).....	415
Smith v. Rheinstrom (C. C. A.).....	984	United States, Lowenthal v. (C. C.).....	420
Smith, Roza v. (D. C.).....	592	United States, New York Daily News v. (C. C. A.).....	493
Snow v. Mast (C. C.).....	995	United States, Tiffany v. (C. C.).....	494
Snow v. Mast (C. C.).....	996	United States, Weed v. (D. C.).....	399
South Brooklyn, The (D. C.).....	253	United States, White v. (C. C.).....	788
Southern R. Co., Markwood v. (C. C.).....	817		
Stahl, George Ertel Co. v. (C. C. A.).....	517		
Stahl, George Ertel Co. v. (C. C. A.).....	519		
Standard Paint Co. v. Bird (C. C.).....	509		
Stanley, Westinghouse Electric & Manuf'g Co. v. (C. C.).....	321		
Summerfield v. Phoenix Assur. Co. (C. C.)	292		
Swan, United States v. (C. C. A.).....	647		
Syndicate Ins. Co. v. Bohn (C. C. A.)....	165		

	Page		Page
United States, William J. Matheson & Co. v. (C. C.).....	422	Wetherell, United States v. (C. C. A.).....	987
Vandercook, The (D. C.).....	251	Wetzel v. Minnesota Railway Transfer Co. (C. C. A.).....	23
Van Leuven, United States v. (D. C.).....	78	Wheeler v. Walton & Whann Co. (C. C.)..	720
Vermilya v. Brown (C. C.).....	149	White v. United States (C. C.).....	788
Vesey v. Seawall, two cases (C. C. A.)....	398	Whitehurst, Jonathan Mills Manuf'g Co. v. (C. C.) .....	996
Village of La Grange, Colby v. (C. C.)....	554	Whitman Shoe Co., Lefavour v. (C. C.)..	785
Wabash Western Ry. v. Brow (C. C. A.)... 941		Wickes v. Lockwood (C. C.).....	610
Wadley v. Blount (C. C.).....	667	Wilcox & Gibbs Guano Co., Phenix Ins. Co. of Brooklyn v. (C. C. A.).....	724
Wagner, Griswold v. (C. C.).....	513	Wills v. Baltimore & O. R. Co. (C. C.)... 532	
Walsh, Owosso Sav. Bank v. (C. C.).....	78	William J. Matheson & Co. v. United States (C. C.).....	422
Walton & Whann Co., Wheeler v. (C. C.)..	720	Wm. P. Mockridge Manuf'g Co., Frank v. (C. C.).....	521
Washington & C. R. R. Co., Ralston v. (C. C.) .....	557	Williams v. McKinley (C. C.).....	4
Weed v. United States (D. C.).....	399	Williams v. The Sirius (D. C.).....	226
Weiller, United States v. (C. C. A.).....	418	Wilmot & Hobbs Manuf'g Co., Newark Watch-Case Material Co. v. (C. C. A.)..	507
Wolf v. Goldenberg (C. C. A.).....	466	Wilson v. Northwestern Mut. Life Ins. Co. (C. C. A.).....	38
Wesley, Tindall v. (C. C. A.).....	731	Wright, Pratt v. (C. C.).....	99
Western Electric Co., Thomson-Houston Electric Co. v. (C. C.).....	615	Wright & Colton Wire-Cloth Co., Clinton Wire-Cloth Co. v. (C. C.).....	425
Westinghouse Air-Brake Co. v. New York Air-Brake Co. (C. C.).....	99		
Westinghouse Electric & Manuf'g Co. v. Stanley (C. C.).....	321		

# CASES

ARGUED AND DETERMINED

IN THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

---

CHISHOLM et al. v. RADFORD BRICK CO.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1895.)

No. 190.

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

The point that the evidence does not support the verdict cannot be raised for the first time on appeal.

Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Assumpsit by the Radford Brick Company against Samuel S. Chisholm, James A. Boyd, and Bruce C. White. Plaintiff obtained judgment. Defendants bring error.

Jesse Cox, for plaintiffs in error.

Willits, Robbins & Case, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge. The plaintiffs in error, citizens of Illinois, composing the firm of Chisholm, Boyd & White, sold, by contract in writing, to the defendant in error, a corporation of Virginia, a brick press, which by the sixth clause of the contract they agreed to take back, and to refund the price, in case it failed to make good merchantable pressed brick from the clay of the Radford Brick Company, provided the clay were furnished to the press in proper condition and quantity, and the bricks made were properly burned. The suit was brought upon this clause of the agreement and judgment rendered in favor of the plaintiff, the defendant in error, for \$5,000, the price of the press. The first and chief contention of the plaintiff in error is that in certain particulars there was no evidence to support the verdict; but no step was taken at the trial to raise that question, and there was in fact no lack of evidence to justify the submission of the case to the jury. Error has been assigned upon various rulings of

the court in respect to the admission of evidence, and upon the instructions given to the jury, but the questions are unimportant, involving nothing novel in principle or in the application of the rules of evidence which could justify a particular statement. There is no error in the record, and the judgment is affirmed.

---

HEBERT v. BROWN et al.

(Circuit Court, D. Minnesota, Fifth Division. January 7, 1895.)

PUBLIC LANDS—TITLE.

L. made application for a pre-emption entry, and some months later gave a mortgage on the land covered thereby. Six months thereafter he relinquished his pre-emption claim, and immediately filed a homestead entry on the same land. *Held*, that the mortgage was extinguished by the relinquishment, and did not attach to the homestead entry.

This was a suit by Louis Hebert against Cyrus E. Brown and others to quiet title to certain lands. The cause was heard on the pleadings and proofs.

R. R. Briggs, for complainant.

Gilfillan, Belden & Willard, for defendant John M. Watts.

NELSON, District Judge. This is an action brought by complainant, a citizen of the state of Wisconsin, against defendants Brown, Hedderly, and Watts, citizens of the state of Minnesota, and Pasqual Leveque, a citizen of the state of Maine, to quiet title to a certain 160 acres in the county of Itasca, state of Minnesota, and to restrain the three defendants first named from cutting and removing the timber therefrom. None of the defendants except Watts make answer to the bill. On March 10, 1884, Pasqual Leveque filed a declaratory statement for a pre-emption of the land in controversy, under the United States land laws, and submitted his final proofs for cash entry before the register and receiver of the Duluth land office, July 1, 1884. A special agent of the government appeared at that time to cross-examine the witnesses introduced to sustain the entry, and upon the proof submitted the register and receiver made a divided report. The former in his report to the commissioner of the general land office, dated December 12, 1884, refused to recommend an approval, in which action the receiver, in a supplemental report, acquiesced, at the same time stating that he had some information which, in his opinion, justified a rehearing; and on February 13, 1885, the same was ordered by the commissioner. On the 6th day of April, 1885, Leveque filed a voluntary relinquishment in writing to the United States of his right and claim under his pre-emption declaratory statement, stating that he could not produce the receipt given him at the time, as it was not in his possession; and on the same day he filed his application, under section 2289, Rev. St. U. S., for a homestead entry of the very same land, made the necessary affidavit, paid the compensation required by law, and received a receipt for the same. When the rehearing was had, May 18, 1885,

a new receiver of the land office had been appointed, and the register and receiver, ignoring the relinquishment of Leveque of April 6, 1885, proceeded with the examination, and reported a recommendation that Leveque's proofs be accepted as of July 4, 1884, the day when presented and payment tendered. The money was furnished by one C. E. Brown, an employé of the Martin Lumber Company, who had previously furnished the money for the declaratory statement under the pre-emption claim. On July 25, 1885, the commissioner, on the proof submitted in the report to him of May 18, 1885, declared the pre-emption filing a fraud, and canceled the same. Previously, on December 5, 1884, before the register and receiver had made their reports to the commissioner in regard to the proofs first made in the Leveque pre-emption claim, Leveque gave a mortgage to C. E. Brown, with covenants of warranty, on the land upon which he had made his pre-emption claim, to secure two promissory notes payable to the order of Brown of even date, one for \$600 due in 60, and the other for \$500 due in 90 days after date. This mortgage was recorded in the proper county, March 30, 1885. It was, with other mortgages, assigned by Brown to one Hedderly, January 23, 1890, and subsequently, April 16, 1890, assigned by him to J. M. Watts. Both these assignments were duly recorded. The mortgage was foreclosed by advertisement, January 18, 1893; the land was sold March 9, 1893, and purchased by Watts; and the usual sheriff's certificate given therefor, which was recorded two days later. On June 29, 1887, Leveque, under the provisions of sections 2259 and 2301, Rev. St. U. S., made a cash payment for the land he had entered as a homestead, April 6, 1885, and on September 10, 1888, sold and conveyed the same to Louis Hebert, the complainant. A patent was subsequently issued to Leveque, April 11, 1889.

Under this state of facts, what are the rights of the defendant Watts? When Brown took the mortgage for security, he knew that Leveque had no title to, but had simply filed a pre-emption claim on, the land. Leveque had no vested right, but merely an inchoate undetermined claim, liable to be defeated by his own act, or by that of the government, if he did not carry out the provisions of the law; and Brown took the mortgage, with all its weaknesses and imperfections. The instant Leveque relinquished his pre-emption claim, which he had a legal right to do, the land became a part of the public domain, and could have been taken immediately by another pre-emptor or homesteader, and, of course, Brown's mortgage would have been no lien on the land. Even if Leveque had not relinquished his pre-emption claim, the same state of affairs would have supervened when his filing was canceled by the commissioner for fraud. I cannot agree with the proposition that the mortgage on the pre-emption claim attached to and followed the homestead entry of the same land. The two proceedings are entirely distinct. Whatever land Leveque entered, whether that in dispute or any other tract, would come to him from the government clear and free of all incumbrance, In this view of the case, I hold that the sheriff's certificate cannot be set up as a defense against the title of complainant. It being of rec-

ord, a cloud is cast thereby upon Hebert's title, which he is entitled to have removed. Judgment will be entered for the complainant, with costs, in accordance with the prayer of the bill.

---

WILLIAMS v. McKINLEY et al.

(Circuit Court, D. Minnesota, Fifth Division. December 27, 1894.)

AGENCY—FRAUD ON PRINCIPAL.

Complainant was the owner of a quantity of land on which iron ore had been discovered. At the request and upon the representation of defendant that it would facilitate negotiations by him with certain capitalists for a lease of the mines to them, complainant executed to defendant a lease of certain lands, providing for certain royalties on all ore mined, in lieu of rent, and a contract was executed at the same time by both parties, by which defendant agreed, among other things, in consideration of the receipt by him of one-fifth of the net revenues derived by complainant from royalties, faithfully to manage said property, under complainant's direction, for their mutual interests. The contract also provided that if defendant, without complainant's consent, used or transferred the lease, otherwise than to the capitalists with whom he was negotiating, he should thereby forfeit his one-fifth interest. Defendant's negotiations failed, and complainant then, at his request, consented to his leasing a part of the land to M. Instead of a part, defendant leased to M. the whole of the land, and immediately took back a lease to himself of the part as to which no permission to lease had been given by complainant. He then proceeded to lease parts of this land to sundry persons for mining purposes, receiving from them large sums in money and stocks, of all which complainant had no knowledge until long afterwards. Complainant subsequently confirmed in writing two of the leases made by defendant, but this was done with only a partial knowledge of defendant's transactions. *Held*, that defendant was complainant's agent, and not his lessee, and was accountable to complainant for all profits made by him out of his dealings with the property; and having violated the contract, and acted contrary to the interest of his principal, and for his own gain, he forfeited his one-fifth interest, and was not entitled to compensation for his services.

Bill by John M. Williams against John McKinley and George A. Elder for an accounting. The cause was heard on the pleadings and proofs.

Herrick, Allen & Boyesen and J. L. Washburn, for complainant.

Walter Ayers, for defendant John McKinley.

Cash, Williams & Chester, for defendant George A. Elder.

NELSON, District Judge. John Williams, a resident and citizen of the state of Illinois, brings this suit in equity against the defendants, John McKinley and George A. Elder. The bill alleges, in general terms, that complainant, the owner of a large quantity of land in the state of Minnesota, upon a part of which iron ore had been discovered, at the request of defendant McKinley, executed to him a lease of 13 tracts, of about 40 acres each, and an agreement, of even date therewith, whereby McKinley was to act as his agent in leasing these 13 tracts to a certain syndicate in the east, for mining purposes, and was to receive for his services in so doing, and for managing the property, a one-fifth part of the net revenue arising therefrom; that McKinley, being unable to interest said syndicate,

stated to Williams that he could lease three definite tracts of said lands to Leonidas and Alfred Merritt, and obtained his authority so to do; that thereupon, without the knowledge or consent of complainant, he leased to them, not only the three, but the whole thirteen, tracts, and on the same day took back from them a lease to himself of all said lands save the three tracts; that thereafter McKinley leased the remaining tracts to other parties for mining purposes, without the knowledge or consent of his principal; that, for making these leases, he received large amounts of money and stock, whereby great profit inured to himself, instead of to complainant; and this bill is filed for an accounting of all moneys or property received by McKinley as the proceeds of such leases, and praying that the agreement or contract of agency between the parties be canceled, and that the defendant McKinley be decreed to have no interest therein. The bill further sets forth that the defendant George A. Elder claims to have some interest in the agreement made between complainant and McKinley, and in some of the moneys or profits made by the latter in the above transactions, and asks that George A. Elder be decreed to have no interest therein or right or title thereto. The defendants answer separately. McKinley denies that he was the general agent of complainant as to these lands in question; admits the leasing to the Merritts of the thirteen tracts, and the re-leasing to him by them of all but the three tracts; admits that he received certain profits for making the leases to the Merritts; admits that he leased the remaining tracts to certain other parties, and that he received large quantities of stock for so doing; admits that he sold and transferred a part of his interest in said remaining tracts to other parties, and received certain profits therefor; but alleges that each and all of these transactions were rightful and lawful, and with the knowledge and consent of complainant, or that the latter afterwards ratified all that he (McKinley) had done in the premises. The defendant Elder sets up in his answer that, by virtue of an instrument in writing from McKinley to him, he has an interest in the agreement or contract made between complainant and McKinley hereinbefore referred to. A replication was filed, and a large amount of testimony, both oral and documentary, was taken before a master, the record whereof was filed in court; and after hearing the arguments of counsel, and carefully considering the evidence in the case, I find the following facts:

Complainant, at the times mentioned, was the owner of all the lands set out in the bill of complaint, and he and defendants were residents and citizens of the states of Illinois and Minnesota, respectively. From the year 1881, Williams had been engaged in the purchase of pine lands in St. Louis county, Minn., and defendant McKinley had acted as his agent in the purchase and care of the same, under a written agreement, dated September 8, 1882. This agreement was canceled in 1888, but after that time McKinley continued to act for complainant with reference to his lands. In May, 1891, Williams, being in Duluth, was informed by McKinley that large deposits of iron ore existed on some of these lands, and suggested that, in view of their past relations, he be given a chance to obtain



some interest in the same, but nothing definite was settled at that interview. In the fore part of July, following, McKinley met Williams in Chicago, and stated he thought he could interest a very strong syndicate in the east, including Carnegie, of Carnegie, Phipps & Co., in these mineral lands, but that, in order to do so successfully, it would be necessary that he should have a lease of the lands running to himself, to show that he had control of them and had power to act as lessor. Williams then told him that, if he gave him a lease of these lands, there must be also a private contract between them; and eventually, on August 1, 1891, complainant executed and delivered to McKinley a lease of 13 tracts of about 40 acres each, which was recorded September 17, 1891, and is as follows:

"This indenture, made this first day of August, A. D. one thousand eight hundred and ninety-one, by and between J. M. Williams, of Chicago, state of Illinois, party of the first part, and John McKinley, of Duluth, state of Minnesota, party of the second part, witnesseth:

"That the party of the first part, in consideration of the sum of one dollar (\$1.00) to him in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in further consideration of the covenants and conditions herein contained, to be kept and performed by the party of the second part, does hereby contract, lease, and demise to the party of the second part for a term of years, from and after the first day of August, one thousand eight hundred and ninety-one (1891), during and until A. D. one thousand nine hundred and eleven (1911), the following land, situated in the county of St. Louis, in the state of Minnesota, viz. [here follows description of land], which premises are leased to the party of the second part for the purposes of exploring for, mining, taking out, and removing therefrom, the merchantable shipping iron ore which is or which hereafter may be found on, in, or under said land, together with the right to construct all buildings, make all excavations, openings, ditches, drains, railroads, wagon roads, and other improvements upon said premises which are or may become necessary or suitable for the mining or removal of iron ore from said premises.

"[Here follows clause giving right and providing for notice necessary to terminate agreement.]

"The party of the first part hereby agrees that the party of the second part shall have the right, under this agreement, to contract with others to work such mine or mines, or any part thereof, or to subcontract the same, and the use of said land, or any part thereof, for the purpose of mining for iron ore, with the same rights and privileges as are herein granted to the said party of the second part. The party of the second part, in consideration of the premises, hereby covenants and agrees to and with the party of the first part that the party of the second part will, on or before the tenth (10th) day of April, July, October, and January, in each year, during the period hereinbefore stipulated, or during the period this contract continues in force, pay to the first party, for all the iron ore mined and removed from said land during the three (3) months preceding the first (1st) day of the month in which payment is to be made as aforesaid, at the rate of thirty cents per ton for all iron ore so taken out, mined, and carried away, each ton to be reckoned at twenty-two hundred and forty (2,240) pounds.

"[This clause provides for weighing and determining amount of ore.]

"It is understood and agreed between said parties that, within thirty (30) days after this lease is executed, a satisfactory estimate to both parties shall be made of the pine stumpage (or amount of pine) contained upon said land described in this lease; and such amount of stumpage thus agreed upon, and also other timber upon said land, the party of the second part agrees with party of first part to save him harmless from loss thereof by fire up to July 1st, 1892, at which time said estimated amount of pine is to be paid for in cash, at the rate of four dollars (\$4.00) per thousand feet, by said second party to said first party, unless said second party, before that time, under the terms of the lease, abandons all of said mining lands described herein. All

other timber upon said land is to be used for mining and building purposes by party of second part, for the use of said mines, free and without charge.

"It is further agreed between said parties that from the first of July, 1892, the yearly annual output of iron ore from said land shall be estimated at not less than ten thousand gross tons per year, and that minimum amount of royalty shall be paid as per lease to party of first part, one-half the first of July, and one-half the first of January, of each year, whether the same is mined and shipped from said mine or not; and a failure to pay said royalty at the time specified shall constitute an abandonment of said mines or lease, at the option of the party of the first part. Said second party is to pay all taxes and assessments levied upon said lands embraced in this lease during the continuance of same, unless terminated upon the conditions herein expressed.

"[Here follow clauses providing for payments, and for removal of machinery on condition broken, and for entry to inspect.]

"The covenants, terms, and conditions of this lease shall run with the land, and be in all respects binding and operative upon all sublessees and guaranties under the party of the second part.

"[Clause for re-entry in case of default, and for lien for unpaid balances.]

"To further protect said first party in his property rights under this lease, it is expressly understood and agreed between said parties that this lease shall not be assigned or transferred to any other party or parties without the written consent by said party to such transfer or assignment.

"In witness whereof, the parties hereto have assigned their names, and affixed their seals, on the day and year first above written.

"[Witnessed.]

John M. Williams. [Seal.]

"John McKinley. [Seal.]"

Contemporaneously therewith an agreement was executed and delivered between the parties, which, at the request of McKinley, was not recorded. This agreement is as follows:

"This agreement, made this first day of August, 1891, between John M. Williams, of Chicago, state of Illinois, party of the first party, and John McKinley, of Duluth, Minnesota, party of the second part, witnesseth:

"That whereas, said Williams has this day executed a certain lease to said McKinley, from the first day of August, 1891, until the first day of August, A. D. 1911, to the following described lands, to wit [description of lands], situated in the county of St. Louis, in the state of Minnesota, for the purpose of mining the merchantable shipping iron ore which is or may be found in, on, or under said land, reference being had for greater certainty to said lease, of even date herewith:

"Now, therefore, said John M. Williams, his heirs, executors, administrators, or assigns, hereby agrees with the said John McKinley, his heirs, executors, administrators, or assigns, to pay to said McKinley, his heirs, executors, administrators, or assigns, one-fifth part of the net revenue arising from the royalties collected by him, said Williams, his heirs, executors, administrators, or assigns, under the terms of said lease, said payments to be made to said McKinley, his heirs, executors, administrators, or assigns, within fifteen days after payment is made to him, said Williams, his heirs, executors, administrators, or assigns.

"In consideration thereof, the said McKinley does hereby agree to save said Williams, his heirs, executors, administrators, or assigns, free and clear from any expense which may be or may have been incurred in the discovery, exploration, or development of said property preparatory to leasing the same, and also agrees to well and faithfully manage said property under said Williams' direction, to the best of his ability, for the mutual interests of both the undersigned parties. Also whatever expense is incurred in conducting the business, in keeping an accurate monthly record of the shipments of the ore from the mines, and rendering a correct quarterly statement or account of the amount due to said Williams from the royalties or otherwise, under said lease, and the remitting of proceeds from parties owing the same, by bank draft on Chicago or New York, payable to the order of said Williams or his heirs and assigns, or other service and attention required for the mu-

tual protection of the interests of both of said parties in and to said mine, shall all be faithfully performed by said McKinley, at his own expense, further than receiving his one-fifth (1-5) interest in the revenues of said mines, as hereinbefore expressed.

"It is mutually agreed, however, between said parties, that in the event that said Williams should wish to dispose of or sell his fee-simple rights or title to said mines or mining lands, to the parties in possession or other parties, he reserves the right to do so, either by selling the same for so much money, cash, or credit, or by merging said lands into a stock company formed alone from his lands, or with other parties and other contiguous lands. If such event should be consummated, said McKinley is to receive for his one-fifth (1-5) interest of the revenues of said mine as hereinbefore expressed, in lieu thereof, in the event of sale, ten per cent. (10 per cent.) of the net proceeds arising from said sale, whether in money or stock, but, if the latter (in stock), such sale shall not be consummated without the consent of said McKinley.

"It is further understood and agreed by said Williams and McKinley, in relation to said lease of lands, executed by said Williams to said McKinley, as herein described, that said McKinley represents and declares that in procuring said lease he is acting for certain other responsible eastern parties with whom he is connected, who form a syndicate for the purpose of mining the iron ore contained in said land and other lands contiguous thereto, and the building of a railroad from Duluth, Minnesota, to said mining and pine lands.

"Now, it is mutually agreed and understood between said McKinley and Williams that the full lease of said land, of even date herewith, executed by said Williams to said McKinley, for the purposes mentioned in said lease, is upon the express condition that said lease is to be assigned over, and its rights and obligations transferred by said McKinley to, said above referred to parties. If said lease is used or transferred or otherwise sublet by said McKinley to other parties without said Williams' consent, said McKinley thereby forfeits all his one-fifth interest in and to the revenues accruing under said lease from said Williams, or his heirs and assigns; and such assignment will, at said Williams' option, work a cancellation of said lease as between said Williams and McKinley.

"The time of this contract shall extend for the period of twenty years, or parallel with the time of said lease, unless for good cause, in equity, or other conditions herein expressed, said McKinley, his heirs, executors, administrators, or assigns, shall, by his or their acts, forfeit his or their claim thereto or under the same.

"Further, if said party of second part should under their rights of lease abandon same, and yield up possession to said first party, in such event this one-fifth (1-5) interest before existing and herein set forth, between said Williams and said McKinley, shall also terminate, and said Williams receive peaceable possession of same as in his first and former estate.

"In witness whereof, the parties hereto have signed their names, and affixed their seals, on the day and year first above written.

"[Witnessed.]

John M. Williams. [Seal.]  
"John McKinley. [Seal.]

The above lease and contract were prepared by complainant, without the aid of a lawyer. Shortly after this, McKinley represented to Williams that the syndicate would not lease the 13 tracts, but that he could lease three 40's thereof to the Merritts, on the same terms, who, he stated, were financially strong, and would be able to build a railroad to the mines, and he believed it was the best thing that could be done. Complainant, therefore, on the 15th of September, 1891, gave his consent in writing that McKinley might lease the three 40's to the Merritts. On September 17, 1891, McKinley, without the knowledge or consent of Williams, but under a prior arrangement with the Merritts, executed to them a lease of the whole 13 tracts, providing for a minimum output of 10,000 tons per annum,

and a royalty thereon of 30 cents a ton, to be paid to himself, or directly to Williams, whether any ore was mined or not. On the same day, McKinley took back to himself from the Merritts a lease of the same land, with the exception of the three 40's he was authorized to lease to them, and with a similar provision therein for royalty, but no minimum output was designated on which royalty should be paid. A clause in the original lease of August 1, 1891, from complainant to defendant, provided that it should not be assigned without the written assent of the party of the first part (Williams), but this clause was omitted in the lease from McKinley to the Merritts, and in the re-lease from them to him. As a consideration for leasing to the Merritts these three tracts and another one called the "Hill 40," McKinley received from them the sum of \$30,000. On the same day (September 17, 1891), McKinley, by an instrument in writing, assigned and transferred to James Billings, of Duluth, a one-half interest in the leases, to him from the Merritts, for the sum of \$20,000; and shortly thereafter McKinley and Billings sold to a Mr. Humphreys, of Duluth, an undivided four-sevenths interest in the same leases, for the sum of \$30,000. The lease from McKinley to the Merritts was filed for record the day it was executed (September 17th), while that from the Merritts to McKinley was not filed until December 23, 1891. None of these leases or transfers were disclosed to Williams by McKinley at the time of the transactions, and he was not made aware of them until some time in March or April, 1892. On September, 18, 1891, the Merritts transferred their lease from McKinley to the Biwabik Mountain Iron Company, providing for a minimum output of 10,000 tons per annum, and the payment to them, or to Williams directly, of 30 cents a ton royalty thereon, whether ore was mined or not; and on April 23, 1892, that company leased the same lands to one Peter Kimberly, with the proviso that not less than 300,000 tons should be mined annually, and a royalty of 50 cents a ton on that amount should be paid, whether ore were mined or not, and that the interest of Williams in the royalty might be paid to him directly. On December 1, 1891, McKinley executed to the Cincinnati Iron Company, a corporation organized by Billings, Humphreys, and himself, a lease of a portion of the lands embraced in the lease to himself from the Merritts, reserving to the lessor 30 cents a ton royalty on a minimum output of 10,000 tons per annum; and that company, on June 23, 1892, sublet this lease to one Barbour, reserving to itself a royalty of 55 cents a ton, with a proviso that not less than 150,000 tons per annum should be mined. As a consideration for executing this lease, McKinley received \$300,000 par value of the stock of that company. In June, 1892, McKinley executed a lease of certain other property, embraced in the lease to him from the Merritts, to the Chicago Iron Company, a corporation also organized by Billings, Humphreys, and himself, reserving to the lessor 30 cents a ton royalty, to be paid on a minimum output of 10,000 tons a year. In consideration of the execution of this lease, McKinley received \$333,000 par value of the stock of that company. All these leases provided that, whatever the interest of Williams in the royalties

should be, it might be paid to him directly. None of these transactions of leasing were communicated at the time by McKinley to Williams, and the latter received none of the proceeds thereof, so far as any bonus or stock was concerned. On the 25th of March, 1892, a question having arisen as to the title of complaint to a certain 40-acre tract described in the lease of August 1, 1891, complainant and his wife, at the request of McKinley, executed to him a lease confirmatory of the first lease, excluding therefrom that certain 40. On the 27th day of April, 1892, Williams executed and delivered to the Biwabik Mountain Iron Company an instrument reciting the lease from him to McKinley, of August 1, 1891, the lease from McKinley to the Merritts, the re-lease from the Merritts to McKinley, of September 17, 1891, the confirmatory lease to McKinley by complainant and wife, of March 25, 1892, and the further fact that the Biwabik Mountain Iron Company desired to lease the lands at present held by it, and that a question had arisen as to whether the Williams lease could be forfeited. By the terms of this instrument, complainant released and waived the right of forfeiture so long as the company performed all the covenants in the lease, and waived all right to declare a forfeiture against the company by reason of any failure on the part of the Merritts to perform the covenants with regard to the lands held by them. On December 23, 1892, complainant executed an instrument reciting the lease of August 1, 1891, of certain tracts, and the fact that McKinley desired, under that lease, to sublet those tracts to the Chicago Iron Company, by the terms of which he assented to the subletting, on condition that the company mine at least 10,000 tons per annum, and pay the full royalty expressed in the lease, whether any ore be mined or not. The defendant, George A. Elder, on the 11th day of March, 1893, entered into an agreement, for a valuable consideration, whereby the defendant McKinley sold, assigned, transferred, and set over to him one-half of whatever profits, money, or property might become due to McKinley under the contract of August, 1891.

Under the foregoing state of facts, what was the relation of the parties to each other, and what are their respective rights? Counsel for defendant McKinley urges that under a fair construction of the lease and agreement of August 1, 1891, Williams was only entitled to a royalty of 30 cents a ton on a minimum output of 10,000 tons per annum; and, so long as he received that, whatever McKinley obtained in excess, whether in the shape of increased royalties or bonus, rightfully belonged to the latter. In my opinion, the controlling question in this case is, was McKinley during all this time the agent of complainant, or was the relation between them that of lessee and lessor? Under the agreement of August 1, 1891, he was clearly the agent of Williams to transfer the lease to a specific party, and in it he "agrees to well and faithfully manage said property under said Williams' direction, to the best of his ability, for the mutual interest of both the undersigned parties." Reading the agreement and lease together, I think the relationship of agency is clearly established.

But counsel, in support of his contention, urges the acquiescence of Williams in the receipt by McKinley of a bonus from the Merritts, and of stock from other parties, at the time when these transactions were brought to his notice, and also the making of the confirmatory leases by complainant in 1892. The acquiescence of Williams was limited to the receipt by McKinley of two or three, or perhaps five, thousand dollars from the Merritts, and no more; and that at a time when it is not pretended that he knew of the leasing of the 13 40's to them, and of the leasing back of the remainder to McKinley. It is true McKinley claims that in the spring of 1892 he informed Williams that he had received \$30,000 from the Merritts, and \$333,000 of stock from the Chicago Iron Works, and that he might have informed him of the receipt of \$20,000 from Billings, and \$30,000 from Humphreys, and that Williams consented to his receiving these amounts; but this is denied by complainant, who states that he asked for an accounting, and it was refused. I think McKinley was mistaken. I do not believe that complainant, the absolute owner of the property, with full knowledge of the whole situation, acquiesced in the receipt by McKinley of these large amounts of money and stock, not one dollar of which was to go to him. As to the confirmatory leases, complainant says he made them under the advice of counsel, as an escape from the lesser of two evils, because, as between third parties, it was probable that these leases could be enforced. The correspondence and evidence show that even at that time complainant was not fully informed as to the true situation, and that he did not understand fully how matters stood until some time in the spring of 1893, when this suit was commenced.

Taking into consideration all the circumstances of the case, and in view of the acts of and the correspondence between the parties, I am satisfied that at all these times Williams had the right to and did look upon McKinley as his agent to look after their mutual interests, and not as his lessee to act independently of him so long as the 30 cent a ton royalty was paid. I am also of opinion that almost from the inception McKinley violated this trust. The leasing of the 13 tracts to the Merritts, the re-lease to himself of the remaining 10, omitting the clause forbidding a sublease without the consent of Williams, and the sale of his interest to Billings, all on the same day, were a plain violation of the terms of the agreement, and such acts alone would work a forfeiture of his interest thereunder.

The agency of McKinley being established, the law is well settled. I hold that McKinley, having made the leases and transfers set out in the bill of complaint without the knowledge of his principal, or without his ratification upon a full understanding of the whole situation, is accountable to complainant for all moneys, notes, and stock received by him as consideration for making any and all of the leases, sales, or transfers in question. I hold, further, that in these transactions, and in all of them, McKinley acted contrary to the best interests of his principal, and for his own benefit and gain, and therefore cannot recover compensation for any services performed by him in connection with the contract of agency.

As the rights of the defendant George A. Elder are dependent

upon those of the defendant McKinley, they must fall with his. A decree will be entered in accordance with the prayer of the bill, and a reference will be had to a master for an accounting, with costs.

---

NEW YORK SECURITY & TRUST CO. v. EQUITABLE MORTG. CO.

(Circuit Court, S. D. New York. December 13, 1894.)

1. TRUSTS—FOLLOWING PROCEEDS OF TRUST PROPERTY.

The E. Co. was engaged in the business of loaning money upon mortgages of real estate. The mortgages received by it were deposited with trustees, to secure debentures issued by the E. Co. in series, generally amounting to \$100,000. The agreements under which the bonds were deposited provided that the amount of mortgages should at no time be less than the outstanding debentures in the series; that such mortgages should always be first charges upon real estate worth  $2\frac{1}{2}$  times the amount of the mortgages; that if the trustee should, at any time, deem a mortgage an insufficient security, the E. Co. should, upon demand, replace it by a sufficient one; that until default in replacing such mortgages, or in payment of principal or interest of the debentures, the E. Co. should be entitled to receive the interest, but that, in case default should be made in any manner, the trustee might sell or realize upon the mortgages. No assignments of the mortgages were placed upon the records in the counties where the lands lay, and payments of interest and principal were made by the mortgagors to the E. Co. Receivers of the E. Co. were appointed in 1893, and took possession, among other things, of about \$63,000 which had been paid to the E. Co. upon mortgages included in these deposits, and not turned over by it to the trustees. *Held*, that such money should be paid over to the trustees, in preference to any claims of general creditors of the E. Co., since it belonged, not to the E. Co., but to the trustees, who might follow and reclaim it.

2. SAME—PROTECTING TRUST PROPERTY.

The E. Co. had paid considerable sums for taxes on lands covered by mortgages included in the said deposits, and in buying in such lands at tax sales. *Held*, that these sums should not be deducted from the moneys collected upon the mortgages, since they were paid simply in discharge of the E. Co.'s obligation to keep the mortgages first charges on the land.

This was an application by the receivers, heretofore appointed of the property of the defendant corporation, for instructions as to the disposition of certain funds in their hands.

Wm. B. Hornblower, for complainants.

Thos. G. Sherman, for receivers.

LACOMBE, Circuit Judge. Receivers of the defendant company were appointed by this court in August, 1893. The business of defendant (so far as it need now be stated) was this: It loaned money, mainly in the West, to farmers and others, upon bonds and mortgages of real estate. It borrowed money from investors upon so-called "debentures," by the terms of which it agreed to pay at a fixed date in the future, to the holders of the debentures, the principal sum therein named and interest semiannually. These debentures were issued in series, generally amounting to \$100,000 in each series. To secure the payment of each series, defendant deposited with a trustee a certain stipulated amount of the bonds and mortgages aforesaid, under a deed of trust, which, among other provisions, con-

tained the following: The amount of the securities thus deposited shall at no time be less than the amount of debentures issued and remaining uncanceled. Every such security shall be a mortgage, and shall be a first charge upon real estate valued at not less than  $2\frac{1}{2}$  times the amount secured. The trustee is to hold the deposited securities as a collateral security for the payment of the principal and interest due upon the debentures, and for the benefit of the holders of said debentures. Whenever the company shall surrender to the trustee a debenture regularly canceled, the trustee shall, if so requested by the company, redeliver to the company, out of the securities, for the time being deposited with the trustee, securities to an amount equal to or not exceeding that of the debentures so canceled. The company may at any time call upon the trustee to redeliver to the company any security for the time being remaining deposited with the trustee, and the trustee shall forthwith redeliver such security to the company upon the company substituting for such security another security, duly certified, in the manner provided for securities originally deposited, to be a first and valid charge or lien upon real estate of not less value than the security to be redelivered to the company as aforesaid. If the trustee shall at any time think that a security held by him is not a sufficient security for the amount expressed to be secured thereby, he may require the company to deposit with him further security of like nature, sufficient to cover the estimated deficit, and the company shall within 60 days make such deposit. Until the company shall be in default in making such deposit, or until default shall have been made by the company in the payment of any principal money or interest due on the debentures, the company shall be entitled to receive all interest due upon the mortgages for the time being deposited with the trustee. In case default shall be made in any manner, the trustee may forthwith, without any further consent on the part of the company, sell, call in, or otherwise realize any of the securities so deposited, and may take any steps by selling any property comprised in such security, either by private treaty or public auction, or by legal proceedings, or by negotiating and effecting a transfer of any such security, to realize such securities, or any of them, and shall hold the moneys arising from such realization upon trust—First, to pay all costs and expenses incident to such realization; second, upon trust for the holders of the debentures; and, thirdly, upon trust to pay the surplus, if any, of such moneys to the company. And the company undertakes to be liable for the expenses in exoneration of the proceeds of securities so realized. For the purpose of effectuating any such sale or transfer, the company shall, on the requirement of the trustee, execute all proper and necessary deeds and other instruments. This agreement was an assignment to the trustee of all the bonds and mortgages in the series, as collateral security for the debentures, with full power to collect or sell out such security in case of default; but no assignments of the original mortgages were recorded in the counties where the real estate is situated. In consequence, mortgagors who wished



to pay off their debt in whole, or to pay an installment thereof, made such payment to the officers and agents of the defendant, their mortgagee, and the only person they knew in the transaction. In this way, as the receivers report, when they took possession, the company had received about \$63,000, which it had not paid over to the trustees of the respective series within which were included the mortgage securities upon which these payments were made. A small amount was also thus collected by local agents of the company after appointment of receivers, but before such agents were advised of the change. This small sum has not been paid over. The receivers have also, in some instances, themselves received payments on account of principal, but have paid over all such collections to the trustees.

The first point upon which instructions are asked for is whether the several trustees who held these mortgages thus paid in whole or in part to the company, or to the local agents, after receivers were appointed, are entitled to payment of the moneys thus collected in preference to the general creditors. Undoubtedly they are. The moneys thus collected were moneys, not of defendants, but of the trustees to whom the mortgages had been assigned, and in which defendant had only a remote equity. Money of another thus collected, and not paid over, may be followed by him, and reclaimed from the general funds of defendant, either out of the cash in its possession, if that be sufficient, or, if the money thus wrongfully detained has been in part invested in personal property held by the defendant, then out of such personal property. Receivership has not altered the situation in this respect, and, there being enough cash and unincumbered securities purchased with the trustees' money to replace the sum thus misappropriated, the receivers will pay this sum of \$63,000 in preference to any claims of the general creditors.

It further appears that in many instances the original mortgagors failed to pay the taxes falling due on the mortgaged property, and that thereupon the defendant corporation paid them to the proper authorities, and its receivers now hold the tax receipts therefor. Such payments amount to over \$12,000. In some instances default in payment of taxes continued until, upon expiration of the statutory term of credit, the land was sold for nonpayment thereof. Upon such sales the defendant corporation bought in, and received from the proper officers, tax titles or certificates of title. The amount thus paid is \$15,849. It appears that taxes were thus paid and tax titles thus purchased in cases where the property was covered by mortgages included in the very series of debenture pledges, which also included the mortgages upon which payments of principal were made as above set forth. Under these circumstances, the receivers ask for instructions as to whether or not they should deduct the amounts thus paid for taxes or for tax titles from the sum collected as principal before paying over such collections of principal to the respective trustees. They should not do so. The payments of taxes and for tax titles were not made at the request of the trustee, but voluntarily by the defendant company, and it must be assumed for

its own benefit. The trustee was under no obligation to pay the taxes, nor even to see to it that the original mortgagors paid them. The trust agreement contemplated no such action on his part. It was for the defendant to see to it that each security pledged as collateral for debentures continued to be what the contract required it to be,—“a first charge upon real estate.” When unpaid taxes became a first charge upon the property, the trustee was entitled under the contract to return the degraded security, and require from defendant a “first-charge” security in its place, or to insist upon a deposit of further security as collateral. The various payments of taxes made by defendant, therefore, were payments in its own behalf, to relieve it from the obligation of replacing securities, and are not proper charges in its hands against the trustee.

The several trustees, moreover, ask for the delivery to them of the tax receipts, and upon this point receivers ask for instructions. This is practically already answered. They represent payments by defendant to protect its own interests, and should be retained by it. They constitute the evidence by which defendant may show, whenever challenged to do so, that the several securities to which they relate are still, so far as the lien of taxes is concerned, a first charge upon the property. They are not muniments of title. It is the original entry on the tax books, and not the duplicate thereof, issued to the taxpayer, that discharges the tax lien.

The trustees also ask for the delivery to them of the tax titles, and of the certificates of title, and upon this point receivers ask for instructions. That question will not now be decided, and, until it is presented more fully than it is on this application, receivers will retain such titles and certificates.

It is urged on behalf of the trustees that the pledgor of the mortgage should not be allowed to buy in a superior title, and thus destroy the value of the property he has pledged; and the clause in the trust agreement providing that, for the purpose of effectuating any sale or transfer of the pledged securities, in order to realize upon them in the event of default, the defendant company shall, on the requirement of the trustee, execute all proper and necessary deeds and other instruments, may be cited in support of the proposition that a tax title subsequently purchased should be assigned. But there may be some equitable consideration which would deprive the trustee of any right to insist upon compliance with this clause. For example, the trust agreement gives the trustee a most comprehensive power of sale, either “at public auction or by private treaty.” But if it should appear that a trustee had arbitrarily sold all the securities pledged for a series of debentures at private sale, at a sum far below what they could at the same time have been sold for in the open market, thereby increasing the general indebtedness of defendant, and thus reducing the dividend ultimately to be paid to the general creditors, it is questionable whether a court of equity will aid him in his effort to withdraw valuable assets from the general fund. It is manifest that this question can be answered only upon a full presentation of all the facts.

Upon payment of the sums collected as principal, the receivers will require delivery to them of any bonds and mortgages fully paid off, and will also see to it that all partial payments are indorsed on the respective bonds partially paid.

---

COE v. EAST & WEST R. CO. OF ALABAMA et al.

SMITH v. KELLY.

(Circuit Court, N. D. Alabama, S. D. December 10, 1894.)

ATTORNEY'S LIEN—TO WHAT ATTACHES.

One S., a lawyer, was retained by K. and B. to protect their interest in a large number of the bonds of an insolvent railway company. S. rendered important services, which were fully successful. The road was ordered to be sold under the decree in a foreclosure suit, and, before the sale, S. was discharged by K. and B., and the discharge recognized by the court, reserving S.'s right to have his compensation fixed and the extent of his lien declared. At the foreclosure sale, K. bought the road. S. afterwards applied to have his compensation fixed and lien declared. *Held*, that S. had a lien upon the bonds of his clients and upon any portion of the proceeds of the sale applicable to their payment, but that his lien did not extend to the property of the road in the hands of K. after his purchase thereof, even though the purchase price was insufficient, after paying costs and receiver's certificates issued by order of the court, to leave any balance applicable to the bonds.

This was a suit by George S. Coe, as substituted trustee, against the East & West Railroad Company of Alabama and others, for the foreclosure of a mortgage. Frank Sullivan Smith, formerly solicitor for the defendants Eugene Kelly and John Byrne, filed his intervening petition, asking to have his compensation fixed and the lien thereof declared. The petition was referred to F. S. Ferguson, as special master, who filed a report, to which exceptions were taken. The report is as follows:

To the Honorable, the Judges of said Court:

In obedience to the order of the court, dated May 19, 1893, I gave due notice to the parties to this intervention that I would take the testimony therein at No. 35 William street, New York, on the 19th day of June, 1893, which time and place was consented to by the intervener and respondent. Accordingly, I attended at said time and place, and the parties duly appeared before me in person and by their counsel. Mr. Denegre, in behalf of the respondent, objected to the taking of the testimony, or to any proceedings under the order of reference of May 19, 1893, because—First, the court had no jurisdiction to make such order; and, second, because of the want of proper parties defendant, Mr. Kelly being made the sole defendant, whereas John Byrne should have been joined with him. I stated to counsel then, and now report, that I had no authority to determine a plea to the jurisdiction of the court, or to pass upon the legal sufficiency of or to grant an amendment to any pleadings sent to me by the court. Doubtless, the objection was made by counsel in order that his client might not be held to have waived it by silence. For this purpose, and no other, I permitted the objection to be entered as a part of the proceedings before me, and now report that it was made before any of the testimony was taken. A careful study of the order of reference has convinced me that the court has already ascertained that the relation of solicitor and client did exist between the intervener, Frank Sullivan Smith, Esq., and the respondent, Mr. Eugene Kelly, in the cases of the foreclosure

suit against the East & West Railroad Company of Alabama, and the dependent and auxiliary bill of Grant Brothers et al. against the same, and that the duty devolved upon me by the order was—First, to ascertain and report what would be a reasonable compensation for Mr. Smith for his services as such solicitor; and, second, what lien, if any, he had on the property of the defendant railroad company, or on the proceeds of the sale therefor, for the payment of such compensation. But, if this construction of the order is erroneous, I proceed now to ascertain from all the testimony before me whether or not Mr. Smith was employed by Eugene Kelly and John Byrne as their solicitor to represent their joint interest in and to nine hundred and sixty-six of the first consolidated mortgage bonds of the defendant railroad company, which they had acquired from the Brownings and West by the contract of May 11, 1888, and to what extent he did represent them, or either of them, as such solicitor in the foreclosure suit and in the auxiliary suit of Grant Brothers, by which it was sought to have said nine hundred and sixty-six bonds declared fraudulent and void.

I discard from my consideration, as not pertinent to this issue, all of the testimony as to the services Mr. Smith rendered to certain parties and committees from December, 1887, up to the time of the filing of the foreclosure bill, to wit, June 2, 1888. Those parties and committees were trying to devise a plan to avoid litigation, by a prompt reorganization of the defendant railroad company, and, doubtless, Mr. Smith rendered them valuable service; but, under the order of reference, it could not be considered by me in this behalf, or constitute any part of the service to be charged against the respondent. The testimony clearly shows that the foreclosure suit was begun at the instance of Eugene Kelly and John Byrne, as the holders of the majority of the first consolidated mortgage bonds of the East & West Railroad Company of Alabama. The mortgage of December 1, 1886, securing said bonds, provided that on the happening of certain events, such as failure to pay interest, etc., and a demand in writing of a certain number in value, of the holders of said bonds, the trustee should institute proceedings to foreclose it. The railroad company failed to pay the interest on said bonds due the 1st of December, 1887, and, upon such failure, Eugene Kelly and John Byrne, as the holders of said bonds to the amount, in value, of nine hundred and sixteen thousand dollars, and Eugene Kelly, as the holder of said bonds to the amount, in value, of ninety thousand dollars, demanded, in writing, that the trustee should at once proceed to foreclose the mortgage. This writing is dated May 18, 1888, and was prepared by Mr. Smith, the intervener, at the request of Eugene Kelly and John Byrne. He (Mr. Smith) delivered this written demand to the trustee, the American Loan & Trust Company, and thereupon the trustee instructed its counsel, Robert Ludlow Fowler, Esq., to take the necessary legal steps to foreclose the mortgage, which instruction he promptly obeyed. He prepared the bill, receiving aid from Mr. Smith in the way of the collation of the facts necessary thereto, and, in company with Mr. Smith, came to Birmingham, Alabama, to file it in court. Having reached Birmingham, Mr. Fowler delayed filing the bill a day or two, in order to ascertain whether or not the railroad company had failed to pay the interest due on the 1st of June, 1888, and, having been duly informed of the fact of such failure, filed the bill on June 2, 1888. This action on the part of Eugene Kelly and John Byrne, and each of them, it seems to me, was an employment of Mr. Smith to represent them, and each of them, in the foreclosure suit, and threw on him the responsibility of upholding the genuineness and validity of the bonds held by them, in that suit. Some weeks later, the Grant Brothers and others filed a dependent and auxiliary bill, in which it was charged that the bonds held by Kelly and Byrne, and which they had obtained from the Brownings and West, as above shown, were fraudulent and void. Mr. Smith testifies—and no one contradicts him—that he was duly employed by Messrs. Kelly and Byrne to represent them in that suit, and contend for the validity of the Brownings and West bonds under the terms of the contract of May 11, 1888. This he did by preparing and filing their answer to the said bill, and by attending all the sittings of the special master, acting as examiner, to take the testimony by examining and cross-examining witnesses, by preparing a brief, and arguing the case before

the circuit court at New Orleans, and, on appeal, before the circuit court of appeals. During all this time—a period of nearly five years—he testifies that he had frequent interviews with Mr. Kelly, and informed him of the progress of the litigation, and of his own actions therein as Mr. Kelly's solicitor. From time to time during this period, he testifies, Mr. Kelly paid him various amounts of money towards the expenses of the suit and his own compensation. *Hotchkiss v. Le Roy*, 9 Johns. 142; *Burghart v. Gardner*, 3 Barb. 64; *Fore v. Chandler*, 24 Tex. 146. In view of these undisputed facts, I find and report that Mr. Smith was duly retained by Eugene Kelly and John Byrne, and each of them, to represent their joint and individual interests in the East & West Railroad bonds held by them, in the suit for foreclosure of the mortgage, and in the suit instituted by Grant Brothers et al. I am strengthened in this conclusion by the failure of Mr. Kelly to testify to a different state of facts. It is true that on the 6th of April, 1893, he filed an affidavit in this court to the effect that he had never employed Mr. Smith as his solicitor in the East & West Railroad litigation, and that Mr. Smith had no authority to appear for him therein; but this affidavit is purely *ex parte*, extrajudicial, and has been stricken from the files of the court by the very order referring this controversy to me. Therefore, I cannot consider or give it any weight whatever, no matter in what shape it may be presented to me. I cannot avoid the legal conclusion that when a party has an opportunity to dispute the testimony given against him, and fails to do so, he admits its truth, unless falsehood is apparent on the face of it. More than this, as late as January, 1893, Mr. Kelly wrote to Major John Byrne, his partner, or the joint owner with him in and to the bonds in litigation, requesting him to have Mr. Smith send in "our bill," in order that he might be paid that month; thus admitting a liability on his part to Mr. Smith.

But it is contended on the part of Mr. Kelly that, in the spring of 1889, the court authorized the issuance of receiver's certificates constituting a lien on the railroad property superior to that of the bonds; that Mr. Kelly purchased a very large portion of these certificates; and that thenceforward his interest as a bondholder was antagonistic to his interest as a holder of receiver's certificates, and, therefore, Mr. Smith was precluded from further service as his solicitor in the litigation. The receiver's certificates, to the amount of six hundred and fifty thousand dollars, were authorized to be issued by the court in March, 1889, by and with the consent of all the bondholders. This was done in order to raise money to widen the gauge of the railroad, and for its betterment generally, and, indeed, to keep it a "going concern." At Mr. Kelly's special request, the order was so framed as to require the receiver to offer the certificates first and preferably to the bondholders in the proportion of their holdings of the bonds. It is to be presumed that the receiver did so offer them, for such is the order, and it was his duty to obey it. The records show that these certificates never went out of the family of the litigants, as no one purchased them from the receiver except bondholders, to wit, Eugene Kelly, the American Loan & Trust Company, Drexel, Morgan & Co., De Coppett & Co., and Reuben L. Fox. Whether or not these parties took the certificates in proportion to their holdings of the bonds the testimony is silent; but it is certain that they obtained whatever of advantage there was in the ownership of them over the bondholders who did not accept the terms of the order by which they were issued. As above stated, these certificates were endowed with a lien superior to that of the bondholders; and this by their unanimous consent. Superiority of lien by no means involves the idea of an antagonism of lien; the very term imports that there is no hostility between them. In this case the purchasers of the receiver's certificates became at once the wards of the court, and it was the duty of the court to protect their interests, without putting them to the expense of employing counsel to look after and guard it. They needed no counsel. Their certificates were never in dispute. Their absolute superiority as liens on the property was never questioned, and the court was most careful to secure the rights of the holders of them in its decree of foreclosure and sale. *Beach, Rec. § 402 et ante.*

How, then, can it be reasonably contended that Mr. Kelly was the owner of antagonistic liens, and that, therefore, as a lawyer, Mr. Smith should have

abandoned his employment to maintain the validity of the Browning and West bonds? The interest of Messrs. Kelly and Byrne in and to said bonds was equal. Mr. Smith represented both and each of these clients, and, in doing so, it was scarcely possible that he could advocate the interest of one without advocating the interest of the other. The certificate holders, as such, never disputed the validity of any of the bonds; and nowhere in the pleadings does it appear that Mr. Kelly, as a bondholder, disputed the superior lien of the certificates, or, as a certificate holder, the secondary lien of all the bonds. As I understand the testimony, Mr. Smith never pretended to represent Mr. Kelly as a holder of the receiver's certificates,—a most useless labor,—but that he did appear for and represent the interest of Mr. Kelly and Major Byrne as bondholders, and nothing else. In doing so, under all the facts in evidence before me, I cannot see in what particular he has violated the canons of professional ethics, or any duty that he owed to his client or to the court. To Mr. Kelly, as a certificate holder, he owed no duty whatever. In that interest the court was Mr. Kelly's guardian. To Mr. Kelly, as a bondholder, he did owe the duty of asserting and maintaining the genuineness and validity of the bonds obtained by him and Major Byrne from the Brownings and West, which was assailed by the averments of the Grant Brothers' bill. This duty he discharged with a zeal, fidelity, and ability which lawyers should always give to the interest of their clients, and with a success that all lawyers strive for and are proud to attain.

Again, it is contended on the part of Mr. Kelly that in April or November, 1892, he discharged Mr. Smith as his solicitor, and that he (Mr. Smith) has no right to compensation after the time of that discharge; that Mr. Smith should have ceased to represent Mr. Kelly from that time. As a matter of taste, this, perhaps, should have been his course; but the authorities lay the law down differently. I quote from *Weeks on Attorneys* (2d Ed., § 250): "A party has no right arbitrarily to change his attorney without paying the costs earned; and the original attorney is not bound to consent to a substitution, or deliver the papers upon which he has a lien, until the amount of his just demands are ascertained by a court or a reference, and paid." This view of the law is upheld by the cases of *Sloo v. Law*, 4 Blatchf. 268, Fed. Cas. No. 12,958, and *Wilkinson v. Tilden*, 14 Fed. 778.

As to the value of the services rendered by Mr. Smith, three witnesses have testified. Gov. Hoadley, a lawyer of wide and varied experience in such cases, having "looked" at the book of testimony in the Grant Brothers' case, and heard the statement of Mr. Smith as to the time involved and the nature of the litigation, and having read his brief as filed in the circuit court and in the court of appeals, fixes the sum of twenty-five thousand dollars as a reasonable fee, in addition to his expenses. Mr. Green, a lawyer of much experience in railroad litigation, having read Mr. Smith's direct examination before me, fixes the fee at five thousand dollars, or, at the highest, five thousand five hundred dollars. Mr. Robert Ludlow Fowler, who was the solicitor for the complainant throughout the entire foreclosure suit, and a witness to the services of Mr. Smith in the courts and before the special master, and is thoroughly familiar with the whole history of the litigation, and entirely competent otherwise, fixes the sum of eighteen thousand or twenty thousand dollars as a proper and reasonable fee, in addition to his disbursements for necessary traveling expenses. Of the testimony of these witnesses, the most satisfactory to my mind is that of Mr. Fowler. Gov. Hoadley and Mr. Green testify from the standpoint of the hypothesis, which is seldom, if ever, certain and complete in its statement of facts. Mr. Fowler testifies as an eye witness, so to speak, to substantially all of Mr. Smith's services, and fixes the fee with an intelligent appreciation of their importance and value to his clients, whoever these clients may have been. I therefore find and report that, for his services as solicitor for Eugene Kelly in the foreclosure suit and in the Grant Brothers' suit, Frank Sullivan Smith should be allowed the sum of twenty thousand dollars, and also his necessary disbursements, as shown by his testimony to be the sum of one thousand five hundred and five dollars and eighty-one cents. From the aggregate of these two sums should be deducted the amount heretofore paid him by Mr. Kelly, as shown by Mr. Smith's testimony, to wit, the sum of two thousand five hundred and five dollars and

fifty cents, which would leave a balance of nineteen thousand dollars and thirty-one cents due to Mr. Smith.

The next and most difficult question submitted to me by the order of reference is, what lien, if any, has the intervener upon the property of the East & West Railroad Company of Alabama, or the fund in court arising from the sale thereof? I have had much difficulty in framing an answer to this question which is satisfactory to my mind, but that difficulty arose mainly from the fact that, in my first reasonings, I mistook the result of the litigation for its cause. The general rule is that an attorney at law who is employed to prosecute a demand has a lien upon any judgment or recovery obtained through his services for fees or compensation due him therefor. All the authorities are clear as to the existence of this lien, but there is great contrariety of opinion as to the proper remedy for its enforcement. It seems, however, that, as long as the parties are under the control of the court, it has the power and will find the way to execute it. *Mansfield v. Dorland*, 2 Cal. 507; *Pinder v. Morris*, 3 Caines, 165; *Andrews v. Morse*, 12 Conn. 444; *Walker v. Sargeant*, 14 Vt. 247; *Adam v. Fox*, 40 Barb. 442. He has a lien upon his client's papers that came into his possession in the course of his professional employment (*Ex parte Russell*, 1 How. Pr. 149); also upon a note deposited with him for collection or suit (*Howard v. Osceola*, 22 Wis. 453; *Stewart v. Flowers*, 44 Miss. 513); also upon a bond or mortgage in his hands for foreclosure (*Bank v. Todd*, 52 N. Y. 489). This is the law substantially in Alabama. *Ex parte Lehman*, 59 Ala. 631; *Jackson v. Clopton*, 66 Ala. 29; *Warfield v. Campbell*, 38 Ala. 527; *Royall v. McKenzie*, 25 Ala. 363; *In re Tallahassee Manuf'g Co.*, 64 Ala. 567; *Weaver v. Cooper*, 73 Ala. 318; *Moseley v. Norman*, 74 Ala. 422.

The first question to be solved is, what was the subject-matter of the litigation in the foreclosure suit and the Grant Brothers' bill? Messrs. Kelly and Byrne placed their nine hundred and sixty-six bonds in the hands of Mr. Smith, as their solicitor, for collection, by a foreclosure of the mortgage given to secure them. The foreclosure suit was instituted on their demand. The Grant Brothers' bill attacked the validity of these bonds, but, in legal effect, the foreclosure suit and the Grant Brothers' suit constituted one litigation concerning the same subject-matter. The objections to these bonds could have been taken in the foreclosure suit before the master when he was directed to list the claims against the defendant railroad company, and their validity tested without the filing of a separate bill. Mr. Smith's lien as solicitor attached to these bonds from the moment of his employment; and, when they were declared valid and embraced in the decree, this lien was fixed on that decree; and, when the mortgaged property was sold, it was transferred to that property, even had it been purchased by a stranger to the record. Certainly, it cannot be contended that the receiver's certificates constituted the subject-matter of the litigation. They were issued as a mere incident of that litigation to preserve the property and improve it. The foreclosure bill sought to have a sale of the mortgaged property for the payment of the bonds secured by the mortgage. The Grant Brothers' bill challenged the validity of nine hundred and sixty-six of those bonds held by Eugene Kelly and John Byrne. Mr. Smith, as solicitor for these parties, advocated the validity of these bonds as just and legal securities under the mortgage; and the decree of the court declared them to be of equal validity with all the other bonds, and ordered a sale of the property for the payment thereof. The property was not sold to pay receiver's certificates, but to pay the bonds which were secured by the mortgage then foreclosed. True, the decree required the purchaser to assume the payment of the certificates, just as it required him to pay the costs of the court; but that did not transform them into the subject-matter of the original suit any more than it did the costs of the clerk or the marshal of the court. The bonds secured by the mortgage, and nothing else, constituted this subject-matter; and the property of the defendant railroad company was the thing—the corpus—upon which the lien of the bonds was declared, and sought to be made fruitful by sale. That this property did not sell for a sum sufficient to pay the costs, certificates, and bonds is no fault of the counsel, any more than it is of the court of which he is an officer. And here, it seems to me, is the fallacy of Mr. Denegre's argu-

ment in favor of the respondent. The lien may exist without a possibility of its enforcement to fruition. It is true the bonds took nothing by the sale, but their lien existed nevertheless. Suppose the property had been sold for two million dollars in cash; less than half that amount would have paid all the costs, preferred claims, and the receiver's certificates, and the residue of over one million dollars would have been apportioned to the payment of the bonds. On these bonds, nine hundred and sixty-six thousand dollars, in value, were ascertained to belong to Eugene Kelly and John Byrne. (See master's report, September 6, 1892.) Mr. Smith represented the holders of these bonds throughout the entire litigation, and was successful in having them declared of equal validity with the other bonds. Can it be contended in the supposed case that these bonds of Kelly and Byrne would not have received their just proportion of the proceeds of the sale after paying costs, preferred claims, and receiver's certificates? Can it be contended that, in that event, Mr. Smith would have no lien as solicitor upon these bonds, or upon their proportion of the proceeds of the sale, for his fees and disbursements? Can a failure of property to bring a high price at judicial sale alter the principles of law? I think not. Mr. Smith fully discharged his duty to his clients when he contended for and obtained a decree recognizing the validity of their bonds, and ordering a sale of the property for their payment. He had a lien on the bonds for his compensation during the litigation, and, when they were merged in the decree of sale as legal and valid securities, that lien at once attached itself to the property to be sold. It would be a mockery of justice to declare that that lien was lost and destroyed because the proceeds of the sale were insufficient to pay any portion of the bonds. *Ex parte Plitt*, 2 Wall. Jr. 453, Fed. Cas. No. 11,228; *McDonald v. Napier*, 14 Ga. 89. I find and report, as matter of law, that the intervener, Frank Sullivan Smith, Esq., has a lien upon the property, rights, and franchises of the East & West Railroad Company of Alabama, recently sold to Eugene Kelly, under the decree of this court, for his services as solicitor for said Eugene Kelly, to the amount of twenty thousand dollars, and his disbursements for necessary expenses, to the additional amount of one thousand five hundred and five dollars and eighty-one cents, less the amount heretofore paid him on account, to wit, the sum of two thousand five hundred and five dollars and fifty cents; leaving, as a balance due him, the sum of nineteen thousand dollars and thirty-one cents.

It will be seen from the foregoing that Mr. Smith was the solicitor of Eugene Kelly and John Byrne as joint owners of the nine hundred and sixty-six first consolidated mortgage bonds of the defendant railroad company, and, as such, earned the compensation herein reported due him. In what proportion these nine hundred and sixty-six bonds were owned by Messrs. Kelly and Byrne the evidence does not inform me with accuracy; but, from all the testimony relating thereto, I find and report that their interest in said bonds were equal, share and share alike, and that each of them is bound for the payment of the fee and expenses of their solicitor.

Treating this intervention as a proceeding in personam, I find and report that Mr. Kelly should pay to Mr. Smith the sum of nine thousand five hundred and 15-100 dollars (\$9,500.15), and that Major John Byrne should be held to pay the balance of the sum herein reported as due Mr. Smith. Mr. Kelly became the purchaser of the property upon which I have reported Mr. Smith has a lien, and a deed thereto has been duly executed and delivered to him, through his attorney, Mr. Walter Denegre. It would be useless to attempt to apportion the liability of Messrs. Kelly and Byrne to Mr. Smith for the compensation herein found and reported due him, if this intervention is a proceeding in rem; that is a matter for settlement between them. The order of reference, as I understand it, calls for a report from me in either and both views of the case. To the best of my ability I have discharged that duty.

I file with this report the original of the testimony upon which it is predicated.

All of which is respectfully submitted.

[Signed]

F. S. Ferguson, Special Master.



Alexander C. King, for intervener Smith.  
Walter D. Denegre, for respondent Kelly.

PARDEE, Circuit Judge. The matter of the intervention of Frank Sullivan Smith, heretofore solicitor for Eugene Kelly and John Byrne in the main case and in the dependent suit of Grant Bros. v. Brownings, Kelly, and Byrne, and others, wherein intervener, Smith, having been discharged as solicitor for the said Eugene Kelly pending the litigation, petitions the court to fix and assess the amount of his compensation as against Eugene Kelly, and determine the extent of his lien, has been submitted on exceptions to the report of the special master. The very comprehensive and well-considered report of the special master answers all the important exceptions taken thereto, save and except the one which objects to the finding that the intervener has a lien for his compensation, as the solicitor for Kelly and Byrne, upon the property, rights, and franchises of the East & West Railroad of Alabama.

The undisputed facts seem to be that the intervener, Smith, was employed in his professional capacity to represent Messrs. Kelly and Byrne in protecting and defending their very large bonded interest in the East & West Railroad of Alabama, amounting to 966 bonds out of a total of 1,750; that as solicitor, so employed, he rendered valuable services, and made outlays for expenses, in protecting the said bonded interest, and was so far successful therein as to secure a full recognition of such interest as against the very serious attacks made against its validity. After defending the suit of Grant Bros. v. Brownings et al. successfully, and after the decree of foreclosure had been entered in the main case in favor of all the bonded interest, including that owned and controlled by Kelly and Byrne, but before a sale of the railroad property under the decree of foreclosure, Kelly discharged Smith as his solicitor, and the discharge was recognized by the court, reserving to Smith the right to have his compensation fixed and the extent of his lien declared. Under the authorities cited by the special master, and in the very able briefs submitted to me, it is clear that, when Solicitor Smith was discharged, he was entitled to be paid for his services by his client Kelly, and, in default thereof, to have the amount due him ascertained by the court, with recognition of a lien upon the interest which Kelly had in the subject-matter of the litigation. It is found by the special master, and not disputed, that the extent of the interest represented by Solicitor Smith in the litigation in the main and dependent suit was the 966 bonds owned and controlled by Kelly and Byrne. At no time did Solicitor Smith claim to represent Mr. Kelly in any interest in the receiver's certificates; nor in any other interest outside of the 966 bonds. Mr. Smith's lien for compensation for his services was, in equity, fixed and determined at the time he was discharged, and it is difficult to see how any subsequent action of Mr. Kelly in purchasing the East & West Railroad of Alabama could enlarge or defeat the lien. Even if Mr. Kelly had purchased the railroad property as a bond-

holder, representing the said 966 bonds, Mr. Smith's lien would not thereby have been enlarged and extended to the railroad property, except so far as the 966 bonds were by such purchase merged into the railroad property. As a matter of fact,—undisputed in this record,—Mr. Kelly purchased the East & West Railroad of Alabama as any stranger might have done. Under the terms of the decree of foreclosure, the sale was of the railroad property, free and clear of all incumbrances save for receiver's certificates and obligations, and thereby all lien of the mortgage bonds was divested as to the railroad property, and remitted to the funds derived from the sale.

A decree will be entered in the case amending the special master's report so as to deny a lien in favor of Frank Sullivan Smith upon the property, rights, and franchises of the East & West Railroad Company of Alabama, but recognizing his lien upon Mr. Kelly's interest in the 966 first consolidated mortgage bonds of the East & West Railroad Company of Alabama, claimed in the litigation to have been owned by Kelly and Byrne; and that, as amended, all exceptions be overruled, and the special master's report be approved and confirmed.

---

WETZEL et al. v. MINNESOTA RAILWAY TRANSFER CO. et al.

(Circuit Court of Appeals, Eighth Circuit. December 10, 1894.)

No. 496.

**TITLE TO LAND—LACHES.**

In 1848 a warrant for 160 acres of land was issued to R., the widow of a soldier in the Mexican war, and her minor children, of whom she was guardian. In the same year, R., acting individually and as guardian of her children, but without first obtaining the leave of the orphans' court, as required by statute, sold and assigned the warrant to one T., who located it, and in 1850 received a patent for the land, which subsequently became very valuable, and passed, by numerous mesne conveyances, into the hands of many holders, who made valuable improvements. The youngest child of R. attained majority in 1863. In 1892 the surviving children of R., and heirs of deceased children, brought this bill to establish their title to the land; alleging, as reasons for their delay, that they were ignorant till 1889 of the issue of the warrant, and that they were illiterate and inexperienced persons. *Held*, that as the plaintiffs were acquainted with the facts which, under the law, entitled them to receive a land warrant on account of their father's services, and as they are presumed to have known the law, and as slight attention to their rights would have disclosed the fact, many years prior to the filing of the suit, that a land warrant had in fact been issued in their favor, and had been assigned and located, and as many innocent parties had expended their money on the land, and acquired interests therein, which they supposed to be valid, and which it would be inequitable to disturb, the delay of the plaintiffs amounted to such laches as would bar a suit for equitable relief. *Held*, further, that the plaintiffs could not plead ignorance of the right asserted as an excuse for years of delay in asserting it, inasmuch as it appeared that such ignorance was due to their own neglect, in failing to take any steps to secure a land warrant which they knew they were entitled to. *Held*, further, that ignorance of one's rights will not serve as an excuse in a court of equity for not bringing a suit to enforce them, when such ignorance is fairly attributable to negligence, or to the party's failure to make such inquiries with respect to his rights as, with the information at his command, he ought to have made.

### Appeal from the Circuit Court of the United States for the District of Minnesota.

This was a suit by Elizabeth Wetzel and others against the Minnesota Railway Transfer Company and others to establish title to land. Upon the hearing in the circuit court, the bill was dismissed for laches. 56 Fed. 919. Complainants appeal.

This was a suit by the appellants, who were complainants in the circuit court, to establish their title to an undivided interest in a certain tract of land situated in Ramsey county, Minn., to wit, the S. W.  $\frac{1}{4}$  of section 28, township 29 N., range 23 W., which was patented by the United States to Nathan C. D. Taylor on the 20th of March, 1850, as assignee of Elizabeth Remsen, in her own right, and as guardian of the minor heirs of George W. Remsen, deceased. The facts out of which the controversy arose may be stated with substantial accuracy, as follows: George W. Remsen was a soldier in the Mexican war, and by virtue of his enlistment and service he became entitled, under the provisions of the ninth section of an act of congress approved on February 11, 1847, to 160 acres of land. 9 Stat. 123, 125. Said Remsen died in the service in the month of October, 1847, and under the provisions of said act his right to said land inured to the benefit of his surviving wife and children. On September 30, 1848, a warrant was duly issued to Elizabeth Remsen, widow of said George W. Remsen, and to Harriet A., Mary Ann, John W., Elizabeth, and George W. A. Remsen, children and heirs at law of said George W. Remsen, deceased, who was described in the warrant as "late a private in Company K, third regiment, United States infantry." At the time of the issuance of said warrant, all of said children were minors; Harriet A. Remsen, the oldest child, being then about 17 years of age. Section 9 of the act of February 11, 1847, aforesaid, provided in substance that, in the event of the issuance of a land warrant under said act to the minor children of a deceased soldier, "then the legally constituted guardian of such minor children shall, in conjunction with such of the children, if any, as may be of full age, upon being duly authorized by the orphans' or other court having probate jurisdiction, have power to sell and dispose of such certificate or warrant for the benefit of those interested." Elizabeth Remsen qualified as guardian of all the minors aforesaid, except Harriet A., the oldest, before the orphans' court of the county of Philadelphia, state of Pennsylvania, on October 6, 1848. Subsequently, and on the 11th of October, 1848, she sold and assigned the land warrant in question to Nathan C. D. Taylor, who located the same on the land now in controversy, and received a patent therefor, as heretofore stated. The assignment of said land warrant was executed by said Elizabeth Remsen, the mother, in her own behalf, "and as guardian of the minor children of George W. Remsen, deceased"; but she appears to have obtained no order from the orphans' court aforesaid, authorizing her to sell her children's interest therein. The assignment of the land warrant was also executed by Harriet A. Remsen, the oldest daughter, who had previously become the wife of Jacob Heyer, but her husband did not join with her in the execution of the assignment. By numerous mesne conveyances, covering a period of many years, the title to the aforesaid tract of land thus acquired by Nathan C. D. Taylor has now become vested in very many persons, who are in possession of different parcels of the land, and who were made parties defendant to the bill of complaint. All of the aforesaid minor children of George W. Remsen, deceased, lived to attain their majority, and for some years thereafter. The youngest of them, George W. A. Remsen, attained his majority as early as the year 1863; the others, except Harriet A., in the years 1856, 1858, and 1861. Elizabeth Wetzel, one of the appellants, is the former wife of George W. Remsen, who died in October, 1847, she having married Paul Wetzel since the death of her first husband. Harriet A. Van Zant, another of the appellants, is the oldest daughter of said George W. Remsen, who joined with her mother in the sale and assignment of the land warrant, as heretofore stated. John Wesley Remsen, also one of the appellants, is a son of George W. Remsen, deceased. The other children of said deceased heretofore named, to wit, Mary Ann, Elizabeth, and George W. A. Remsen, appear to be dead; and their interests

are represented in the present proceeding by the other appellants, to wit, by Emma F. Hergeshelmer and Maggie L. Beckman, who were the daughters of Mary Ann Remsen, and by Mary J. Remsen and her children, George W., Clara B., and Mabel Remsen, who are, respectively, the widow and lineal descendants of George W. A. Remsen, now deceased. Elizabeth Remsen appears to have died, leaving no lineal descendants. It was claimed in behalf of the appellants that the sale and assignment of the aforesaid land warrant were utterly void, as to the interests of all the minor children of George W. Remsen, other than Harriet A., who joined in the assignment of the same, because the assignment made by their mother and guardian was not authorized by any order or decree of the orphans' court of the county of Philadelphia, as the act of congress required. They therefore prayed that the title of such minor heirs to an undivided interest in the tract of land aforesaid might be established, and that the defendants holding under the patent issued to Nathan C. D. Taylor might be adjudged to hold the legal title so acquired in trust for the appellants, and that they be compelled to convey the legal title to the appellants. On the final hearing the proceeding was dismissed on the ground of laches.

C. W. Bunn and William C. Mayne (William E. Bramhall, on the brief), for appellants.

C. K. Davis (F. B. Kellogg and C. A. Severance, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The bill of complaint in this suit appears to have been filed in the circuit court of the United States for the district of Minnesota on the 28th day of May, 1892,—nearly 44 years after the land warrant which was issued to the widow of George W. Remsen and to his minor children was sold and assigned by the widow, acting for herself and as guardian of said minors, to Nathan C. D. Taylor, under whom the defendants now claim. When the suit was instituted, more than 42 years had come and gone since Taylor had located the warrant on the lands in controversy, and had obtained a patent therefor from the United States, and nearly 30 years had elapsed since the youngest minor child of George W. Remsen had attained his majority. In the meantime, two large cities, Minneapolis and St. Paul, had grown up in the immediate vicinity of the place where Taylor had located the warrant. For a number of years prior to the commencement of the suit, the property in question was within the outboundaries of one of these cities. It had been, to a large extent, subdivided into lots and blocks. It had become of immense value, and had been sold in separate parcels to numerous purchasers, who had made extensive improvements thereon. Some idea may be formed of the extent to which the property in question has changed hands, and of the number of persons whose interests are injuriously affected by the present litigation, from the admitted fact that there are more than 1,200 entries in the abstract of title which counsel for the complainants found it necessary to procure before the bill of complaint in the present suit could be intelligently drawn. These general facts, with respect to which there is no dispute, are sufficient, we think, to justify us in ignoring all other questions, and in directing our attention primarily to the important inquiry whether,

in view of the long period that has elapsed since the wrong complained of was committed, and since the minor heirs of George W. Remsen attained their majority, they and their descendants have shown such reasonable diligence as will serve to excuse the long delay in asserting their rights, and entitle them to relief in a court of equity.

The doctrine of laches has so often been applied by the supreme court of the United States and by this court, in cases bearing a strong likeness to the one at bar, that we deem it unnecessary, in this opinion, to enter into a general discussion of the subject. It is now well settled that, while the defense of laches is ordinarily available in equity in those cases where the plea of the statute of limitations would be effectual at law, yet in many instances, depending on a variety of circumstances, laches will be regarded as a good defense even where the plea of the statute would not be available at law. The plea of laches does not always depend for its support upon mere lapse of time, but upon the manifest inequity of permitting the claim to be enforced, in view of some change in the condition of the property or in the relations of the parties to the controversy. It is also a well-established rule that when a suitor applies to a court of chancery for relief, for any considerable length of time after the wrong complained of was committed, it is incumbent on him to show, both by averment and proof, some sufficient excuse to justify the delay. This latter rule, requiring a suitor to plead and prove some adequate excuse for his silence and inaction in every instance where there has been an apparent want of diligence, is applied and enforced with great strictness in those cases where a person seeks to fasten upon another a constructive trust with respect to personal or real property, and in those cases, as well, where the property in controversy has rapidly appreciated in value, or has been improved by those in possession, or when the rights of numerous third parties have intervened and attached. These principles have been recognized and applied in such a great variety of cases that it is hardly necessary to do more at present than to refer to a few of the leading authorities where they have been clearly stated and rigidly enforced. *Badger v. Badger*, 2 Wall. 87, 95; *Godden v. Kim-mell*, 99 U. S. 201; *Gallihier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873; *Felix v. Patrick*, 145 U. S. 317, 12 Sup. Ct. 862; *Naddo v. Bardon*, 4 U. S. App. 642, 2 C. C. A. 335, 51 Fed. 493; *Lemoine v. Dunklin Co.*, 10 U. S. App. 227, 2 C. C. A. 343, 51 Fed. 487; *Railroad Co. v. Sage*, 4 U. S. App. 160, 1 C. C. A. 256, 49 Fed. 315; *Kinne v. Webb*, 4 C. C. A. 170, 54 Fed. 34; *Ashhurst's Appeal*, 60 Pa. St. 290.

In the case at bar the complainants have attempted, in accordance with the foregoing rule, to show by their bill and their proofs that their long silence and inaction, extending over a period of 29 years after the youngest child of the deceased soldier attained his majority, were due to causes beyond their control, which should be accepted as a valid excuse by a court of equity. With reference to the excuse so pleaded, it may be said that the plaintiffs allege in substance that none of the minors, except Harriet A. Remsen, who joined with her mother in the assignment of the land warrant, had any intimation

that the warrant had been issued or that the same had been sold until some time in the latter part of the year 1889, and that they did not become possessed of all of the facts stated in the bill until the month of August, 1891. It is further said in their behalf that they were persons occupying a humble station in life, and that they were, to a certain extent, illiterate and inexperienced. It is not claimed, however, that any fraud was practiced upon the plaintiffs, or that knowledge of the issuance and sale of the land warrant was intentionally concealed from them, with a view of preventing them from asserting their rights, either before or after they attained their majority. The case rests, therefore, so far as any excuse for the delay in bringing suit is concerned, solely upon the plea of long-continued ignorance, unaffected by any other extenuating circumstances. Is this excuse sufficient to give them a standing in a court of equity, upon the state of facts disclosed by this record? Proceeding to consider this question, we may be permitted to intimate a serious doubt whether all or any of the minor heirs of George W. Remsen, who are represented in this action, were in fact ignorant of the issuance, sale, and assignment of the land warrant by their mother and older sister when the sale was made. At that time, Mary Ann Remsen, the mother of two of the plaintiffs, was about 14 years of age; John Wesley Remsen, one of the present plaintiffs, was a boy at least 11 years old. They were then living with their mother, and the family appears to have been possessed of limited means, and to have been in straightened circumstances. Under these conditions, it is possible, of course, that the sale of the warrant and receipt of the purchase money was only known to the mother and oldest daughter, but it is by no means probable that such was the fact. It is more reasonable, we think, to believe that a transaction of such importance to people in their then condition was frequently discussed or mentioned in the family circle, and that it was well known to all of the children who were then capable of understanding facts or events of that nature. At this late day it is easy for those of the children who are still living to say, with much apparent sincerity, that they had no knowledge of the issuance and sale of the warrant, while it is practically impossible for the defendants to disprove such assertions. For these reasons, we think that the testimony tending to show ignorance of the transaction in question, as an excuse for the long years of delay, should be received and acted upon by a chancellor with great caution, even if it is not entirely discredited. There are some facts, however, of which the plaintiffs do not pretend to have been ignorant. It is admitted—or, if not admitted, it is apparent from the testimony—that all of the minor heirs well knew that their father was a soldier in the Mexican war, that he died in the service, and that their mother was in receipt of a pension on account of such service. They were all affected, at least when they attained their majority, with knowledge of the law which granted to them and to their mother 160 acres of land, and entitled them to receive a warrant therefor from the government. This latter fact is one, we think, of which the plaintiffs cannot be permitted to plead ignorance. It is also a fact which should

have inspired some affirmative action on their part, with a view of ascertaining their rights, within a reasonable period after they, respectively, became of full age, and were entitled to receive their inheritance. Assuming that they were each utterly ignorant until they became of full age of the previous issuance and sale of the land warrant, yet a simple inquiry addressed to the land department could not have failed to have made them acquainted, more than 30 years ago, with all of the facts attending the issuance and sale of the warrant which they have since learned. At that time—say from 1856 to 1863, during which period the several minors became of age—the land in controversy, which is now worth nearly if not quite a million dollars, was then worth not to exceed fifteen hundred dollars, and but few conveyances affecting the same had been made. These are facts which a court of equity cannot overlook in determining whether the plaintiffs have exercised such reasonable diligence as they were required to exercise. It must be presumed that they were acquainted with the law which, on a state of facts that was well known to them, entitled them to receive a certain gratuity from the government on account of their father's enlistment and services. They must also be presumed to have known whatever would have been discovered, had they made such use of the knowledge which they are presumed to have possessed, as other persons of fair intelligence would have made of it. Stating the proposition in a different form, it may be said that they cannot plead ignorance of the rights now asserted, as an excuse for long years of delay, when it is evident that such ignorance was due to their own neglect in failing to take any steps to secure a land warrant which they knew they were entitled to, if it had not already been issued. While it is true that ignorance of one's rights will frequently serve as an excuse in a court of equity for not bringing a suit to enforce them, yet it will never have that effect where such ignorance is fairly attributable to negligence, or to a party's failure to make such inquiries with respect to his rights as, with the information at his command, he ought to have made.

It has been suggested by counsel that it is a harsh rule which imposes on the plaintiffs the duty of knowing the law, and of thereby knowing, many years ago, that they were entitled to a land warrant. It is also suggested that the old maxim, "Ignorance of the law excuses no one," is not applicable to the present case. In almost the same breath, however, it is confidently asserted that all of the numerous persons who, for the past 30 or 40 years have bought portions of the land now in controversy, some of whom were doubtless as ignorant and inexperienced as these plaintiffs, are each and all of them affected with knowledge of the invalidity of their respective titles, because the records do not affirmatively show that the sale of the land warrant under which they derived title was made pursuant to an order of the orphans' court, as the act of congress required. We confess our inability to perceive that the rule in question is any less harsh or oppressive in the latter case than in the former. If it can be invoked by the plaintiffs to affect the defendants with notice of the flaw in their title, then, with equal jus-

tice, it can be invoked by the defendants for the purpose of showing that the plaintiffs were many years ago affected with such knowledge of the law and facts as should have put them upon inquiry. For the foregoing reasons, we have felt constrained to hold that the plaintiffs failed to show such diligence in ascertaining their alleged rights as entitled them to relief in a court of chancery. It is as much the duty of a suitor in equity to be diligent in discovering his rights as it is to be prompt in asserting them after they become known. In the present case, nothing appears to have been done by the minors, for more than 30 years after they became of full age, with a view of finding out whether a land warrant had ever been issued by the government, although they are presumed to have had knowledge during all of that period that they were justly entitled to one. Such conduct on their part either amounts to gross laches, or it creates a strong presumption that they were fully aware of the issuance and sale of the land warrant in question; and, for the purposes of this case, it matters not which of these views ought to be adopted.

There is another potent reason why the decree dismissing the bill of complaint ought not to be disturbed. It has already been stated that, in applying the doctrine of laches, courts of equity are not influenced solely by lapse of time, but by other considerations as well, which render it obviously inequitable to grant the relief prayed for. They have a limited discretion in determining under what circumstances they will afford redress, and the hand of the chancellor will always be stayed when to act would be to do an injustice. *Gal-lier v. Cadwell*, supra; *Felix v. Patrick*, supra; *McKinney v. Bode*, 33 Minn. 450, 23 N. W. 851; *Murphy v. Burke*, 47 Minn. 99, 49 N. W. 387. In the present case there has not only been long—and, as we think, inexcusable—delay, but it would be grossly unjust to grant the relief which these plaintiffs seek to obtain. More than 40 years ago the widow of George W. Remsen sold the land warrant in question for its full value, and doubtless used the proceeds for the support and maintenance of her minor children. If she sold it without having obtained the requisite authority from the orphans' court, her action was due solely to a mistake of law. The testimony does not raise the slightest suspicion of fraud or attempted concealment either on her part or on the part of the purchaser. Through the foresight of the purchaser of the warrant it was located in the vicinity of two frontier villages, which have since become large cities, and the land has become of immense value. Hundreds of people who were at least as innocent as these plaintiffs have since expended their means in purchasing portions of the property, and in improving it in divers and sundry ways. The plaintiffs live a thousand miles distant from the premises. It was not through any foresight of theirs that the fortunate selection of the land was made, and they have never contributed a dollar towards its improvement. It only requires a glance at these facts and at this situation to warrant us in saying that no greater wrong could be perpetrated under the



guise of administering justice than by granting the relief prayed for in the present suit. The decree of the circuit court dismissing the bill is therefore affirmed.

---

BECK v. FLOURNOY LIVE-STOCK & REAL-ESTATE CO.

(Circuit Court of Appeals, Eighth Circuit. December 10, 1894.)

No. 520.

1. INDIAN LANDS—ALLOTMENTS IN SEVERALTY—LEASES.

In 1863, the W. tribe of Indians was removed to a new reservation, pursuant to an act of congress which provided that the secretary of the interior might allot lands in severalty to the individual members of the tribe, which should be vested in such individuals and their heirs "without the right of alienation." Some allotments were made under this act by patents containing this restriction. In 1887, another act of congress made further provision for allotment of lands to the Indians in severalty, such lands to be held in trust for the Indians and their heirs, by the United States, for 25 years, any conveyance of or contract touching such lands being declared absolutely null and void. The same act provided that Indians so receiving lands in severalty should thereby become citizens of the United States, and entitled to all the rights of such citizens. A large amount of land was allotted under this act. The F. Co., without the sanction of the commissioner of Indian affairs, obtained leases from the allottees of large quantities of these lands allotted under both acts. Upon learning this fact, the commissioner directed the Indian agent to notify such lessee that the leases were void, and would not be recognized by the government, and that the lands must be vacated by a day certain, which the agent proceeded to do. *Held*, that the citizenship bestowed on the Indians was in no way inconsistent with the restriction upon their title to their lands, and that the leases obtained by the F. Co. were utterly void.

2. EQUITY JURISDICTION—IRREPARABLE INJURY.

The F. Co. having obtained an injunction against the agent forever restraining him from disturbing it in its possession or use of the lands, *held*, further, that such injunction was erroneously issued, since the agent had done no more than to give notice, under the direction of his superiors, that the leases were void, which gave no ground for an appeal to equity, on the pretense that he was about to commit a wrongful act, which would cause irreparable injury, and such injunction was, in any event, too broad.

3. SAME—COMING INTO EQUITY WITH CLEAN HANDS.

*Held*, further, that as the F. Co. had evidently embarked upon the business of securing the leases with knowledge of their illegality, and in reliance upon the difficulties the government would meet in getting rid of them, a court of equity would not interfere, at the instance of such wrongdoer, to restrain any action the government might take to vindicate its rights, but would leave it to seek damages at law for whatever injury it might sustain.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This was a suit by the Flournoy Live-Stock & Real-Estate Company against William H. Beck to restrain him from interfering with complainant's possession of certain lands. The circuit court rendered a decree in complainant's favor. Defendant appeals.

Ralph W. Breckenridge, Sp. Asst. to U. S. Atty. (A. J. Sawyer, U. S. Atty., on the brief), for appellant.

H. C. Brome (A. H. Burnett and R. A. Jones, on the brief), for appellee.

Before CALDWELL and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an appeal from a decree rendered in favor of the Flournoy Live-Stock & Real-Estate Company, who was the complainant in the circuit court, whereby the appellant, William H. Beck, was enjoined from interfering with the complainant's possession of a large body of land situated within the limits of the Omaha and Winnebago Indian reservation in the state of Nebraska. In June, 1893, the appellant, who is a captain in the United States army, was detailed by the president to take charge of the Omaha and Winnebago Indian agency in the state of Nebraska, pursuant to an act of congress approved on July 13, 1892, which authorized army officers to be detailed by the president for such service. 27 Stat. 120, c. 164. Prior to that time, during the year 1890 and the early part of the year 1891, the Flournoy Live-Stock & Real-Estate Company, which will be hereafter referred to as the "Real-Estate Company," had secured leases from certain Winnebago Indians for about 37,000 acres of land lying within said reservation, and was in possession of the land, either by its agents or its sublessees, claiming the right to hold, occupy, and use the land in question. Said leases had been obtained by the real-estate company without the sanction or approval of the commissioner of Indian affairs, and, as soon as the existence of the same became known to the department of the interior, the department pronounced the leases in question to be utterly null and void, and of no force and effect whatsoever. In the month of July, 1893, after the appellant had assumed charge of the agency, he was directed by the commissioner of Indian affairs to cause notices to be served upon the appellee and upon all other persons holding leases for land within said reservation that the leases were void, and would not be recognized by the department of the interior, and that the leased premises must be vacated by the various lessees not later than December 31, 1893. The appellant was proceeding to execute this order, and to serve such notices, when the present bill of complaint was filed by the real-estate company in the circuit court of the United States for the district of Nebraska. An interlocutory injunction was granted by the circuit court on October 10, 1893, restraining the appellant from interfering with the real-estate company's possession or use of lands lying within the reservation, and held by it under leases obtained from Winnebago Indians. This injunction was modified in some respects in May, 1894, but, as finally entered on July 16, 1894, it forever enjoined and restrained the appellant from interfering with or disturbing the real-estate company or its lessees in the possession or use of the lands described in the bill of complaint.

The fundamental question presented by the record is whether the leases that have been obtained by the real-estate company in the manner aforesaid for lands situated within the Omaha and Winnebago reservation are valid, and the consideration of that question

involves a brief reference to the various treaties and acts of congress under and by virtue of which the lands in question were acquired and are now held by the Indian lessors. The Winnebago tribe of Indians was originally domiciled on lands situated in the state of Minnesota, but by an act of congress approved on February 21, 1863, the president of the United States was authorized to take such steps as he might deem necessary to effect the peaceful removal of the tribe from that state. He was also empowered to assign and set apart for the use of said tribe a tract of unoccupied land, beyond the limits of any state, in extent at least equal to their diminished reservation in the state of Minnesota. 12 Stat. 658, c. 53. Pursuant to this act the Winnebagoes were first removed and settled upon lands in the territory of Dakota, where they appear to have been located as early as the year 1865. By a treaty that was concluded between the United States and the Winnebago tribe of Indians on March 8, 1865, and proclaimed on March 28, 1866, the tribe ceded its reservation in Dakota to the United States, and in consideration therefor the United States agreed "to set apart for the occupation and future home of the Winnebago Indians forever all that certain tract or parcel of land ceded to the United States by the Omaha tribe of Indians, on the 6th day of March A. D. 1865, situated in the territory of Nebraska and described as follows, viz.: Commencing at a point on the Missouri river four miles due south from the north boundary line of said reservation; thence west ten miles; thence south four miles; thence west to the western boundary line of the reservation; thence north to the northern boundary line; thence east to the Missouri river; and thence south along the river to the place of beginning." 14 Stat. 671. Shortly after the conclusion of the aforesaid treaty the tribe moved to the reservation last described, and has since continued to live thereon. During the period of their residence on said reservation, which has been generally termed the "Omaha and Winnebago Reservation," they have at all times been under the charge and control of Indian agents who have been appointed by the government from time to time to supervise the affairs of the tribe. The fourth section of the act of congress approved on February 21, 1863 (12 Stat. 659, c. 53), provided, in substance, that when the Winnebago tribe of Indians was removed to its new reservation, the secretary of the interior might allot lands in severalty to the individual members of said tribe "not exceeding eighty acres to each head of a family other than chiefs, to whom larger allotments may be made, which lands, when so allotted, shall be vested in said Indian and his heirs without the right of alienation and shall be evidenced by patent." Under the aforesaid provision of said act, allotments were made in the year 1871 or 1872 to various members of the tribe to the extent of about 960 acres, which are a part of the lands involved in the present suit. The patents issued for the lands so allotted referred to the act of February 21, 1863, under which the same had been issued, and in the granting clause contained the following limitation, to wit: "Without the right of alienation as stipulated in the act of congress aforesaid." No further allotments of land appear to have been made to members of the Winnebago tribe of

Indians until after the passage of an act of congress approved on February 8, 1887, which is entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes." 24 Stat. 388, c. 119. The first section of this act authorized the president of the United States to cause Indian reservations on which Indians were then located under the care of the government to be surveyed, and the lands to be allotted in severalty to the Indians living thereon, in certain prescribed proportions, "whenever, in his opinion, any such reservation or part thereof was advantageous for agricultural or grazing purposes." The second section of the act prescribed the manner in which land should be selected for allotment, either by the Indians themselves or by the Indian agent in charge of the reservation. The third section of the act provided that allotments should be made under the supervision of special agents appointed for that purpose, and that the allotments, when made, should be certified to the secretary of the interior for his action, and be deposited in the general land office. The fifth and sixth sections of the act, which have a more immediate bearing on the questions at issue in this case, are as follows:

"Sec. 5. That upon the approval of the allotments provided for in this act, by the secretary of the interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: provided, that the president of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. \* \* \*

"Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside; and no territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Under the act last aforesaid a large body of land has now been allotted in severalty to the Winnebago Indians out of the territory embraced within the limits of their reservation in the state of Ne-

braska. Proceedings to secure such allotments appear to have been inaugurated in the year 1889, when the government detailed a special agent to supervise the proceedings; but the allotments made were not approved by the secretary of the interior until some time in the month of August or September, 1893. In the meantime, during the year 1890 and the early part of 1891, the appellee company had succeeded in obtaining leases from the various allottees for 34,160 acres of allotted land lying within the reservation, and leases for about 1,880 acres of unallotted land within the reservation, which latter leases appear to have been executed by a committee representing, or assuming to represent, the Winnebago tribe.

It is manifest, we think, from an inspection of the various acts to which reference has been made above, that congress did not intend to authorize, and has not in fact authorized, the members of the Winnebago tribe of Indians to whom allotments of land have been made in severalty under the act of February 21, 1863, and the act of February 8, 1887, to lease or otherwise dispose of their right to use and occupy the lands so allotted to them. The act of February 21, 1863, declared that the lands allotted under that act should be vested "in the Indian and his heirs without the right of alienation." The fifth section of the same act further provided that the members of said tribe should be deemed "incapable of making any valid contract with any person other than a native member of their tribe without the consent of the president of the United States." The subsequent act of February 8, 1887, is equally, if not more, specific. It declares that, "if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned (to-wit: the term of twenty-five years), such conveyance or contract shall be absolutely null and void." These limitations upon the power of the Indians to sell or make contracts respecting land that might be set apart to them for their individual use and benefit were imposed to protect them from the greed and superior intelligence of the white man. Congress well knew that if these wards of the nation were placed in possession of real estate, and were given capacity to sell or lease the same, or to make contracts with white men with reference thereto, they would soon be deprived of their several holdings; and that, instead of adopting the customs and habits of civilized life and becoming self-supporting, they would speedily waste their substance, and very likely become paupers. The motive that actuated the lawmaker in depriving the Indians of the power of alienation is so obvious, and the language of the statute in that behalf is so plain, as to leave no room for doubt that congress intended to put it beyond the power of white men to secure any interest whatsoever in lands situated within Indian reservations that might be allotted to Indians. This conclusion is fortified by an amendment to the act of February 8, 1887, which was adopted on February 28, 1891 (26 Stat. 794, c. 383), whereby power was conferred upon the secretary of the interior to prescribe regulations and conditions for the leasing of lands allotted to Indians under the previous act of February 8, 1887, whenever, by reason of "age or other disability,"

the allottee was not able to occupy or improve the land assigned to him with benefit to himself. It is manifest that the amendment in question, authorizing allotted land to be leased in certain cases, under the direction of the secretary of the interior, was unnecessary if power to execute leases of allotted lands had already been conferred by previous enactments or treaty stipulations. The last-mentioned act, therefore, is a legislative declaration that congress did not intend by any previous statute to authorize the leasing of any lands that might be assigned to Indians to be held by them in severalty.

The only argument that has been advanced to sustain the validity of the leases in question is founded on section 6 of the act of February 8, 1887, heretofore quoted. It is suggested, as we understand, that because congress conferred the right of citizenship upon all Indians to whom allotments of land might be made, and upon every Indian who should take up a residence separate and apart from his tribe, and adopt the habits of civilized life, the power to sell, lease, and otherwise dispose of allotted lands was also conferred as a necessary incident of citizenship. It is urged, as we understand, that congress could not make these Indians citizens of the United States without at the same time giving to them the unrestricted power to sell, use, and control all property whatsoever in which they chanced to have an interest. This argument appears to us to be untenable. We know of no reason, nor has any been suggested, why it was not competent for congress to declare that these Indians should be deemed citizens of the United States, and entitled to the rights, privileges, and immunities of citizens, while it retained, for the time being, the title to certain lands, in trust for their benefit, and withheld from them for a certain period the power to sell, lease, or otherwise dispose of their interest in such lands. It is competent for a private donor, by deed or other conveyance, to create an estate of that character; that is to say, it is competent for a private person to make a conveyance of real property, and to withhold from the donee, for a season, the power to sell or otherwise dispose of it. And we can conceive of no sufficient reason why the United States, in the exercise of its sovereign power, should be denied the right to impose similar limitations, especially when it is dealing with a dependent race like the Indians, who have always been regarded as the wards of the government. Citizenship does not carry with it the right on the part of the citizen to dispose of land which he may own in any way that he sees fit without reference to the character of the title by which it is held. The right to sell property is not derived from, and is not dependent upon, citizenship; neither does it detract in the slightest degree from the dignity or value of citizenship that a person is not possessed of an estate, or, if possessed of an estate, that he is deprived, for the time being, of the right to alienate it. It does not follow, therefore, that the power of these Indians to deal with land which was held by the government in trust for their benefit was sensibly enlarged, or that the restriction against alienation found in the fifth section of the act of February 8, 1887, was removed, because, in the sixth section of the same act, congress saw fit to declare that when land had been allotted to

an Indian, or he had separated from his tribe, and adopted the habits of civilized life, he should be entitled to all the "rights, privileges, and immunities" of a citizen. The two sections of the act are by no means inconsistent with each other. The clause imposing a limitation upon the power of alienation is not in conflict with the subsequent clause conferring the boon of citizenship. Both provisions may well stand together. They were inserted for a well-defined purpose, which it is easy to comprehend; and the act should be so construed as to give effect to both provisions, and thereby accomplish the purpose of the lawmaker. For these reasons we have no hesitation in holding that the leases secured by the real-estate company were executed in open violation of the laws of the United States, and are therefore utterly null and void.

It is contended, however, that, even if the leases held by the appellee are absolutely null and void, yet that it was entitled to such an injunction as was granted by the circuit court, because the appellant had wrongfully and unlawfully interfered with its possession of the lands in controversy, or had threatened to do so, before the bill was filed. It is said that the circuit court very properly issued an injunction to prevent the doing of a wrongful act which would occasion an irreparable injury, notwithstanding the fact that the appellee was unlawfully in possession of the demised premises. It is a sufficient answer to this contention to say that at the time the bill was filed and at the time the injunction was obtained, in October, 1893, the appellant had done nothing to disturb the possession of the appellee other than to notify it that the leases then held by it were unlawful and void; that the demised premises must be restored to the several lessees by December 31, 1893; that no planting or sowing should be undertaken on the demised premises after that period; and that no further leases of land within the reservation should be solicited unless applied for under the provisions of the act of February 28, 1891, pursuant to regulations in that behalf prescribed by the secretary of the interior. It is not denied that notices of this nature had been served by the appellant, but in taking such action he had simply obeyed instructions received from the executive department of the government, which is charged with the duty of enforcing the laws and preventing violations thereof. It cannot be said, therefore, that in taking such action as is last described the appellant acted unlawfully; nor is there the slightest pretense for asserting that, because he was instrumental in serving the aforesaid notices upon the appellee and its lessees, a court of equity, for that reason, acquired jurisdiction to issue an injunction. We think that the record clearly shows that when the bill was filed the appellant had simply discharged his sworn duty under the law, in accordance with the directions of the department of the interior, and that there was no ground for an appeal to a court of equity on the pretense that he had committed, or was about to commit, a wrongful act which would occasion an irreparable injury.

The decree was manifestly erroneous for another reason. As it was finally drawn and entered, it provided "that the defendant, W. H. Beck, his agents and servants, be and are forever enjoined and

restrained from interfering with or disturbing the complainant or its lessees in the possession or use of the lands described in the complaint." It is apparent, we think, that a decree in this form, without any limitation or qualification, effectually precluded the defendant, as an Indian agent, from taking any action in behalf of the government, whether by means of judicial process or otherwise, that might possibly lead to an ouster of the real-estate company, and to a recovery of the possession of the land which it had unlawfully leased. It is manifest, therefore, that in any aspect of the case the injunction was too broad, and that it ought not to be upheld.

But, aside from the foregoing considerations, there is another reason that should have influenced the circuit court to dismiss the bill of complaint, even if it had appeared in proof that, prior to the commencement of the suit, the commissioner of Indian affairs had caused notices to be served on the appellee and its sublessees that force would be used to eject them from the demised premises if they did not abandon the same on December 31, 1893. The real-estate company obtained the leases in question notwithstanding the provisions of an act of congress which declared, in express terms, that if such leases were granted by the Indians they should be deemed utterly void. The company appears to have been organized for the express purpose of obtaining leases of lands situated within the reservation that had been or might be allotted to members of the Winnebago tribe of Indians. It appears to have embarked in the enterprise of securing the leases with full knowledge that it was an unlawful undertaking, and that the government would dispute the validity of whatever leases it might succeed in obtaining from the Indians. In other words, the company deliberately took the chances of violating the law, in the belief, no doubt, that the government of the United States would be powerless to recover possession of the demised premises, if possession was actually acquired, except by bringing a multitude of suits in ejectment. That is the position now assumed by the appellee. It asserts with great confidence that the government must be treated as a private landowner; that it can only recover the possession of the leased lands by bringing suits in ejectment. It is fair to infer, therefore, that the real-estate company intended at the outset to assume that position, and to rely upon that defense. It is also fair to infer that it was led to embark in the enterprise of leasing the lands in the belief that a suit in ejectment would prove a barren remedy, and that the law might be violated with impunity. Under these circumstances, it is clear, we think, that a court of equity should not interfere, at the instance of the appellee, to arrest any action that the government of the United States may take to vindicate its rights. It should leave the appellee in the condition in which it has deliberately placed itself, and require it to seek redress in a court of law for whatever damage it may sustain in consequence of any wrongful act committed by government officers in ejecting it from the demised premises, if any such wrongful act is in fact committed. We will certainly not presume that the executive department of the government intends to adopt any unlawful means to regain possession of the demised premises. But,



be this as it may, it is not within the legitimate province of a court of equity to assist a wrongdoer, like the appellee, in retaining the possession of property which it has acquired in open violation of an act of congress, when the party against whom relief is sought is an officer of the United States, who is acting under the direction and control of the secretary of the interior. For these reasons, the decree of the circuit court will be reversed, and the case will be remanded to that court, with directions to vacate the decree, and to dismiss the complainant's bill, at the complainant's costs.

---

WILSON et al. v. NORTHWESTERN MUT. LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. December 3, 1894.)

No. 465.

TIME—PUBLICATION OF NOTICE.

The publication of a notice of sale once a week for only 27 days before the day of sale is not a "previous publication" of such a notice "once a week for at least four weeks prior to such sale," as required by section 3, Act Cong. March 3, 1893 (27 Stat. 751, c. 225).

Appeal from Circuit Court of the United States for the District of Kansas.

This was a suit by the Northwestern Mutual Life Insurance Company against Levi Wilson and Maria Wilson for the foreclosure of a mortgage. From an order confirming a master's sale the defendants appeal.

Robert W. Patrick, for appellants.

Charles E. Dyer, A. B. Jetmore, and A. P. Jetmore, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from an order confirming a master's sale, and overruling exceptions to his report thereof in a suit to foreclose a mortgage. It is assigned as error that the court below confirmed this sale over objection made and exception taken by the appellants on the ground that no notice of the sale had been published for at least four weeks before it took place. The third section of "An act to regulate the manner in which property shall be sold under orders and decrees of any United States courts," approved March 3, 1893 (27 Stat. 751, c. 225; 2 Supp. Rev. St. p. 135), provides:

"That hereafter no sale of any real estate under any order, judgment, or decree of any United States court shall be had without previous publication of notices of such proposed sale being ordered and had once a week for at least four weeks prior to such sale in at least one newspaper printed, regularly issued and having a general circulation in the county and state where the real estate proposed to be sold is situated, if such there be."

The first publication of the notice of sale in this case was made Friday, November 10, 1893; the second, Friday, November 17, 1893; the third, Friday, November 24, 1893; the fourth, Friday, December 1, 1893; and the sale was made Thursday, December 7, 1893.

In this act of congress the preposition "for" in the clause "for at least four weeks," as is often the case when it is used with relation to periods of time, clearly means "during" or "during the continuance of." 2 Cent. Dict. p. 2314, par. 15, under "For"; Whitaker v. Beach, 12 Kan. 492, 493. Conceding that the day of the first publication of the notice may be counted as a part of the four-weeks publication, it is not difficult to demonstrate that this notice had not been published four weeks when the sale was made. A week is seven days. The first publication of this notice was November 10th; its publication for one week, or seven days, could not have been, and was not, complete until 12 o'clock p. m., or midnight, November 16th; its publication for two weeks was not complete until midnight, November 23d; its publication for three weeks was not complete until midnight, November 30th; and its publication for four weeks was not complete until 12 o'clock p. m., or midnight, of December 7, 1893, but the sale was made at 2 o'clock in the afternoon of that day. It is plain that the notice had not then been published "for at least four weeks," and, as the act of congress positively prohibits such a sale unless "at least four weeks'" publication has been made and is complete before the sale, this sale cannot be sustained.

Our conclusion is that the publication of a notice of sale once a week for only 27 days before the day of sale is not a "previous publication" of such a notice "once a week for at least four weeks prior to such sale," as required by section 3, c. 225, p. 751, 27 Stat. (page 135, 2 Supp. Rev. St.). Early v. Doe, 16 How. 610, 616; Pratt v. Tinkcom, 21 Minn. 142, 146; Worley v. Naylor, 6 Minn. 192, 200 (6 Gil. 123, 126); Bacon v. Kennedy, 56 Mich. 329, 22 N. W. 824; Meredith v. Chancey, 59 Ind. 466; Boyd v. McFarlin, 58 Ga. 208.

The order confirming the sale must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion; and it is so ordered.

---

ST. LOUIS DRAYAGE CO. v. LOUISVILLE & N. R. R.

(Circuit Court, E. D. Missouri, E. D. December 17, 1894.)

No. 3,786.

INTERSTATE COMMERCE—CONNECTING CARRIERS—EXCLUSIVE PRIVILEGES.

Neither public policy nor any legislation forbids a railroad company engaged in interstate commerce to make an exclusive contract with a carrier, whose route connects with and extends beyond that of such railroad company, for through billing and rating over the connecting lines, and by which such carrier is given the exclusive right to receive from the railroad company and forward freight destined to points beyond the line of such railroad.

This was an action by the St. Louis Drayage Company against the Louisville & Nashville Railroad to recover damages for unjust discrimination. The case was heard by the court without a jury.

This is an action for damages for unjust discrimination and undue preferences in contravention of public policy. The case was submitted to the court without the intervention of a jury, with the understanding that the court would first determine the questions of law arising in the case, and, if

the court should be of opinion that the plaintiff was entitled to recover, it would either hear further evidence on the amount of damages, or refer the matter to a referee. There are several counts in the petition, but, as they involve practically the same questions of law, it will be sufficient to state the substantive allegations of the first count.

The plaintiff is a corporation of the state of Illinois, engaged as a common carrier of freights in the city of St. Louis, Mo., and between said city, across the Mississippi river, and East St. Louis, in the state of Illinois. The defendant is a foreign railroad corporation, engaged in the business of a common carrier, operating a line of railway from East St. Louis, Ill., to various points into states south of the Ohio river. The St. Louis Transfer Company is a Missouri corporation, engaged in the business of a common carrier of freights over said Mississippi river, between the cities of St. Louis and East St. Louis, in the state of Illinois. The petition avers that, on east-bound freight delivered to defendant at East St. Louis by the St. Louis Transfer Company, the defendant pays to the transfer company its charges for hauling such freight from St. Louis to East St. Louis, and "absorbs" such charges in the tariff paid by the shipper, but, on freight delivered to defendant by plaintiff under like circumstances, defendant refuses to pay plaintiff its drayage to East St. Louis, but adds the same to the regular tariff rate, which is paid by the shipper. So that on goods hauled from St. Louis to East St. Louis the expense to the shipper is the regular tariff from East St. Louis, plus plaintiff's drayage, whereas on goods hauled to East St. Louis by the transfer company, the cost to the shipper is only the regular tariff rate from East St. Louis, and vice versa, as to freight from East St. Louis into the city of St. Louis. The answer admits that on freight hauled to East St. Louis by plaintiff for shipment to certain territory, known as "competitive points," the cost to the shipper is the regular tariff from East St. Louis, with plaintiff's drayage charges added, but denies that such freight is hauled by plaintiff and delivered to defendant under like conditions and similar circumstances to that which is hauled by the St. Louis Transfer Company. The answer further avers that the reason defendant pays to said St. Louis Transfer Company its drayage on this particular class of shipments, and absorbs the same out of its through rate from St. Louis, is because it has, by contract, employed said transfer company to haul such freight, and because it has a contract with the shipper to transport said freight from St. Louis, Mo., to point of destination. The answer sets out this contract of March 1, 1881, made six years before the plaintiff began to do business, between it and the transfer company, the material parts of which contract are as follows: (1) Said transfer company agreed, first, to furnish necessary wagons for prompt transportation of all freight, etc., between defendant's depot in East St. Louis and a depot to be furnished by said transfer company at its own cost, in St. Louis. (2) Said depot in St. Louis to be located satisfactory to defendant, and the expenses of all labor and clerical force at the depot in St. Louis to be borne by the transfer company; and the defendant was to furnish the necessary labor and clerical force to receive and deliver to said transfer company's wagons at East St. Louis. The transfer company agreed to collect and pay over to defendant all freights and charges that may be due on freight received by it from defendant; to give notice of arrival of freight to consignee, and be accountable for freight in its possession as warehousemen; that its clerks and employes should be satisfactory to defendant, etc. In consideration of the premises, defendant agreed to pay the transfer company certain rates for transfer of said freights on all freights transferred between the depot of the St. Louis Transfer Company in St. Louis and the defendant's depot in East St. Louis, while the transfer company was authorized to make additional charge for freight hauled from other points in St. Louis to defendant's depot in East St. Louis. Such additional charge to be collected from shipper. Said transfer company was to have the forwarding of freight from defendant's railway consigned to points through and beyond St. Louis, provided the same shall not have been contracted through to destination by defendant or its agents. Said transfer company is authorized to collect reasonable freight charges on freight remaining in its warehouse after 24 hours. Defendant agrees to employ said transfer company exclusively for such serv-

ices described in said agreement. Said agreement to be terminated by either party on 90 days' notice in writing. On October 23, 1893, said agreement was modified as to certain rates for transfer charges, but the transfer company continued as the exclusive wagon transfer connection of defendant between St. Louis and East St. Louis, except on certain perishable freight, where defendant was authorized to pay not exceeding two cents per 100 pounds for the transfer of the same; and it was further agreed that on business hauled by said transfer company from store doors or other points in the city of St. Louis, except the transfer company's depot, the defendant would only pay to said transfer company two cents per 100 pounds, and said transfer company was to collect any further charges from the shipper. That the agreement, as modified, is now and has been in force since 1881. That in making the agreement, and continuing it in force, the defendant had no desire or intention to discriminate against plaintiff, but, in good faith, to secure for itself and its patrons adequate facilities for the safe and prompt transfer of freight between its railway and the city of St. Louis. Defendant is thus enabled to charge all persons, equal and alike, the actual rate as published in its tariff to and from St. Louis. The evidence quite satisfactorily sustains the allegations of the answer. It shows that the contract has been carried out between the defendant and the transfer company to the letter. In all instances where it is alleged the defendant has discriminated against plaintiff in the matter of absorbing drayage rates, or loading and unloading freights at East St. Louis, the shipments were made from St. Louis proper on through tariff rate, and not from East St. Louis, as in the case of shipments hauled by plaintiff to East St. Louis, and vice versa.

Henry B. Davis, for plaintiff.

Orr, Christie & Bruce, for defendant.

PHILIPS, District Judge (after stating the facts). The plaintiff's action proceeds upon the theory that the transfer company is an independent common carrier, and is engaged in interstate commerce between the cities of East St. Louis and St. Louis, and the defendant is engaged likewise as such common carrier between the states, with its western general terminus at East St. Louis. This being so, the defendant railway company had the unquestioned right to enter into a contract with the transfer company for a continuous connecting business between East St. Louis and the city of St. Louis. No legislature and no court has ever yet undertaken to interfere with such right. As said by the supreme court in *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 680, 4 Sup. Ct. 185:

"At common law, a carrier is not bound to carry, except on its own lines; and we think it quite clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purpose of the contract; and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work."

See, also, *Pullman's Palace Car Co. v. Missouri Pac. Ry. Co.*, 115 U. S. 598, 6 Sup. Ct. 194; also, *Express Cases*, 117 U. S. 1-26, 6 Sup. Ct. 542, 628; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559.

The proposition that it is not competent for a railroad company to make such a contract with another company without admitting

every other like concern into a corresponding arrangement, and conceding to them equal facilities and opportunities, has been expressly denied in the recent case of *Little Rock & M. R. Co. v. St. Louis S. W. Ry. Co.*, 63 Fed. 775. In this case it is expressly held that the interstate commerce law does not require the common carrier to treat all other common carriers alike, without regard to its own interests; that the courts have no power to compel interstate carriers to enter into arrangements with each other for through rates; that for legislatures or courts to undertake to deprive railway carriers of the right to make their own contracts and arrangements with other companies for a continuous line would be an attempt to deprive such carriers—

“Of the management and control of their own property, by destroying their right to determine for themselves what contracts and tariff arrangements with connecting carriers are desirable, and what are undesirable.”

And the conclusion reached by the court is that it—

“Is unable to adopt a construction of the interstate commerce act which will practically compel a carrier, when it enters into an arrangement with one carrier for through billing and rating, \* \* \* to make the same arrangement with all other connecting carriers, if the physical connections for an interchange of traffics are the same, and to do this without reference to the question whether the enforced arrangement is or is not of any material advantage to the public.”

So Mr. Justice Field, in *Oregon Short-Line & U. N. Ry. Co. v. Northern Pac. R. Co.*, 51 Fed. 475, observed:

“It follows from this that the common carrier is left free to enter into arrangements for the use of its tracks or terminal facilities with one or more lines without subjecting itself to the charge of giving undue or unreasonable preferences or advantages to such lines, or of unlawfully discriminating against other carriers. In making arrangements for such use by other companies, a common carrier will be governed by considerations of what is best for its own interests.”

The defendant company, by reason of its terminus on the east bank of the Mississippi river, was placed at a great disadvantage in competing with the St. Louis & Iron Mountain Railroad for traffic between the city of St. Louis and competing points south of the Ohio and east of the Mississippi rivers. It therefore became, as the evidence shows, a matter of supreme importance to the defendant company to effect such arrangement as to best enable it to bill freights immediately from the city of St. Louis through to such points at the same rates as the Iron Mountain Railroad. To this end it was essential that, in selecting a company for the transfer of its freights between St. Louis and East St. Louis, it should secure one fully equipped for doing the business,—solvent and reliable. It could not afford to take chances in so grave a matter. It might be unsafe to trust to the caprice of competing transfer companies, or to sporadic rivalries. It could not foresee how long it would be before the railroad company, in such dependence, might find itself a prey to a “combine” among the transfer companies, or become exposed to the not improbable contingency of a rivalry between competing companies, which would break both down, leaving the railroad company without a certain, reliable connection with the city.

It would be harsh, unreasonable, and questionable legislation that would deny to the common carrier the protection of a provident, reliable contract, like the one in question. It was essential to a reliable and permanent arrangement that the transfer company should establish and maintain sufficient warehouse buildings for the reception and storage of freights collected from the city of St. Louis, and that the company with which it contracted should have ample facilities and equipments to successfully carry out such connecting arrangement. All this, the evidence shows, was represented in the business character, standing, and capital of the transfer company, which, without disparaging the business character of the younger company, it is not too much to say, the defendant would not find in the plaintiff company to the extent presented in the transfer company. So long as the public enjoys the advantages of the competition between the defendant company and other railroad companies, in securing through rates for freights to competitive points, it is of no concern to the public that the plaintiff drayage company cannot share equally in the business of the defendant company. Especially so when the plaintiff makes no showing of any benefit to the shipper by admitting it to equal facilities with the transfer company. It certainly was not in the mind of congress, in enacting the interstate commerce law, to interfere with such contract as this defendant company entered into in 1881. And, as the defendant has kept and performed its contract to the letter, the court ought not to interfere, when such contract neither contravenes any statute law, nor is contrary to sound public policy. The result cannot be different whether the contract between the transfer company and the defendant be regarded as a connecting line between two independent carriers engaged in interstate commerce, or whether it be regarded as a selection by the railroad company of the transfer company as an agency for the delivery of the defendant's freight between East St. Louis and the city of St. Louis. The law is that the plaintiff cannot recover. Judgment accordingly.

---

BOOTH v. DENIKE.

(Circuit Court, W. D. Texas, San Antonio Division. November 29, 1894.)

**1. GARNISHMENT—AFFIDAVIT.**

Under 1 Sayles' Tex. Civ. St. art. 183, cl. 3, authorizing garnishment where a judgment creditor makes affidavit that defendant has not property in his possession within the state, subject to execution, sufficient to satisfy the judgment, an affidavit that he has not sufficient property within a certain district of the state is insufficient.

**2. SAME—AMENDMENT—STATE AND FEDERAL PRACTICE.**

Though, under the decisions of the Texas state courts, an affidavit for garnishment is not amendable, Rev. St. § 914, providing that the practice, pleadings, and forms and modes of proceeding in the circuit and district courts shall conform as near as may be to those existing in the courts of the state within which the circuit or district courts are held, does not require a federal court to follow such decisions, it being permitted to

make the amendment by section 948, authorizing it to allow an amendment of any process where the defect has not prejudiced and the amendment will not injure the party against whom the process issues, and by section 954, authorizing it at any time to permit either party to amend any defect in the process or pleadings on such conditions as it shall, in its discretion, prescribe.

Garnishment proceedings by C. D. Booth against Ed. Denike. For a defect in the affidavit for garnishment, J. L. S. Hunt, one of the original defendants, moves to quash the affidavit. Plaintiff moves to amend it.

H. P. Drought and Redford Sharpe, for plaintiff.  
Thos. H. Franklin and C. L. Bass, for defendant Hunt.

MAXEY, District Judge. In a suit instituted in this court by C. D. Booth as plaintiff against the firm of Hunt & Booth, composed of J. L. S. Hunt and W. H. Booth, as defendants, judgment was rendered in favor of the plaintiff, May 19, A. D. 1894, against the defendants, Hunt & Booth, for the sum of \$5,474.08, with interest thereon. On the 26th of June following, the plaintiff, by his attorney, filed a sworn application for a writ of garnishment to be served upon the said Ed Denike. The affidavit, after reciting the existence of the indebtedness as evidenced by the judgment, proceeds as follows:

"That the said J. L. S. Hunt and W. H. Booth, as the firm of Hunt & Booth and individually, have not, within the knowledge of affiant, property within the Western district of Texas subject to execution, sufficient to satisfy said judgment."

The parties having duly appeared, the attorney of J. L. S. Hunt, one of the defendants in the original suit, moved the court to quash the affidavit for garnishment on the ground of its failure to state that the defendants in the original suit, Hunt & Booth, have not, within the knowledge of the affiant, property in their possession in the state of Texas, subject to execution, sufficient to satisfy the judgment rendered in favor of C. D. Booth.

Under the laws of Texas, writs of garnishment are authorized to be issued in the following cases:

(3) "Where the plaintiff has a judgment and makes affidavit that the defendant has not, within his knowledge, property in his possession within this state, subject to execution, sufficient to satisfy such judgment." 1 Sayles' Tex. Civ. St. art. 183, cl. 3.

It is not necessary to consider other provisions of the statute in connection with this motion. Garnishment proceedings are strictly construed by the courts of this state, and for material defects appearing in the affidavit the proceeding will be set aside. Touching the rule of construction applied by the supreme court of Texas to proceedings of this character, it is said by Mr. Justice Bell, in *Willis v. Lyman*, 22 Tex. 270:

"There can be no good reason why the same strictness should not be required in respect to garnishments as in other cases of attachment, for gar-

nishments are but a species of attachment. The writ of garnishment brings into court strangers to the judgment or to the original suit, as the case may be, and subjects them to much inconvenience and hazard. It often happens—or, to say the least, it sometimes happens—that garnishees are obliged to pay twice, because the court is not informed of all the facts in the particular case. For these reasons, proceedings against garnishees ought not to be sustained unless there is strict conformity with the requirements of the law.”

In the case of *Scurlock v. Railway Co.*, 77 Tex. 481, 14 S. W. 148, the rule is stated in the following language:

“It has always been held that the statute authorizing the writ of garnishment must be strictly construed, and that a party attempting to avail himself of the remedy must strictly follow the law.”

See, also, *Jemison v. Scarborough*, 56 Tex. 361.

The same rigid rule of construction is uniformly applied by the courts of this state to proceedings by attachment. *Sydnor v. Chambers*, Dall. Dig. 601; *Sydnor v. Totham*, 6 Tex. 189; *Culbertson v. Cabeen*, 29 Tex. 247. Tested by the rule of construction adopted by the supreme court of this state, the affidavit for garnishment made in behalf of the plaintiff, Booth, would seem to be defective. The affiant merely states that the defendants, Hunt & Booth, have not property within the Western district of Texas, subject to execution, sufficient to satisfy the judgment. It fails to state altogether that said defendants have not property within the state of Texas sufficient to satisfy the judgment. The writ can only properly issue, as has already been shown, upon filing the statutory affidavit; that is, an affidavit in strict compliance with the statute. In this case the affidavit fails to conform to the requirements of law in a material respect, and is therefore defective. The court is of the opinion that the motion to quash should be sustained.

The plaintiff, C. D. Booth, thereupon moved the court for leave to amend the affidavit so as to cure the defect indicated, and make the affidavit conform to the statutory requirement. Objection is made to this motion on the ground that under the laws of Texas, and the practice of its courts, an affidavit for garnishment is not amendable. That such is the accepted doctrine of the courts of this state clearly appears by reference to adjudged cases. “By an unbroken line of authorities from the days of the republic until the present time,” says Mr. Justice Bonner, “an affidavit for attachment cannot be amended.” *Marx v. Abramson*, 53 Tex. 265; *Sydnor v. Chambers*, supra. In view of the decisions of the supreme court of this state, it is evident that a court of the state would be without authority to permit an amendment to an affidavit in a proceeding of this character. But it does not follow that in all cases the rule applied by the local courts would be binding upon a federal court sitting within the state. This question was carefully considered by Mr. Justice Matthews in the case of *Erstein v. Rothschild*, which was tried in the state of Michigan. In that case the learned justice said:

“It is, then, the doctrine enforced by the courts of Michigan that a writ of attachment is void unless supported by an affidavit conforming in all



respects to the strict requirements of the statute, from which the conclusion is deduced that the affidavit itself, being the foundation of jurisdiction, cannot be the subject of amendment. But this is not the doctrine of the courts of the United States in the case of *Matthews v. Densmore*, 109 U. S. 216, 3 Sup. Ct. 126. The supreme court of the United States reversed the supreme court of the state of Michigan on this very point, and held that the jurisdiction of the court over the property taken by virtue of the writ of attachment did not at all depend upon the regularity or sufficiency of the affidavit; all questions of that character being questions merely of error in procedure. And the principle was then considered to have been fully established in *Cooper v. Reynolds*, 10 Wall. 308; and that such is the general rule, embracing the power of amendment, appears also from *Tilton v. Coffield*, 93 U. S. 163. In that case a statute of the territory of Colorado permitted amendments in attachment proceedings as was formerly done in Michigan. In addition the court said: 'Allowing amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. Usually to permit or refuse rests in the discretion of the court, and the result in either case is not assignable for error. \* \* \* Where no local statute or rule of local law is involved, the power to amend is the same in attachment suits as in others. Cases of this kind, too numerous to be cited, may be found, in which amendments in the most important particulars were permitted to be made.' But it is argued there is a rule of local law administered by the courts of Michigan which, by adoption by the statutes of the United States, becomes also the law of this court. Section 914, (Rev. St.), is as follows: 'The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like cases in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.' The purpose of this provision, as was said in *Nudd v. Burrows*, 91 U. S. 426, 441, was to bring about uniformity in the law of procedure in the federal and state courts of the same locality, having reference to the Code enactments of many of the states; yet, as was said in *Railroad Co. v. Horst*, 93 U. S. 291, 300: 'The conformity is required to be as near as may be, not as near as may be possible, or as near as may be practicable. This indefiniteness may have been suggested by a purpose. It devolved upon the judges to be affected the duty of construing and deciding, and gave them the power to reject, as congress doubtless expected they would do, any subordinate provisions in such state statutes which, in their judgment, would unwisely incur the administration of the law, or tend to defeat the ends of justice in their tribunals. While the act of congress is to a large extent mandatory, it is also to some extent only directory and advisory.' The act of congress at any rate does not require the adoption, with the local statutes, of the local interpretation which may have been put upon them, or which may from time to time be enforced. It must be held that the body of the local law thus adopted in the general must be construed in the courts of the United States in the light of their own system of jurisprudence, as defined by their own constitution as tribunals, and of other acts of congress on the same subject. It can hardly be supposed that it was the intent of this legislation to place the courts of the United States in each state, in reference to their own practice and procedure, upon the footing merely of subordinate state courts, required to look from time to time to the supreme court of the state for authoritative rules for their guidance in those details." 22 Fed. 63, 64.

Whenever the practice and procedure of the federal courts are regulated by United States laws, it cannot be doubted that such laws would prevail over the statutes of the state in which the courts are held. Local laws may apply in the absence of federal legislation, but when the laws of the United States furnish the guide, courts should be governed thereby. In such a case state legislation would

have no application to the courts of the United States. As pertinent to this subject, it is said by the supreme court in *Southern Pac. Co. v. Denton*, 146 U. S. 209, 13 Sup. Ct. 44, that:

"Whenever congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of the legislation of the state upon the same matter."

See, also, *Railway Co. v. Pinkney*, 149 U. S. 206, 13 Sup. Ct. 859.

In *Ex parte Fisk*, 113 U. S. 721, 5 Sup. Ct. 724, Mr. Justice Miller says:

"The case before us is eminently one of evidence and procedure. The object of the orders is to procure evidence to be used on the trial of the case, and this object is effected by a proceeding peculiar to the courts of New York, resting alone on a statute of that state. There can be no doubt that if the proceeding here authorized is in conflict with any law of the United States, it is of no force in the courts of the United States. We think it may be added further in the same direction, that if congress has legislated on this subject, and prescribed a definite rule for the government of its own courts, it is to that extent exclusive of any legislation of the states in the same matter."

See, also, *Whitford v. Clark Co.*, 119 U. S. 525, 7 Sup. Ct. 306.

And it may be here noted that rule No. 1 of the rules of this court, adopted June 13, 1872, only adopts the modes of proceeding prescribed by the laws of Texas "when they do not conflict with a law of the United States, or a rule of the supreme court of the United States or of this court."

It only remains to inquire whether congress has legislated upon the subject of the amendment of process and pleadings in the courts of the United States. In the case of *Erstein v. Rothschild*, supra, the learned justice permitted the affidavit for attachment to be amended, and held that the power of amendment was conferred by section 948, Rev. St., which reads as follows:

"Any circuit or district court may at any time, in its discretion and upon such terms as it may deem just allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

In addition to that section, I think the power to amend affidavits for garnishment, attachment, and other proceedings in civil causes is clearly given by the last clause of section 954, Rev. St. It is therein provided that:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

It seems clear that the last clause of section 954 expressly confers upon the courts the power to permit parties to amend any defects

in the process or pleadings in furtherance of justice. That such power includes also the authority to permit amendments in garnishment proceedings, appears equally evident, and I think it cannot be doubted that the legislation of congress is exclusive of the local laws on that subject. Further employing the language of Mr. Justice Matthews:

"It is not necessary to say that the power to permit amendments in such cases is to be exercised according to the sound discretion of the court to whom the application is addressed, as it is not open to observation that it will be authorized in any cases or circumstances except in those where right and justice require it."

The court is of the opinion that the amendment should be allowed, and it is so ordered.

---

GULF, C. & S. F. RY. CO. v. JACKSON.

(Circuit Court of Appeals, Eighth Circuit. December 3, 1894.)

No. 424.

1. MASTER AND SERVANT—DUTY AS TO SAFE PLACE.

Though it is the duty of a master, in many cases, to exercise ordinary care in providing his servants with a reasonably safe place in which to discharge their several duties, he is not required to provide a safe place, in cases where the very work upon which the servant is engaged is of a nature to make the place where it is done temporarily insecure, but in such cases the servant assumes the increased hazard.

2. SAME—RISKS OF EMPLOYMENT.

Plaintiff, a section hand in the employ of defendant railway company, was engaged at night, with others, in tearing up and relaying a portion of the railway track which had been undermined by high water in a river near which it ran. While plaintiff and others were carrying a heavy rail, a part of the river bank near by caved in, which caused them to move forward hurriedly, when one of the men stumbled and fell. The others dropped the rail, which fell across a tie, causing one end to fly up and strike and injure plaintiff. Plaintiff claimed that defendant was negligent in not providing sufficient light, and in allowing the ground to be encumbered with the obstruction over which his fellow workmen stumbled. *Held* that, under the circumstances of the work to be done, defendant was not bound to supply a place free from obstructions, to do the work, and that plaintiff assumed the risks attendant upon the obstructed condition of the ground, as well as upon any deficiency of light, which must have been at least as well known to plaintiff as to defendant.

In Error to the United States Court in the Indian Territory.

This was an action by Jo Jackson against the Gulf, Colorado & Santa Fé Railway Company to recover damages for personal injuries. The plaintiff recovered a verdict in the circuit court. Defendant brings error.

J. W. Terry, P. L. Soper, and C. L. Jackson, for plaintiff in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case comes on writ of error from the United States court in the Indian Territory. The plaintiff, Jo Jackson, who is the defendant in error here, brought a suit against

the plaintiff in error, the Gulf, Colorado & Santa Fé Railway Company, for personal injuries said to have been sustained by him in the month of September, 1891, while he was helping to tear up and relay a portion of the defendant company's railroad track near Purcell, on the bank of the South Canadian river, in the Indian Territory. The testimony shows that the railroad track at that place had been undermined by high water in the river, and that it had become necessary to take up a portion of the track, and relay it further back from the river bank, where it would be safe from the encroachment of the flood in the river. The plaintiff was employed in this work at night, with a large gang of extra sectionmen, and, at the time he was hurt, was assisting 10 or 12 other men in removing the rails from the old track which was being dismantled. As the party of men last mentioned were in the act of lifting and carrying a steel rail which weighed about 700 pounds, a portion of the river bank in their immediate vicinity caved in. This caused them to move forward very hurriedly with their burden, and as they did so, one of the party accidentally stumbled and fell. The other men thereupon dropped the rail. It fell across a tie, and one end thereof flew up, hitting the plaintiff in the abdomen, thereby inflicting the injuries of which he now complains. In the complaint on which the case was tried, the plaintiff below charged, in substance, that his injuries were occasioned by the culpable neglect of the defendant company, in failing to provide a sufficient number of lights to do the work with ordinary safety, and in permitting ties and other obstructions to remain in the way of the men who were engaged in dismantling the old track, and in failing to inform them of the existence of such obstructions. At the conclusion of the testimony, the court instructed the jury as follows:

"It is the duty of a railway company to furnish its employes with safe and suitable appliances to do the work they are employed to do, and if you believe from the evidence in this case that the defendant company failed to furnish sufficient light for the doing of that work in which the plaintiff was engaged with safety and security, or that the defendant failed to furnish safe premises where the work was to be done, and that the plaintiff was injured by reason of such failure on the part of the defendant either to furnish lights or safe premises, and would not have been injured but for such failure, and the plaintiff himself was free from negligence, you will find for the plaintiff, unless you find for the defendant under the instructions hereinafter given you."

In obedience to this instruction, the jury returned a verdict in favor of the plaintiff, on which a final judgment was subsequently entered. To reverse that judgment the defendant company has sued out the present writ of error.

We have only to inquire and to determine whether, in view of the facts disclosed by the present record, the foregoing instruction was applicable to the case, and was properly given. It is doubtless the duty of a master, in very many cases, to exercise ordinary care in providing his servants with a reasonably safe place in which to discharge their several duties. When men are set to work in a building, or on a scaffolding or other structure, which has been provided by the employer for their use, it is the employer's duty to exercise reasonable diligence in seeing that such building or other

structure is made reasonably safe, and that the ordinary risks of the employment are not enhanced by latent defects in the place where the servant is required to exercise his calling, whether it be a building or any other structure. In the respect last mentioned, the duty of the master to provide for the safety of his servants is commensurate with his duty to provide safe tools, machinery, materials, and other appliances for the use of the servant. It sometimes happens that much skill, experience, and care is required in erecting structures of even a temporary character for the use of laborers and artisans; and in such cases it is more especially the duty of the master to take such precautions as are reasonably necessary to guard against possible defects in such structures, which may endanger the lives of his workmen, or subject them to unusual and unnecessary risks. *Manning v. Hogan*, 78 N. Y. 615; *Green v. Banta*, 48 N. Y. Super. Ct. 156; *Whalen v. Centenary Church*, 62 Mo. 336; *Anderson v. Bennett*, 16 Or. 515, 528, 19 Pac. 765; *Kelly v. Telephone Co.*, 34 Minn. 321, 25 N. W. 706; *Railway Co. v. Needham* (decided by this court at the last term) 11 C. C. A. 56, 63 Fed. 107. While the foregoing doctrine is well founded in reason and authority, yet it is not a doctrine of universal application, nor one which can be invoked in all cases where an employé is injured by reason of some insecurity or defect in the place where he is required to work. It frequently happens that men are employed to tear down buildings or other structures, or to repair them, after they have become insecure, or it may be that the work undertaken by the employé is of a kind that is calculated to render the premises or place of performance, for the time being, to some extent insecure. In cases such as these the servant undoubtedly assumes the increased hazard growing out of the defective or insecure condition of the place where he is required to exercise his calling, and the doctrine above stated cannot be properly applied. *Carlson v. Railway Co.*, 21 Or. 450, 28 Pac. 497; *Armour v. Hahn*, 111 U. S. 313, 318, 4 Sup. Ct. 433.

Considering all of the circumstances under which the injuries complained of in the case at bar are said to have been sustained, we think that the case did not warrant an application of the doctrine of "safe place," as that doctrine is ordinarily applied, and that the trial court erred in the instruction above quoted, in charging the jury, in substance, that the plaintiff might recover if the defendant failed to furnish safe premises where the work was to be done, and if the plaintiff was injured by reason of such failure to furnish safe premises. In our judgment, this portion of the charge made the defendant company responsible for an injury occasioned by an ordinary risk of the particular employment, which was clearly assumed by the employé. As we have heretofore stated, the plaintiff had been sent out in the nighttime, with a large gang of extra section men, to help tear up, remove, and relay a portion of a railroad track that was in imminent danger of being washed into the river by high water. The work on that occasion not only had to be done with great haste, but it was a kind of work which, if done with less haste and in the daytime, would naturally cause the right of way to become incumbered for the time being by ties, rails, loose earth, and such other obstructions as are ordi-

narly incident to the work of dismantling an old track and laying a new one. This condition of affairs must have been foreseen by the plaintiff when he undertook to assist in reconstructing the track, as he had been in the employ of the defendant company, as a sectionman, for some two years, and was doubtless familiar with the manner in which such work was usually done, and the risks incident thereto. He had every reason to expect that he would be called upon to carry or assist in carrying rails and ties where the track was torn up, and the ground was somewhat broken and obstructed by debris, and that it might happen on such occasions that some one would stumble and perhaps fall. He certainly had no reason to suppose that the right of way where he would have occasion to work would be kept free at every moment from all such impediments as might cause a man to lose his footing, nor can it be said, in view of the character of the work in which the plaintiff was engaged, that it was the duty of the defendant company to thus keep its right of way at all times free from such obstructions. It is obvious, we think, that, in so far as the injury complained of was occasioned by defects in the place where the plaintiff was required to work, it must be attributed to one of the ordinary risks of the service in which he was engaged, and which he impliedly assumed when he became engaged in such service.

We are also of the opinion that, on the state of facts disclosed by this record, the plaintiff was not entitled to charge the defendant company with responsibility for the injury complained of on the ground that it had failed to furnish sufficient light for the doing of the work in which the plaintiff was engaged. If the light furnished was in fact insufficient to do the work in question with ordinary safety, that was a fact which was as well known to the plaintiff as it was to the defendant's agent, whose duty it was to supply lamps on such occasions. It is also evident that the plaintiff and the other laborers, who were assisting him to carry away rails as the track was torn up, were better acquainted with the need of more lamps, and with the risks incident to insufficient light, at the particular place where they were working, than any other person or persons in the employ of the defendant company. In short, the defect complained of in the appliances furnished for doing the particular work was a patent and obvious defect, and the risks encountered in consequence of the alleged want of proper appliances for doing the work were better known to the plaintiff and to his immediate associates than to any one else. Moreover, as the work in hand was necessarily undertaken in the nighttime and, as it seems to have been a very dark and cloudy night, the plaintiff and the other members of the gang had every reason to believe when they engaged in the work that they would be hindered to some extent by the darkness, and that a little more care would have to be exercised in carrying rails or other heavy burdens than if the work had been undertaken by daylight. For these reasons, and because the plaintiff continued at work with full knowledge of the situation, we think that he should be held to have voluntarily assumed whatever increased hazard was due to insufficient light. If the defendant company was guilty of culpable negli-

gence at the time and place in question, in requiring the plaintiff to help carry rails with the quantity of artificial light that had been supplied, then it is difficult to escape the conclusion that the plaintiff himself was at fault in continuing to work with insufficient light, when he was well acquainted with the increased risk which he thereby incurred. *Railway Co. v. Drake* (Kan.) 35 Pac. 825; *Railroad Co. v. Schroeder*, 47 Kan. 315, 27 Pac. 965; *Railroad Co. v. Moseley*, 6 C. C. A. 225, 56 Fed. 1009, 1012; *Wood, R. R.* § 379, and cases there cited. The result is that, for error committed in giving the foregoing instruction, the judgment of the lower court is reversed and the cause is remanded, with directions to award a new trial

---

EDWARD P. ALLIS CO. v. COLUMBIA MILL CO

(Circuit Court of Appeals, Eighth Circuit. December 10, 1894.)

No. 493.

1. EVIDENCE—BREACH OF GUARANTY OF CAPACITY OF MILL.

The A. Co., millwrights, made a contract with the C. Mill Co. to construct an addition to its flour mill, the contract containing a guaranty that the enlarged mill should "have a daily working capacity of production of 400 barrels in excess of present capacity under equal conditions, and shall produce a barrel of flour of all grades, from not more than 4  $\frac{1}{8}$  bushels of a mixture of  $\frac{1}{2}$  No. 1 hard,  $\frac{1}{2}$  No. 1 Northern, and  $\frac{1}{2}$  No. 2 Northern grades of spring milling wheat. The percentage of production of patent flour to be not less than 75 per cent., and equal to Pillsbury's Best of present quality." After the completion of the work, a controversy arose as to the fulfillment of the guaranty. *Held*, that the C. Mill Co., in proving a failure to comply with its terms, was not restricted to evidence of a test of the mill on some particular occasion, with a mixture of wheat exactly such as described in the guaranty, but that evidence of the total output of the mill during a period of 57 days after the enlargement was both competent and material to show either the extent of the increased capacity of the mill or its ability to produce the stipulated grade of flour in the stipulated proportion, the mill having been supplied during such time with a considerable quantity of the particular mixture of wheat referred to in the guaranty, and with other kinds well suited to test its capacity and the grade of its production.

2. EXPERT TESTIMONY—RENTAL VALUE.

An expert witness, called to testify as to the rental value of a mill, after giving his opinion as to the rental value, stated, on cross-examination, that in forming his estimate he had taken into account the amount of production, cost of production, and probable rate of net profits, and that mill owners, in estimating the rental value of such property, were accustomed to consider its earning capacity. *Held*, that his opinion as to rental value was not rendered incompetent as authorizing a recovery for net profits by the statement made on cross-examination.

In Error to the Circuit Court of the United States for the District of Minnesota.

This was an action by the Edward P. Allis Company against the Columbia Mill Company, consolidated with a suit brought by the latter company against the former by an order directing that the cause of action for breach of a guaranty in the Columbia Mill Company's action should be treated as a counterclaim in the consolidated

action. On the trial in the circuit court the Columbia Mill Company had a verdict. The Edward P. Allis Company brings error.

This was a suit growing out of the alleged nonperformance of a contract which was entered into by and between the Edward P. Allis Company, the plaintiff in error, and the Columbia Mill Company, the defendant in error, on or about the 8th day of August, 1890. The contract was in the form of a proposal made by the Edward P. Allis Company to the Columbia Mill Company for the enlargement of its mill, which proposal was accepted by the latter company. The material parts thereof are as follows:

"Minneapolis, Minn., August 4, 1890.

\* \* \* \* \*

"To Columbia Mill Company, Minneapolis, Minn.—Dear Sirs: We propose to furnish you, f. o. b. cars at Milwaukee, Wis., the following machinery, viz.: 50 No. 4, Gray's Patent Flour Dressers; 30 No. 4, Reliance Scalpers & Graders; \* \* \* 11 No. 4, Gray's Centrifugal Reels; 8 9x24 Gray's Double Corrugated Roller Mills,—for the sum of sixteen thousand nine hundred thirty-five dollars (\$16,935.00). All the above machinery to be of [the] latest improved construction, and complete in every particular, and to be used in connection with the present machinery now in use in the Columbia Mill for enlarging and remodeling the mill. We to make plans and system for the same free of charge. We to furnish a competent foreman millwright to superintend the work, at \$5.50 per day and traveling expenses from Milwaukee and return. In consideration of the above we agree to guaranty that when the mill is completed, according to our plans and system, it shall have a daily working capacity of production of 400 barrels in excess of present capacity under equal conditions, and shall produce a barrel of flour of all grades from not more than 4 <sup>11</sup>/<sub>100</sub> bushels of a mixture of <sup>1</sup>/<sub>3</sub> No. 1 hard, <sup>1</sup>/<sub>3</sub> No. 1 Northern, and <sup>1</sup>/<sub>3</sub> No. 2 Northern grades of spring milling wheat. The percentage of production of patent flour to be not less than 75 per cent., and equal to Pillsbury's Best of present quality, of which sample is to be sealed, and the percentage of low grade and Red Dog not to exceed 6 to 8 per cent. \* \* \* We agree to use our best endeavors to work all the men possible for completing the mill in the shortest length of time from shutting down, and should the Columbia Mill Company order more than above list of machinery, the prices to be pro rata as above. \* \* \* The Columbia Mill Company to pay freights and receive and unload machinery at mill, furnish all labor, lumber, hardware, belting, cups, ironwork, &c., to place above machinery in running order, and furnish labor, wheat, and power for demonstrating results above guarantied, and on satisfactory completion of this contract and guaranty, to accept same and relieve us of further responsibility.

"Yours, truly,

The Edw. P. Allis Co., by Harrison.

"Accepted.

"Columbia Mill Company,

"E. Zeldler, Treas.

"Approved Aug. 8th, 1890.

"W. W. A."

The work of enlarging and remodeling the Columbia Mill, referred to in the foregoing proposal, was commenced under the direction of the Edward P. Allis Company some time in August, 1890, and was concluded about the 6th of December following. A controversy thereafter arose between the parties as to whether the mill as remodeled had the guarantied producing capacity aforesaid, and on May 24, 1892, the Columbia Mill Company brought suit against the Edward P. Allis Company, alleging, in substance, that the mill as enlarged and remodeled did not have a capacity of 400 barrels of flour in excess of its former producing capacity, and that it would not make a barrel of flour from 4 <sup>11</sup>/<sub>100</sub> bushels of the mixture of the grain mentioned in the contract, and that it would not yield the requisite 75 per cent. of patent flour equal to Pillsbury's Best.

On the 13th of June, 1892, the Edward P. Allis Company also brought an action against the Columbia Mill Company for an alleged balance of \$2,995.30,



said to be due to it under the provisions of the aforesaid agreement. These suits were subsequently consolidated, and tried as one action in the circuit court of the United States for the district of Minnesota, and on such trial the circuit court directed that the Columbia Mill Company's complaint in the first suit above mentioned should be treated as a counterclaim interposed in the second suit. The trial was so conducted, and resulted in a verdict in favor of the Columbia Mill Company on its counterclaim in the sum of \$21,966.70.

James G. Flanders and J. M. Shaw (Willard R. Cray, on brief), for plaintiff in error.

Anson B. Jackson, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The alleged error in the proceedings of the trial court to which most prominence is given in the argument of counsel, consists in the admission of certain evidence showing the total output of the Columbia Mill for a period of about 57 days from December 9, 1890, to February 21, 1891, after the mill had been enlarged, and had been put in operation with the new machinery and appliances which the Edward P. Allis Company had contracted to furnish and put in operation. It is contended in behalf of the plaintiff in error that it was not competent for the Columbia Mill Company to establish a breach of the guaranty contained in the aforesaid contract, except by showing that the remodeled mill was subjected to the precise test mentioned in the contract in the presence of both parties or their representatives, and that on such trial it failed to satisfy the guaranty. Stating the proposition in a slightly different form, it seems to be claimed that the breach of the guaranty could only be proven by showing that the mill was set to work on some particular occasion with a view of testing its capacity, on a particular mixture of wheat, such as is described in the contract, and that on such trial it failed to produce 400 barrels of flour in excess of its former capacity, or that it failed to produce a barrel of flour from  $4\frac{10}{100}$  bushels of wheat, or that it failed to yield 75 per cent. of patent flour equal to Pillsbury's Best. Hence it is urged that the evidence tending to show the entire output of the mill for some 57 days after it was set to work was not only immaterial, but that it was also incompetent evidence, because, during the greater portion of that period, the mill was not provided with the requisite mixture of grain consisting of one-third No. 1 hard, one-third No. 1 Northern, and one-third No. 2 Northern spring milling wheat, and because the mill was not run during that time with a view of testing its capacity. We think that this view of the case fails to distinguish, as it should, between the standard of excellence prescribed by the contract and what was competent evidence to prove that that standard had or had not been attained. These are essentially different matters. The parties certainly did not agree in express terms that if a controversy should arise with respect to the capacity of the remodeled mill, that question should be determined solely by a trial made in the presence of both parties,

with wheat of a given mixture, and that all other evidence tending to throw light on the capacity of the mill should be excluded, except the results of such a test. Suppose, for example, that on the completion of the mill, it had been impossible to obtain the contract mixture of wheat with which to make a test of its producing capacity, could it have been successfully maintained that the failure of the mill company in that respect operated to preclude it from obtaining relief for a breach of the guaranty by showing by other evidence at its disposal that the mill did not have the requisite producing power? It might happen—and such would be a very probable supposition—that the inability of the mill to produce 400 barrels of flour in excess of its previous capacity could be readily shown by testing it with a number of different mixtures of wheat other than that specified in the contract, or it might be that the mill company would be able to demonstrate to the satisfaction of any intelligent person, by testing it in a variety of ways, that in no event could the mill be made to produce a barrel of flour from  $4\frac{1}{8}$  bushels of wheat of any grade or mixture. The quantity of flour that a particular mixture or grade of wheat will produce, in comparison with other mixtures or grades, is usually well known to experts, and it seems quite probable that the producing capacity of the mill in question, and its power to make the quantity and quality of flour specified in the contract, could have been determined with a high degree of certainty without subjecting it to a trial with such a mixture of particular grades of wheat as was mentioned in the guaranty. In the case above supposed (that is to say, in case of the inability of the parties to obtain the contract mixture of wheat), we think that the law would not be so unreasonable as to hold that the agreement between the parties contemplated that in case of a controversy as to the producing capacity of the mill a test must be made with the particular mixture of wheat mentioned in the contract, and that all other evidence tending to show its producing capacity should be excluded. The truth is, we think, that the contract in suit simply fixed a certain standard of capacity for the enlarged and remodeled mill, and left the parties at full liberty to show whether the mill had such a capacity by any evidence that might be conducive to that end. It does not, in express terms, limit the proof to establish a breach of guaranty to a test made with a particular mixture of grain, and we would not be authorized to read such a stipulation into the agreement, nor would it be reasonable to do so.

The objection to the testimony now under consideration also seems to be based upon another view of the contract to which we are unable to assent. Very much of the argument in opposition to the admissibility of the evidence, proceeds upon the assumption, as we understand, that all of the terms of the guaranty are limited by the condition that the grain used to produce the guaranteed results shall consist of a particular mixture of wheat, to wit, that specified in the contract. We do not so understand the agreement. The guaranty relative to the percentage of patent flour that the mill should yield, and relative to the production of a barrel of flour from  $4\frac{1}{8}$  bushels of wheat, was undoubtedly made conditional upon

the use of a particular mixture of wheat, but, in our judgment, the stipulation to increase the output to the extent of 400 barrels per day was not thus limited. That stipulation seems to have been intended as an independent guaranty that the enlarged and remodeled mill, when set to work upon any grade of wheat, would produce 400 barrels of flour per day more than the old mill, out of grain of the same quality or grade. In other words, it was a guaranty of the increased capacity of the enlarged mill in comparison with the old mill, the only limitation being that they should be tried "under equal conditions."

It follows, we think, from this view of the case, that no error was committed in admitting the testimony tending to show the total output of the mill from day to day from December 9, 1890, to February 21, 1891, and the percentage of patent flour that was produced in the meantime. This testimony was clearly competent for the purpose of showing the capacity of the enlarged mill in comparison with its former capacity. Indeed, it was about the only testimony in support of that issue which could be produced, and its admissibility was in no wise affected by the fact that the mixture of grain specified in the contract had not been used during all of the period in question. We also think that the testimony was admissible with reference to the other provisions of the guaranty. There was evidence tending to show the following facts: That during the fifty-seven days to which the objectionable proof related a very large quantity of wheat (nearly 200,000 bushels) was ground into flour; that a great portion thereof was "straight No. 1 Northern spring wheat," which was well adapted to test the producing capacity of the mill, both as to the quantity and quality of the output; that in the meantime about 25,000 bushels of the exact mixture of grain specified in the contract was consumed or turned into flour, and that during the period in question an expert miller, who was in the employ of the Edward P. Allis Company, was constantly at work in the mill supervising its operation, and doing whatever was within his power to obtain the best possible results. Moreover, the record before us is replete with testimony, offered by both parties, showing in detail what was said and done during this period, what changes and improvements were made in the machinery, what power was employed to run it, and every other fact and circumstance which would tend to show whether the results obtained were or were not a fair test of the amount and quality of work that could be done by the remodeled plant. Viewed in relation to all the other facts and circumstances in evidence, we are of the opinion that the testimony showing what the mill had actually accomplished during a period of 57 days tended to throw much light on the question, not only whether the mill had the requisite producing capacity, but on the further question whether it would in fact yield the specified amount and quality of flour from 4 $\frac{1}{2}$  bushels of grain of the kind mentioned in the guaranty. The record made by the mill for a period of 57 days under the conditions aforesaid warranted important inferences, which the jury was entitled to draw, as to what the mill could do in the way of fulfilling the exact conditions of the guaranty.

We think, therefore, that the testimony in question, instead of having a tendency to mislead the jurors, as counsel assert, had an opposite tendency, and was well calculated to aid them in reaching a correct conclusion with respect to the questions which they had to decide.

In concluding this branch of the discussion it is also important to observe that the position assumed by the plaintiff in error in this court seems to be somewhat at variance with its position in the trial court. It is contended here, as above stated, that the breach of the guaranty could only be established in a lawful manner by proof of the results of a particular test made with a certain mixture of grain such as is described in the contract. In the circuit court, however, it was alleged, in substance, by the plaintiff in error, in answer to the counterclaim, and such was its attitude before the jury, that the parties had agreed that other and different wheat than that specified in the contract might be used for the purpose of demonstrating the capacity of the enlarged mill, and that when tested with such other and different wheat, it did in fact fulfill substantially all of the conditions of the guaranty. In view of this allegation, it seems hardly necessary to add that it overcomes every possible objection which the plaintiff in error can make to the admissibility of the testimony showing the record made by the mill during the 57 days subsequent to its completion, for, beyond all question, if the mill was ever subjected to a trial by agreement of the parties with any mixture or grade of grain, it was during the period aforesaid, and the plaintiff in error cannot complain because the record of the mill during that period was exhibited to the jury.

It is further assigned for error that the circuit court erred in refusing to strike out and to exclude from the consideration of the jury an opinion expressed by one of the witnesses for the mill company relative to the rental value of the enlarged mill. This testimony was offered by the mill company for the purpose of showing its damages in case the jury found that the guaranty had not been fulfilled. The witness expressed the opinion, in substance, that if the enlarged mill, when completed, had possessed the requisite contract capacity, its rental value would have been from \$4,000 to \$4,750 per month. Other evidence tended to show that it would probably take two months to overcome the existing defects in the mill by making the necessary alterations, and that in the meantime the mill company would lose the use of the plant. On the cross-examination of this witness it was developed that in forming his estimate of the rental value he had taken into consideration the number of barrels of flour that the mill would make per day, the cost of production, and that he had based his opinion as to the rental value upon the assumption that the mill would yield on the average a net profit to the person operating it of 10 cents per barrel for each barrel produced. Thereupon the plaintiff in error objected to the testimony, and moved to exclude the opinion which the witness had previously expressed. This motion was not based upon the ground that the witness was not competent to testify as an expert, nor upon the ground that the rental value of the plant while it was compelled to lie idle undergoing alterations was an improper item of damage. The sole ground

of exception to the testimony seems to have been that it authorized the mill company to recover damages for a supposed loss of net profits. We are unable to concur in this view. The witness did not say, as we understand, that "rental value" and "net profits" were synonymous terms, and that he had expressed his opinion on that assumption. What he did say, in substance, was that mill owners, in estimating the rental value of such property, were in the habit of considering its producing power and probable earning capacity; that this was the way the rental value of such property was usually fixed and determined, and the only practicable way in which it could be ascertained; and that in forming an opinion as to the rental value of the property in question he had proceeded in the customary manner. We think, therefore, that the facts developed on the cross-examination of this witness were insufficient to render his opinion as to the rental value illegal testimony. The competency of the evidence depended upon the fact that the matter at issue warranted the introduction of expert testimony; that the witness was confessedly well qualified to express an opinion; and that he assumed to do so, stating, in substance, that a certain sum per month represented, in his judgment, the fair rental value of the property. The manner in which such judgment had been formed, as disclosed by the cross-examination, did not render the evidence incompetent, but, at most, only affected its weight or credibility. Moreover, as the plaintiff in error did not offer any rebutting testimony on the subject of rental value, it is fair to presume either that the opinion expressed was substantially correct, or that the plaintiff in error did not attach much importance to this feature of the case. The court, we think, committed no error in refusing to exclude the opinion in question.

Some other errors have been assigned upon the record, but they are of less importance than those heretofore considered, and a careful examination of the same has satisfied us that they are without merit, and that they are not deserving of particular notice. Error has also been assigned on account of the denial of the motion for a new trial by the trial court, but we have so often held, in common with other federal courts, that we cannot notice an error of that kind, that nothing need be said on that subject. *Railroad Co. v. Howard*, 4 U. S. App. 202, 1 C. C. A. 229, 49 Fed. 206; *Railroad Co. v. Charles*, 7 U. S. App. 359, 388, 2 C. C. A. 380, 51 Fed. 562. A careful inspection of the entire record has served to convince us that no error was committed which would justify this court in granting a retrial, wherefore the judgment of the circuit court is hereby affirmed.

---

SECOND NAT. BANK OF AURORA v. BASUIER et al.

(Circuit Court of Appeals, Eighth Circuit. December 3, 1894.)

No. 480.

BILLS AND NOTES—NEGOTIABILITY.

The statute of South Dakota defining negotiable instruments provides that "a negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer; \* \* \* must be

made payable in money only, and without any condition not certain of fulfillment; \* \* \* must not contain any other contract than such as is specified in this article." Held that, by virtue of the statute, a note drawn and made payable in South Dakota, "with exchange and costs of collection," was not a negotiable note.

In Error to the Circuit Court of the United States for the District of South Dakota.

This was an action by the Second National Bank of Aurora, Ill., against Charles Basuier and others, upon four promissory notes. On the trial in the circuit court the defendants had a verdict. Plaintiff brings error.

Hosmer H. Keith (William George, on brief), for plaintiff in error.

John E. Carland (O. S. Gifford, on brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a suit by the plaintiff in error, the Second National Bank of Aurora, Ill., against the defendants in error, who were the defendants in the circuit court, on four promissory notes executed by the defendants. Each note was for the sum of \$650, and all of them were dated, "Canton, Dakota, December 17, 1888." They were all drawn in the following form, except that two of the notes were payable May 1, 1891, instead of May 1, 1890:

"\$650.00.

Canton, Dakota, Dec. 17th, 1888.

"May 1st, 1890, after date, for value received, we, the undersigned, jointly and severally promise to pay to the order of Blair Brothers, Aurora, Ill., the sum of six hundred and fifty dollars, negotiable and payable at First National Bank, Canton, Dakota, with exchange and costs of collection, with interest at eight per cent. per annum, payable annually, from date."

The defendants pleaded by way of defense that the notes were drawn and delivered to Blair Bros., the original payees, in payment for a stallion which was sold by Blair Bros. to the makers of the notes, with a certain warranty as to his breeding qualities, and that the warranty had been broken. On the trial of the case, the court instructed the jury, in substance, that, because the notes contained the words "with exchange and costs of collection," they were not negotiable instruments; and that the aforesaid defense could be made against a bona fide purchaser of the paper, as well as against the original holder. The proof showed that the plaintiff bank had purchased the paper for value before maturity, and without notice of defenses. The giving of the foregoing instruction constitutes the only error that we are called upon to review.

We do not deem it necessary or profitable in the present case to enter into an extended discussion of the question whether, at common law, including the law merchant, the words "with exchange and costs of collection," when incorporated into a note or bill which would otherwise be negotiable, render it non-negotiable. A recent well-considered decision by the supreme court of Minnesota (*Hastings v. Thompson*, 55 N. W. 968) contains a perspicuous and forcible statement of the reasons that have induced that court, and the courts of some other states as well, to adopt the view that the words "with exchange," on a particular place, do not, at common law, render

the amount payable so uncertain as to destroy the negotiability of a note or bill. The case also contains a reference to all of the leading authorities which support, and to those which oppose, the Minnesota doctrine.

With reference to the question whether the words "with costs of collection," or "with attorney's fees," or "with a certain per cent. as attorney's fees," render a note too uncertain as to amount, and therefore non-negotiable, the authorities are very much in conflict. One line of decision maintains that such words, or words of equivalent import, do not affect the negotiability of commercial paper, because they do not render the amount payable uncertain if the paper is paid at maturity. Another class of cases maintains that the amount payable on a note or bill should be certain after maturity, as well as at maturity, and that the words aforesaid, or similar stipulations, defeat negotiability. The case of *Farmers' Nat. Bank v. Sutton Manuf'g Co.*, 6 U. S. App. 312, 3 C. C. A. 1, and 52 Fed. 191, adopts the former view, for reasons which are very clearly stated in the opinion. The opinion also contains a reference to the leading cases wherein this much-mooted question has been discussed. Anything that we might add to what has already been said on the subject in the two cases above referred to would be a work of supererogation, and would not aid to any extent in settling the law.

The case in hand cannot be decided exclusively with reference to the rules of the common law, including the law merchant. The notes in suit were executed in the territory of Dakota, and they were made payable in the territory. They are, therefore, Dakota contracts, and must be construed with reference to a statute of the territory, which defines negotiable instruments, that was in force when the paper was executed and delivered. Title 15, c. 1, Comp. Laws Dak. 1887, entitled "Negotiable Instruments," contains the following provisions, and the same were in force on December 17, 1888:

"Sec. 4456. A negotiable instrument is a written promise or request for the payment of a certain sum of money, to order or bearer, in conformity to the provisions of this article.

"Sec. 4457. A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment."

"Sec. 4462. A negotiable instrument must not contain any other contract than such as is specified in this article."

"Sec. 4464. There are six classes of negotiable instruments, namely: bills of exchange, promissory notes, bank notes, checks, bonds, certificates of deposit."

It will be observed that the statute not only prohibits the insertion of "any condition not certain of fulfillment" in a note or bill which is intended to be negotiable, but it further declares, in substance, that a note or bill "must not contain any other contract" than a promise or request for the payment of a certain sum of money to order or bearer. Now, undoubtedly the notes in suit, when fairly construed, do contain an agreement on the part of the makers that, if any costs are incurred by the holder in the collection of the paper, they will pay such costs, whatever the same may be, in addition to the principal sum expressed on the face of the notes; and to this extent they contain a condition which the makers may or may not be called upon to fulfill, depending upon circumstances. The same provision relative to the

payment of costs of collection is also a contract other than, and in addition to, a promise or request for the payment of a definite sum of money to order or bearer. The foregoing interpretation of the phrase "with \* \* \* costs of collection," which seems to us to be a reasonable and natural interpretation, brings the several notes in suit within the inhibitions of the Dakota statute, and will not permit them to be classified as negotiable instruments according to the rule prescribed by and the definitions contained in the statute. We should have some hesitation in adopting the foregoing view if the question was one of first impression, and especially if the courts of the several states were unanimous in holding that the words "with attorney's fees," or "with costs of collection," or other equivalent phrases, do not, at common law, impair the negotiability of instruments otherwise negotiable. But the courts of the country are not agreed as to the true rule of the common law in this respect, and it may be that the Dakota statute was drawn with special reference to the existing controversy, and for the purpose of settling the law in that territory by means of the statute. But, however this may be, we find that as early as May, 1882, the supreme court of the then territory of Dakota had the same statute before it which we have above quoted, in the case of *Garretson v. Purdy*, 3 Dak. 178, 184, 14 N. W. 100; and it was there held that, by virtue of the statute in question, a note was not negotiable which contained the words "and, if action is commenced hereon, attorney's fee for collection." The territorial statute aforesaid is still in force, having been adopted by the state of South Dakota; and in a case arising thereunder (*Hegeler v. Comstock*, 1 S. D. 138, 45 N. W. 331) the supreme court of that state has decided that a note otherwise negotiable, containing the following words, "with interest from date until paid, at the rate of ten per cent. per annum, eight per cent. if paid when due," is not negotiable, because it lacks certainty as to the amount which may be demanded thereon. The decision in that case seems to have been predicated both upon the statute and the court's view of the true rule of the common law, irrespective of the statute. The Dakota statute above quoted is also a literal copy of sections 3087, 3088, and 3093 of the Civil Code of California; and in that state, as well, it has been held that, by virtue of the statute, a note containing the following words is not negotiable, to wit: "Should suit be commenced or an attorney employed to enforce the payment of this note, I agree to pay the additional sum of five per cent. on principal and interest accrued, as attorney's fee in such suit." The court said, in substance, that the statute was intended to remove all doubt, and that it did remove all doubt which conflicting judicial decisions had raised as to whether agreements to pay attorney's fees or costs of collection, when inserted in notes and bills, rendered them non-negotiable. *Adams v. Seaman*, 82 Cal. 636, 639, 23 Pac. 53.

What has already been said should conclude the discussion as to notes containing the words "with costs of collection" that were executed in Dakota, and were made payable in Dakota, after the adoption of the aforesaid statute, and after it had received an authoritative construction by its court of last resort. It is also an important con-



sideration that the state of South Dakota has adopted the territorial statute, and that the state court of last resort has approved the construction which was given to the statute in territorial days. Although the question at issue is one of commercial law, yet the decision depends not upon the law merchant, but upon the meaning of a local statute which prescribes in detail the manner in which a note or bill must be drawn to possess the quality of negotiability; and we do not feel at liberty to ignore the settled construction of the statute in the state where it has been adopted, in dealing with a note that was both drawn and made payable in that state. *Capital Bank of St. Paul v. School District No. 26* (decided by this court at the last term) 63 Fed. 938. See, also, *Railroad Co. v. Hogan*, 11 C. C. A. 51, 63 Fed. 102.

The judgment of the circuit court for the district of South Dakota is therefore affirmed.

---

#### UNITED STATES v. BARRETT et al.

(Circuit Court, D. South Carolina. December 11, 1894.)

##### 1. CONSPIRACY—SUFFICIENCY OF PROOF.

The offense of conspiracy, under the laws of the United States, is sufficiently proved if the jury is satisfied that two or more of the parties charged entered into an agreement to accomplish a common and unlawful design, which was arrived at by mutual understanding, followed by some act done by any of the parties for the purpose of carrying it into execution, and the joint assent may be proven by direct testimony, or may be inferred from facts which establish, to the satisfaction of the jury, that an unlawful combination had been formed.

##### 2. SAME—USING MAILS TO DEFRAUD.

Under an indictment for conspiracy to defraud by the use of the mails, the defendants cannot be convicted by proof that they, severally, ordered goods by mail, not intending to pay for them, without showing that such orders were given in pursuance of a prearranged plan.

##### 3. CRIMINAL LAW—REASONABLE DOUBT.

If the jury in a criminal case are satisfied that the accused is guilty, they should not refuse to convict because of a remote, far-fetched, or merciful suggestion or conjecture that possibly he may be innocent. The vague uncertainties to which some minds are always, and all minds are sometimes, liable are not within the contemplation of the law when it directs that the accused shall have the benefit of the doubt.

This was an indictment against Charles B. Barrett and others for conspiracy to defraud by the use of the mails. Trial by jury.

Wm. Perry Murphy, U. S. Atty., and Edward W. Hughes and E. O. Woods, Asst. U. S. Attys., for the United States.

Absalom Blythe, William Munro, and John M. Caldwell, for defendants.

**BRAWLEY**, District Judge (charging jury). This is an indictment for conspiracy under sections 5440 and 5480 of the Revised Statutes of the United States, which will be read to you. A conspiracy is an agreement between two or more persons to do an unlawful act. The unlawful agreement or combination is the gist of the offense, and at common law the offense was complete when the unlawful agree-

ment was entered into, though nothing was done in execution of its purpose, this being one of the few cases in which the law undertook to punish an unexecuted intent; but, inasmuch as there are no common-law offenses against the government of the United States, an act, to be punished in the federal courts, must be declared an offense by statute, and in an indictment for conspiracy here it is necessary to prove that something was done to carry into effect the unlawful agreement. There must be an agreement of two or more wills to carry into execution some unlawful purpose and some act or acts done in pursuance of that agreement. This joint assent of minds may be proved by direct testimony, or may be inferred from facts which establish to the satisfaction of the jury that an unlawful combination had been formed. It is not necessary to prove that all the parties charged met together and came to an explicit and formal agreement, or that they should all agree formally upon the details or plans by which the unlawful combination should be made effective. The offense is sufficiently proved if the jury is satisfied that two or more of the parties charged entered into an agreement to accomplish a common and unlawful design, which was arrived at by mutual understanding, followed by some act done by any of the parties for the purpose of carrying it into execution. It is not necessary that each of the parties should in person commit the unlawful act, if such act is a part of the plan for which the combination is formed; for, the unlawful agreement having been proved, the act of one is considered the act of all. Each may perform separate and distinct acts in forwarding the design, and proof is not required of participation by each in every step by which the unlawful scheme is carried forward. Nor is it necessary that it should be proved that all of the parties originally combined together, or that each was an original contriver of the mischief, or that all were even acquainted with each other. Mere passive knowledge of the fraud or the illegal action of others is not sufficient to show conspiracy. Some active participation is necessary. If it is proved to your satisfaction that there was in the beginning an unlawful agreement to do the act charged between two or more of the parties, and at any period thereafter a new or additional party came into it for the purpose of aiding in the accomplishment of the plan first agreed upon, and does any act in furtherance of the original design, he is from that moment a fellow conspirator, and responsible for all the consequences which flow from such participation. While it is not essential that each conspirator should know the exact part which every other is to perform, you must be satisfied that a party charged with participation in any of the steps taken in furtherance of the original scheme had knowledge that the parties whom he was assisting were engaged in some unlawful design. Such guilty knowledge may be inferred from his conduct, if the acts proved are of a nature to satisfy the jury that the party was conscious of the fact that the parties with whom he associated himself were engaged in wrongdoing.

Having thus endeavored to make plain to you the law as to the offense charged in this indictment, it may be well to say a few words in respect to the evidence necessary to support it. I have already

charged you that it is not necessary in cases of this kind that the government should prove an explicit, formal agreement among the parties, if you are satisfied that there was a mutual understanding among two or more of them; but inasmuch as you have heard the testimony of some of the parties directly concerned in the alleged unlawful combination, and as much has been said by counsel as to the weight you ought to give to the testimony of co-conspirators, I will instruct you on this point. The law makes them competent witnesses, but the jury must in all cases determine their credibility. Naturally such testimony is open to suspicion, and it would not be safe to accept as conclusive the uncorroborated testimony of accomplices in crime. Being competent witnesses, it is your duty to weigh their testimony with great care, test it by all the ordinary rules by which you are accustomed to weigh evidence, with your minds alert to detect a motive which may have prompted it. Consider it in its relation to all the facts proved, and see whether it is corroborated by the testimony of other witnesses and is consistent with probability. If it is supported in material respects, and produces in your mind an absolute conviction of its truth, then you are bound to credit it, or you may accept so much of it as is corroborated and reject the rest. It is difficult to learn the exact truth and the whole truth as to any human transactions, but we must not for that reason relax our efforts for its ascertainment. As it is peculiarly in your province to determine the facts, all that the court can do is to aid you with such light as the experience of mankind has determined to be most efficacious.

Having thus fixed in your minds the principles of the law respecting conspiracies in general, you will now consider most specifically the particular offense with which these parties are charged. The government of the United States has plenary power over the mails and postal service, and by its legislation has attempted to prevent that service, which is intended for the benefit of the people, being used for the purpose of defrauding them. The law, in its efforts to restrict the use of the mails to beneficial purposes, has provided for the punishment of any person who, having devised any scheme to defraud, effects the same by opening correspondences through the post-office establishment. It is for a combination to make such unlawful use of the mails that these parties stand indicted. The government has attempted to prove that the defendants named in this indictment agreed upon a scheme to defraud the parties therein set forth, and used the mails in furtherance of the design. You have heard the testimony, and it is for you to say whether the proof is sufficient to establish the offense charged. This testimony is very voluminous; it is partly oral and partly written. The delivery of it has consumed four days, and the argument of counsel another day, and the court feels that it is a great tax upon your patience to detain you longer with the recital of the facts; but the importance of the case seems to render it necessary that I should sum up the testimony, and I will endeavor to do so as briefly as I can.

The practice in the courts of the United States permits the judge to express an opinion upon the testimony, and, while it is not my

purpose to do so in such a way as to influence your decision, I wish you to understand that, if in the course of my comments upon the facts I should appear to lean to one side or the other, you are not to consider my opinions upon the facts as in any way binding upon you. You are the final judges of the force and effect of the testimony. While you must accept the law from the court, you must decide the facts for yourselves. Upon your consciences and responsibility rests the ultimate decision of every question of fact. The indictment charges, and testimony has been offered to prove, that in the year 1892 the defendants agreed upon a scheme substantially as follows: That they would, by correspondence with business houses in different parts of the country, obtain shipments of various kinds of goods and articles without intending to pay for the same; that upon their arrival at Spartanburg the consignees thereof would execute sham mortgages and bills of sale, so as to protect the same from seizure by the shippers; and that these articles would be sold, and the proceeds divided among the parties to the scheme. It is charged that shortly before the beginning of operations, and in furtherance of the scheme, several new post offices were established; that Owens, one of the parties, secured, through Barrett, the establishment of a post office called "Owens"; that at his suggestion McElrath likewise applied to Barrett for assistance in establishing a post office called "McElrath"; and Wyatt, another of the parties, had a post office called "Wyatt." All of these offices were in the country,—outside of any town or thickly-settled locality. The parties named, or some member of the family and name, was in each case appointed postmaster. Letter heads were printed setting forth in a neat style the name of the post office and postmaster. A stranger receiving a letter written upon such paper would naturally conclude that his correspondent was a person of some consequence, writing from a town named in his honor, and, holding the office of postmaster, he was probably its worthiest citizen. This impression was doubtless enhanced by the fact that many of the letters were written upon a typewriter. Although the towns of Owens, Wyatt, and McElrath do not appear upon the maps, it may well have been assumed that they were the evidences of the growth of the "New South," of which we hear a great deal. The preliminaries having thus been happily arranged, the "business" began,—not in the old-fashioned way, however. None of these men had any capital; all of them were small farmers,—one-horse farmers,—renters. The defendant McElrath testifies that at a conference with his codefendant Barrett at the inception of the scheme, when its beauties were unfolded, the defendant Barrett said that "it would beat knocking clods to death"; "that people up North were rich, and that we needed money at the South." All of them seemed to agree that the great need of the South was "more money." It is but just to say, however, that whatever may have been the original plan there was nothing sectional in its fruition. In the wide sweep of their enterprise they covered the whole country; for them there was no North and no South, and they must be acquitted of any charge of sectionalism. You will not soon forget, and the innkeepers of this

town will gratefully remember, the long procession of correspondents of these parties who came here to testify. They came from New York and Chicago, from New Jersey and Pennsylvania, from Boston, Baltimore, and Atlanta, from Washington, Richmond, and Savannah, from Charlotte and Augusta, nor was our own state unrepresented in the melancholy throng. Charleston and Greenville and Columbia each had representatives to show that they had not been neglected. As there was no geographical limit to their field of operations, so there was no limitation as to the objects of their concupiscence. While pianos, safes, and typewriters seem to have been the articles most affected, yet there was scarcely any field of human activity that did not furnish some object that was desired. Bicycles, steam engines, writing desks, chairs, fertilizers, lamps, hats and gloves, encyclopaedias, saddles,—all were ordered with equal prodigality. Nothing was paid for. The testimony shows that most of the articles were ordered by Owens, Wyatt, and McElrath; but Tillman, Hannon, Lee, and Hatcher all seem to have caught the infection of ordering things, the two last named to a small extent only. The fact that a great many articles and goods were ordered, and that they were not paid for, is established by such overwhelming testimony that it has not been disputed; but this, of itself, constitutes no crime. In order to convict, you must be satisfied that these things were ordered through the mails in pursuance of a prearranged plan to swindle the parties who forwarded them. You will consider all the circumstances. When a small farmer, living on rented land, orders a \$900 Knabe piano and iron safes, you are at liberty to infer that that is a suspicious transaction; but, even if you conclude that he intended to commit a fraud, you cannot convict upon this indictment unless you find that this was done in pursuance of a plan and in combination with one or more other persons. You will now consider the testimony in its relation to each of the parties implicated. The first named is the defendant Barrett. It appears from the testimony that he is a lawyer, and it is obvious that he is a person of more intelligence than any of those who have appeared upon the witness stand. He has testified in his own behalf, and must have impressed you as a man of acute, supple, and resourceful intellect.

The first witness for the government, one Biggs, details a conversation had with Barrett, wherein Barrett proposed that they should go into an operation similar in kind to that which other witnesses have testified was subsequently entered into, and that he was requested to furnish a list of the principal dealers in pianos throughout the country. The witness declined the proposition; nothing came of it, so far as appears; and Biggs passed from the scene. Barrett makes emphatic denial of such conversation. The next witness is McElrath, who has entered a plea of guilty. I have already charged you as to the weight to be given to the testimony of persons occupying that position. He testifies that he lived about three miles from Owens, and at his suggestion, in March, 1892, he came to Barrett to secure his aid in establishing a post office to be called "McElrath"; that Owens first informed him of the scheme proposed.

and that, after meeting Barrett, the latter told him that "this would beat knocking clods to death"; that Barrett proposed the form of a letter head which his codefendant Hannon carried to the printer; that he ordered a safe; that there was an understanding that the safe was not to be paid for; that the safe was to be sold, and the profits of the operation were to be divided between Hannon, Barrett, and himself; that his next venture was the ordering of a set of encyclopaedias, upon which, by Barrett's advice, he executed a sham mortgage to Tinsley; next a piano, ordered through Tillman; then an organ. This testimony, if it is to be believed, establishes an agreement between Barrett, Owens, and McElrath for an unlawful purpose, and is direct proof of the conspiracy charged in the indictment. You must determine whether McElrath has told the truth, and consider how far he is corroborated. Evidence to show close relations between the two is offered in the letter to Mosler, Bahman & Co., signed, "R. J. McElrath," and proved to be in the handwriting of Barrett. Other evidence of a corroborative nature is found in the fact that the oak desk which the witness swears that he assisted Owens to carry to Barrett's office is proved by indisputable evidence to have been found in Barrett's office at a later day. That the witness was engaged in voluminous correspondence is proved by the letters themselves which have been offered in evidence. You will then consider Barrett's explanation of his relations with McElrath as detailed by him on the stand. Scrutinize the motives and interests which would be most likely to effect their credibility, and determine which one is most likely to be telling the truth. In connection with this you will consider the letter to E. M. Andrews, at Charlotte, about the piano to be shipped to McElrath, recommending him as a man of means, with a postscript, proved to be in Barrett's handwriting, referring to freight. [The testimony of each witness was in like manner stated by the judge, and the rebutting testimony given by each of the defendants implicated, and the jury warned that their verdict should depend upon the testimony heard in the courthouse, and not upon statements made in the newspapers or by parties outside. The charge concludes as follows:]

The burden of proof in all criminal cases being upon the government, the presumption of innocence protects the accused until the jury is satisfied beyond a reasonable doubt that he is guilty. You must not convict unless you are convinced, but, if the proof satisfies you that the accused are guilty, you should not refuse to convict because of some remote, far-fetched, or merciful suggestion or conjecture that possibly they may be innocent. Absolute certainty is rarely possible, and those vague uncertainties to which some minds are always, and all minds are sometimes, liable are not within the contemplation of the law when it directs that the accused shall have the benefit of the doubt. It is not every doubt, however slight or however founded, which should prevent a verdict of guilty. It is not the mere possibility of innocence, or vague notions or capricious or captious doubt, that is intended. If the evidence has produced in your minds a moral certainty that the accused or any of them are

guilty you will say so; if there is a rational uncertainty, growing out of the testimony and sustained by it, and producing a reasonable, substantial doubt as to their guilt, you should not convict. Let the record be handed to the jury.

### UNITED STATES v. HUDSON.

(District Court, W. D. Arkansas. August 27, 1894.)

1. **BAIL BOND—EFFECT, WHEN INVALID.**

An invalid bail bond is not binding on either principal or sureties.

2. **SAME—VALIDITY.**

To make a bail bond valid, it must be taken by competent legal authority; it must be in correct legal form. To make it a good and sufficient bail bond the sureties must be sufficient.

3. **SAME—POWER OF JUSTICE OF SUPREME COURT.**

Mr. Justice White could not, under paragraph 2, rule 36, of the supreme court of the United States (11 Sup. Ct. iv.), make the order made by him in this case, for he was neither a circuit or district court of the circuit and district where Hudson was tried, nor a justice or judge thereof. Under the order of the supreme court allotting the judges thereof, he was a justice of the supreme court for the Fifth, and not for the Eighth, circuit. As such, he could not, under paragraph 2, rule 36, of the supreme court, make an order admitting Hudson to bail.

4. **SAME—CONVICTION OF FELONY—EFFECT OF APPEAL.**

By section 5, establishing a court of appeals (26 Stat. 827), any one convicted of a capital or infamous crime may take, by writ of error or appeal, his case to the supreme court of the United States. The statute made no provision for bail of party convicted after conviction and sentence, pending appeal or writ of error. No statute of the United States is broad enough to authorize bail in such a case after conviction and sentence.

5. **SAME.**

Bail was not allowed by the common law after conviction and sentence.

6. **SAME.**

Bail is a great right, which is secured by law. To secure it, under the laws of the United States, requires a statute guarantying it.

7. **SAME—RULE OF SUPREME COURT.**

On May 11, 1891, the supreme court made the following rule, known as paragraph 2, rule 36: "Where such writ of error is allowed in cases of conviction of infamous crimes, or in any other criminal case in which it will lie under sections 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such sum as may be fixed." The supreme court could not make this rule, as the common law does not give the right to say that bail shall be allowed after conviction and sentence, pending an appeal or writ of error. No statute of the United States expressly or impliedly provides it may do so. It cannot do so under its power to make and establish all necessary rules for the orderly conduct of business in the court, and to prescribe the mode and form of proceeding so as to attain the object for which jurisdiction was given in all cases where congress has not legislated, for business may be conducted in an orderly way, and the object for which jurisdiction was given may be fully attained, whether the party is in jail or on bond.

8. **SAME—STATUTORY AUTHORITY.**

Bail is a right that belongs to a party, because the law secures it to him, and a court cannot grant it without authority to do so by law.

## 9. SAME.

The supreme court having no power to make paragraph 2, rule 36, any bond taken under such rule is void, and the principal and sureties are not bound by it.

(Syllabus by the Court.)

Jas. B. McDonough, Asst. Dist. Atty., for the United States.  
Wm. M. Cravens and C. J. Frederick, for defendant.

PARKER, District Judge. The defendant, at the May term, A. D. 1894, of this court, was convicted by a verdict of the jury of an assault with intent to kill. He was subsequently, at said term, sentenced to imprisonment at hard labor in the penitentiary of Kings county, N. Y., for a term of four years. He filed his motion for a new trial, which was overruled. He then tendered his bill of exceptions, which was signed by the court, and filed. He then filed with the clerk his assignment of errors. Upon Monday, August 6, 1894, the judge of this court made the following order:

"Ordered, that, upon the filing of an assignment of errors in the above-entitled cause, the clerk of this court shall issue a writ of error taking this case to the supreme court of the United States, in order that any alleged errors may be corrected if found to exist by said supreme court."

By request of counsel for the defendant, the writ of error was not immediately issued by the clerk, because said counsel stated that they had not yet determined whether they would take the case to the supreme court. Notwithstanding this, before the clerk had issued the writ, the defendant, by petition, applied to Mr. Justice White, one of the associate justices of the supreme court of the United States, for a writ of error, a supersedeas, and for bail pending the case on writ of error in the supreme court. On the petition filed for defendant by his counsel, Mr. Justice White, on August 14, 1894, made this order:

"Writ of error, to operate as a supersedeas allowed, returnable according to law, the defendant to furnish bond in the sum of five thousand dollars, conditioned according to law, subject to the approval of the district judge.

"Washington, August 14th, 1894.

"[Signed]

E. D. White,

"Associate Justice, Supreme Court, U. S."

It may be remarked in this connection that this is one of the most important questions that ever presented itself to this court; for, if bail is taken upon this order, and it is not warranted by law, then the bail bond is void, and the sureties would not be responsible. It affects the very integrity and efficiency of the administration of justice.

I am not specially concerned in the examination of the issue before us as to the first part of the order of Mr. Justice White. However, it may be noticed in connection with that order that the writ of error is to operate as a supersedeas, without requiring any bond for cost. The writ of error in a case of this kind must be prosecuted at the expense of the defendant. To secure a stay by supersedeas in a civil case, it would be necessary to first file a bond



for the payment of all costs. The question may be asked whether it is not necessary in this case to file such a bond before the supersedeas could operate as a stay of execution. The bond ordered by Mr. Justice White is not a bond for costs, but a bond to secure the appearance of the defendant when and where he may be required to appear. A mere order in a civil case for a supersedeas would not operate as a stay of execution until a bond for costs was filed. If this be the rule in a civil proceeding, is it not much more important that it should be the rule in a criminal proceeding?

But the material question that I, as a district judge, must determine, is whether the bond taken as ordered by Mr. Justice White would be valid. To be effective and binding on the principal and sureties, it must be valid. Then, again, has the judge of this court, under the circumstances of this case, anything to do with the validity of this bond to be approved by him as ordered? Should he approve it if invalid? Does his duty call on him to see to its validity? Most certainly, because one of the highest duties, in order to secure an effective administration of justice, is to allow bail, and pass upon its sufficiency, in cases where authorized by law. What is necessary to make a bail bond valid? First, it must be taken by competent legal authority; second, it must be in correct legal form; third, to make it a good bail bond, the sureties on it must be sufficient. All of these propositions enter into the validity and sufficiency of the bond. Mr. Justice White allowed the defendant bail as provided by his order above referred to. He admitted the party to bail, and ordered that the bail bond be subject to the approval of the judge of this court. Could he admit to bail? Could he declare that the defendant should be bailed?

On May 11, 1891, the supreme court of the United States promulgated the following, as a second paragraph of rule 36, to wit:

"Where such writ of error is allowed in case of conviction of infamous crime, or in any other criminal case in which it will lie under sections 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed." 11 Sup. Ct. iv.

Section 5 of the act establishing a circuit court of appeals, approved March 3, 1891 (26 Stat. 827), gives the right of appeal or writ of error on conviction of capital or otherwise infamous crimes. Its language in defining the jurisdiction of the supreme court of the United States in cases of appeal and writs of error is as follows: "In cases of conviction of capital or otherwise infamous crimes." Neither this section nor any part of said act says anything about supersedeas or bail or admission to bail. The only authority for bail in cases of writs of error to be had after conviction of infamous offenses is the second paragraph of rule 36. There is no statute on that subject, as there is in cases of writs of error in capital cases. In capital cases it is provided for by the act of February 6, 1889 (Supp. Rev. St. U. S. [2d Ed.] p. 639). Rule 36 of the supreme court limits the courts and judges who are to admit bail. There are two words of limitation,—the word "the" and the

word "thereof." "The" is the word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of "a" or "an." The word "thereof" means "of that; of it." This word "thereof" limits the words "justice or judge" to a justice or judge of the courts above specified; that is, manifestly, the circuit or district courts of the circuit where the case was tried. This rule is capable of the construction that the supreme court intended to say that the party should be admitted to bail by the court which tried the case. If it was tried by a circuit court, then he might be admitted to bail by such court, or by any judge or justice thereof. If he was tried by a district court, he might be admitted to bail by the judge who tried him in such court. This is manifestly the interpretation placed upon the rule by Judge Benedict in the case of *U. S. v. Simmons*, 47 Fed. 724. In his opinion the learned judge says:

"The rules of the supreme court of the United States permit persons convicted, when they appeal to the supreme court of the United States, to be admitted to bail, but leave the question of admitting to bail to the discretion of the court below."

The court below means the court which tried the case. This is in the interest of justice. Such court knows the character of the case, knows the character of the defendant (and this may be taken into account on a question of bail), and the qualifications of the sureties offered. And, as this rule is clearly discretionary, the court which tried the accused, if justice is to be administered and the law enforced, is the only court capable of exercising a sound discretion on the subject, because of the want of knowledge in courts which had nothing to do in trying the case. Can it be presumed by Mr. Justice White or other gentlemen that courts will arbitrarily disregard their duty? Can that be said in regard to the matter of bail? Can that be said of this court, which for 20 years has pursued the most liberal policy of any court in America on the subject of bail, and in passing on the sufficiency of sureties? But suppose that we take the other construction of this rule, and say that it means that the bail might be taken by the circuit court of the circuit where the trial for the crime was had, or the district court which tried the case, or by any justice or judge thereof. While the more reasonable construction is that the supreme court meant that it should be taken only by the court which tried the case, still, if it was intended to give the circuit court of the circuit where the case was tried, or any justice or judge thereof, the power to bail, it was not intended to give any district court, or judge thereof, other than the court which heard the case, or the judge thereof, power to bail, for the district court judge can do nothing out of his district. But, upon either construction, let us see if Mr. Justice White comes within the description of any of the courts or persons named in this rule. The rule, when it speaks of a justice thereof, evidently must mean a justice of the circuit court; for, as I have said, the word "thereof" means "of that court" or "of that circuit court" in which the case was tried. There is no such officer

as a justice of the district court. Who is the justice of the circuit court of this circuit?

Section 605, Rev. St. U. S., provides as follows:

"The words 'circuit justice' and 'justice of a circuit,' when used in this title, shall be understood to designate the justice of the supreme court who is allotted to any circuit; but the word 'judge' when applied generally to any circuit, shall be understood to include such justice."

Section 606 of the Revised Statutes provides:

"The chief justice and associate justices of the supreme court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a chief justice or associate justice, or otherwise. If a new allotment becomes necessary at any other time than during a term, it shall be made by the chief justice, and shall be binding until the next term and until new allotment by the court."

It will be seen that section 605 provides that "'circuit justice' and 'justices of a circuit,' when used in this title, shall be understood to designate the justice of the supreme court who is allotted to any circuit." The last-named section provides for the method of allotment. Then, under the law, it is the allotment that makes them justices of the circuit courts. On the 2d of April, 1894, the last allotment was made by an order of the supreme court. This order is to be found in 152 U. S. 711, 14 Sup. Ct. x. Associate Justice White was allotted to the Fifth circuit. That makes him a justice of the circuit court of the Fifth circuit. Mr. Justice Brewer was allotted to the Eighth circuit. He is the only justice of the circuit court of this circuit. Hence, Mr. Justice White is not one of the judicial officers mentioned in the second paragraph of rule 36, when you apply the designation of such officer to this court; and he is, consequently, without authority to make the order to admit bail to this circuit.

It was claimed in the argument by counsel that, this case being in the supreme court, and Mr. Justice White being an associate justice of such court, he could admit to bail. When the order to admit the defendant to bail was made in this case, on the 14th day of August, 1894, no citation had been served. The acknowledgment of service of said citation was made by the district attorney of this district on the 21st of August, 1894, seven days after the making of the order by Mr. Justice White. Then there was no service of citation at the time of the making of the order. Hence the case could not be in the supreme court when the order was made. But, if it was in the supreme court, such court has said, by its rule, who shall bail in cases like this; and it has not said an associate justice as such of the supreme court shall admit to bail, but he must be a judicial officer, known to the law as a "justice" of a "circuit court," and this character can come alone by allotment. If the justice of any circuit court, whether in the circuit or not, can make an order admitting to bail, then, under the language of this rule, any circuit judge or district judge can admit to bail, no matter whether of the circuit or district where the case was tried or not. The dis-

strict judge of Oregon, under such construction, could admit a man to bail who was tried and convicted in the district of South Carolina. This never was intended. I take it that the proposition is clear that Mr. Justice White had no right to make the order for bail. No one could make it, under the rule of the supreme court, until "after citation is served." As I have already said, it had not been served when the order of bail was made, and was not served until seven days afterwards. This alone would make the order invalid.

Again, the power to admit bail by the circuit judge, the circuit justice, or the district judge is with all such officers a discretionary power; for the language of the rule is not that they shall or must admit to bail, but that they shall have the power to admit to bail. This undertakes to give them the power to do it, of course taking into consideration a wise administration of justice, leaving to their sound discretion the question of admitting to bail. It will be observed, under the language of this rule, that, under certain circumstances, their power, while being discretionary, is equal. It may be asked, where the powers are the same in three different judges, and these powers are discretionary in all, can one of these three judges make an absolute order on any one of the other judges to perform a discretionary judicial function or duty? The question answers itself. On the grounds above named, the order of Mr. Justice White must be held to be without authority of law.

But it has been said, why not take the bail under the order of Mr. Justice White, although such order may be without authority of law? And the question is further put whether or not a bond taken under such circumstances would not be good anyhow. Most certainly not. The authorities are uniform on that subject. "Bonds to secure the appearance of a person charged with crime must be taken and executed in pursuance of the order of the proper court or officer." *U. S. v. Goldstein's Sureties*, 1 Dill. 413, Fed. Cas. No. 15,226. In *U. S. v. Horton*, 2 Dill. 94, Fed. Cas. No. 15,393, Judge Dillon says: "It is settled that bonds are valid only when taken in pursuance of law and the order of a competent court." It is said by the court in the case of *State v. Buffum*, 2 Fost. (N. H.) 267, when speaking of the liability of sureties on bail bonds: "They are liable in any case only upon the ground that they enter into a recognizance ordered by a tribunal having authority to act in the premises." "It is the essence of authority understood by the bail or surety of another that there should have been a valid obligation comprehended." *U. S. v. Hand*, 6 McLean, 274, Fed. Cas. No. 15,296. "Bail taken by a court without jurisdiction, or by an officer without authority, is void." *State v. Wininger*, 81 Ind. 51; *Dickinson v. State* (Neb.) 29 N. W. 184; *State v. Jones*, 3 La. Ann. 10; *Gray v. State*, 43 Ala. 41; *Jacquemine v. State*, 48 Miss. 280; *Branham v. Com.*, 2 Bush, 3; *Com. v. Roberts*, 1 Duv. 199; *Com. v. Fisher*, 2 Duv. 376; *Dugan v. Com.*, 6 Bush, 305; *Harris v. Simpson*, 14 Am. Dec. 101; *State v. McCoy*, 1 Baxt. 111; *Wallenweber v. Com.*, 3 Bush, 68; *Williams v. Shelby*, 2 Or. 144; *Schneider v. Com.*, 3 Metc. (Ky.) 409; *Blevins v. State*, 31 Ark. 53; *Cooper v. State*, 23 Ark. 278; *State v. Nelson*, 28 Mo. 13; *State v. Hays*, 4 La. Ann. 59; *State v. Vion*, 12 La. Ann. 688; *Holmes v.*

State, 44 Tex. 631; State v. Berry, 8 Me. 179; State v. Russell, 24 Tex. 505; Com. v. Loveridge, 11 Mass. 33; Com. v. Otis, 16 Mass. 198; Com. v. Canada, 13 Pick. 86; Powell v. State, 15 Ohio, 579; State v. Clark, 15 Ohio, 595; People v. McKinney, 9 Mich. 444. Then I take it, if I approve the bail bond in this case, it is one which is necessarily invalid, because ordered to be taken without authority. But we hear it said that bail may be taken under the circumstances of this case in the interest of liberty. Nothing is in the interest of liberty that is unauthorized by law. That is the source of liberty in this country, and, when an act is done without warrant of law, it is against liberty, because it is in violation of the law of the land. If bail is taken which is unauthorized, the party bailed is licensed to go hence without day, and such an act upon the part of the court would be an act not in the interest of the enforcement of the law, or the administration of justice, and consequently it would be an act against liberty, because a faithful administration of the law is necessary to secure the protection of each and every citizen in the great cardinal rights of life, liberty, and property, and this, and this only, means liberty. All the liberty we know anything about under this government is liberty regulated by law. Everything else is licentiousness, because it gives to each person the right to trample upon the rights of all others. If bail is authorized, then its allowance is in the interest of liberty. If not authorized by law, and taken by a court, it is in the interest of crime and criminals, for it is to turn them loose to prey upon their fellows. It must be remembered that we, as courts, are not law-makers; and, if the order in this case is not authorized by law, we cannot impart validity to an invalid bail bond that might be taken under it.

There is another important question in this case, and it is one which involves the power of the supreme court to make that part of rule 36 which declares that a party convicted of an infamous offense, after conviction, pending appeal, shall be admitted to bail at all, when, as I conceive, congress has failed to make any provision upon that subject. It is with the most extreme diffidence that I put this proposition simply as a *quaere*, because it touches the power of the highest judicial tribunal in this country to make rule 36, declaring that parties can be admitted to bail after conviction. But it must be remembered that, if bail bonds which are taken are void, large numbers of persons in this jurisdiction can give such bonds, and go Scot-free. It must be remembered, further, that the fact exists that the taking of valid bonds rests with the trial court, and such trial court must be held to a strict responsibility for the taking of such bonds. It is a sense of duty that prompts me to allude to this branch of the question. The *quaere* is, is there any power in any one to admit to bail in a case like the one before us? As I have said, section 5 of the act of congress above referred to provides for writs of error and appeals, but it does not provide for bail to be tendered pending appeal or writ of error. No statute of the United States provides for it. It is clear to my mind that the eighth amendment to the constitution, which provides excessive bail shall

not be required, is not self-executing. It requires the legislation of congress to make provision for the method of its execution. I am equally clear that this provision of the constitution applies to persons who are accused, but before trial and conviction.

In *Ex parte Schwartz*, 2 Tex. App. 75, it is declared: "The constitutional guaranty of the right of bail is not operative after trial and conviction." The same principle is recognized in *Ex parte Ezell*, 40 Tex. 451. That was a case where it was held that a statute denying bail to a prisoner after conviction and pending appeal was valid, and consequently held that the constitutional guaranty of bail did not apply to a case after conviction. *Hurd*, Hab. Corp. 78, 90, 92, declares the same principle. *Hallum's Const. Hist.* 140. I have found no case against this principle. Indeed, as far as my observation goes, there is but one line of authorities. The English common law did not give the right to bail after conviction and sentence, but it is now secured in England by statute.

It may be remarked that in the states the admission to bail after conviction and pending appeal only exists in cases of conviction for a felony, when it is regulated by express statute, and then it is always left discretionary with the trial court. *Davis v. State*, 6 How. (Miss.) 399; *Ex parte Dyson*, 25 Miss. 356; *People v. Lohman*, 2 Barb. 450; *People v. Folmsbee*, 60 Barb. 480; *People v. Bowe*, 58 How. Pr. 393; *State v. Connor*, 2 Bay, 34; *State v. Frink*, 1 Bay, 168; *State v. Ward*, 2 Hawks, 443; *State v. Rutherford*, 1 Hawks, 457; *State v. Daniel*, 8 Ired. 21; *Miller v. State*, 15 Fla. 575; *Corbett v. State*, 24 Ga. 391; *Ex parte Ezell*, 19 Am. Rep. 32; *Ex parte Voll*, 41 Cal. 29; *Ex parte Smallman*, 54 Cal. 35; *Ex parte Marks*, 49 Cal. 681; *Ex parte Hoge*, 48 Cal. 3; *Ex parte Brown* (Cal.) 8 Pac. 829; 2 Am. & Eng. Enc. Law, p. 11 (where it is declared that, after sentence or commitment, no bail will be allowed); *Church*, Hab. Corp. 419; *Corbett v. State*, 24 Ga. 391; *Bish. Cr. Pr.* (3d Ed.) 254; *Ex parte Percy*, 2 Daly, 531; *People v. Lohman*, 2 Barb. 450. As I have said, in all the states where the right of bail is allowed after conviction, it has been given by statute, and it has never been exercised after conviction without a statute declaring that it might be given. Conviction means after the verdict of the jury. *Ex parte Brown*, 8 Pac. 829, a decision by the supreme court of California. The supreme court of California in the above case said:

"We think it settled law in this state by the judgments of the courts [in many cases to which the court refers] that this court ought not to admit to bail after a verdict of guilty, unless when circumstances of an extraordinary character have intervened since the conviction."

This is when the statute authorizes bail. This tells us what is the sound discretion to be exercised when there is discretionary power to admit to bail.

The question in the case is not what ought to be, but what is. Does the power exist to bail after conviction in the class of cases like this of Hudson, either by the common law, the constitution of the United States, or by the respective statutes passed in pursuance thereof, on the subject of bail? Of course, no one could deny that congress could pass a law allowing bail after conviction; but has it

done so? No provision is made in any of the laws of the United States for bail after conviction in a case of this kind. There is no federal statute on the subject of bail bonds after conviction. *Ex parte Murphy* (Okl.) 29 Pac. 652. Has the supreme court been given power to provide by rule for admission to bail in cases of this kind? It has not by the express or implied language of any statute upon the subject of bail. Sections 1014, 1015, and 1016, Rev. St. U. S., clearly have reference to bail for parties under arrest, before trial. This is the legislative interpretation of this provision of the law, as shown by section 1017, having reference to bail in criminal cases removed from the state courts. This interpretation is also shown by the act of congress of March 3, 1879 (20 Stat. 354), relating to appeals and writs of error in criminal cases from the judgment of a district court to take the case to the circuit court. Bail is expressly provided for by the second section of such act after conviction, and while the case is pending in the appellate court. Now, a circuit court has the right to make all needful rules and regulations touching its procedure not in conflict with the laws or constitution of the United States. The supreme court has the same power. If the supreme court can determine when bail shall be given, so could it say in the class of cases removed from the state supreme court to it; and the circuit court, under the provision as to its making needful rules and regulations regulating its method of procedure, could determine that a case taken by writ of error or appeal from the district court to it should be bailable; yet congress, in both of these cases, has construed the powers of these courts otherwise, because it has deemed it necessary that the matter of bail in these cases of appeals and writs of error should be determined by positive enactment. The fact that the sections above quoted, relating to the bailing of parties charged with crime, have reference only to crimes before conviction, has been determined by judicial action of the supreme court in adopting paragraph 2 of rule 36; for, if the right to bail existed by virtue of these sections, it was already provided for, and the sections provide who shall take it, and, by the construction of the court, these sections did not apply to cases of bail after conviction and pending appeal or writ of error. If so, why prescribe the rule? It would be unnecessary, for there would already be a statute giving the right to bail, and expressly providing who might take it. Hence we say that we find in all legislative and judicial interpretations on the question of bail by sections 1014, 1015, and 1016, and these sections of the act I have alluded to in reference to bail after conviction, a legislative intent is expressed. Where that intent is expressed to the extent it is here, and there stops, the conclusion naturally follows that congress did not intend that the right of bail could be granted in any other cases than those that it has provided for by express enactment. It is scarcely necessary that we should look to legislative or judicial construction of sections 1014, 1015, and 1016, for there is no room for the construction of these sections. Section 1014, in relation to who may arrest, and of parties arrested, among other things, declares, with reference to the parties to be arrested, "that he may be arrested and imprisoned

agreeably to the usual mode of procedure or process against offenders in such state, and at the expense of the United States, or that he may be bailed, as the case may be, before trial, before such court of the United States as by law has cognizance of the offense. \* \* \*

This is very clear. Section 1015 confirms this interpretation, for it says: "Bail shall be admitted on all arrests." It does not say in cases of appeal or writs of error.

The supreme court has a right to make and establish all necessary rules for the orderly conduct of business in said court, and may prescribe the mode and form of proceeding so as to obtain the object for which jurisdiction was given, in all cases where congress has not legislated. It may be remarked in this connection that all the powers belonging to the courts of the United States must come from the constitution providing for their establishment, or from acts of congress passed in pursuance of the constitution. Is granting bail a necessary rule for the orderly conduct of business? Is it a mode or form of procedure to be exercised to attain the object for which jurisdiction was given? Is not bail a legal right guarantied by the lawmaking powers? Is it in any wise a rule of practice or procedure? The mere method of granting bail may be a rule of procedure, and this, and this only, is what was decided in the case of *U. S. v. Rundlett*, 2 Curt. 41-45, Fed. Cas. No. 16,208. But when and in what cases bail shall be granted is not a mere rule of procedure, and it must be declared by positive enactments of the law-making power. The circuit and district courts, by section 918, Rev. St. U. S., have the right by rule to regulate their own procedure in all cases not inconsistent with any law of congress. Would this give them the right to admit to bail in any case where congress had not provided for bail? If the supreme court can do it, the circuit and district courts can do it. The power of one as to making rules governing its procedure is as broad as the power of the other.

The principle seems to me to be true that, under our government of distributed and defined powers, the right to say when and in what cases bail may be taken must be regulated by the lawmaking power of the government. 2 Am. & Eng. Enc. Law, p. 3. That authority declares that the giving and taking bail is now limited, regulated, and controlled by statute. The lawmaking power of the United States, it seems to me, has regarded it as necessary to declare when bail may be taken, as in every case that is generally regarded as bailable congress has made provision by legislation for such bail. It happens not to have made any provision in a case like this, and the question turns upon the proposition as to whether or not the power given to the supreme court to make rules and regulations governing its practice shall be construed as a power not to make such rules governing its practice alone, but to make rules declaring the effect of its practice. Even in a civil case the statutes of the United States have declared what shall be the effect of an appeal or writ of error in such case, and what shall be done to secure a supersedeas. If it is deemed by the lawmaking power in a civil suit affecting property as necessary that express congressional leg-



isolation shall provide for stay of execution on appeal or writ of error, and for the giving of bond to secure such stay, it seems to me that the reason for express power to admit to bail in a criminal case where a man's life has been jeopardized, and where, as I believe, he who has jeopardized it has had a fair trial, is much stronger than in a case of a civil proceeding, as affording security and safety to innocent human life by the certain enforcement of the criminal law of the land is more important than protecting the mere property rights of the citizen.

As I have said, if the supreme court has no power by rule to provide for bail after conviction, and pending an appeal or writ of error, in a case like this, then all bonds taken under such rule are void, and bail would amount to an absolute discharge for all time from custody in a majority of cases, as men who may be guilty are prone to stay away from courts when they do not have to go to them. My opinion, sincerely entertained, is that the power to provide by rule that bail in a case like this might be given after conviction, pending an appeal or writ of error, has never been given to the supreme court by act of congress; that bail is a great fundamental right, to be provided for by act of congress only, and, unless congress has provided for its being taken, it cannot be taken; that the power to provide when, by whom, and how it shall be taken is a legislative power, that must be exercised by that branch of the government which possesses this power. Honestly and sincerely entertaining these views, I, as judge of a court whose duty it is to act in the premises, could do no less than express the views I have on this question.

---

#### UNITED STATES v. VAN LEUVEN.

(District Court, N. D. Iowa, E. D. December 14, 1894.)

##### 1. CRIMINAL LAW—TESTIMONY OF ACCOMPLICE.

It is proper for the judge, upon the trial of a person indicted for a criminal offense in a court of the United States sitting in a state the statutes of which forbid the conviction of a defendant upon the uncorroborated testimony of an accomplice, to instruct the jury that they cannot find the defendant guilty upon such testimony.

##### 2. SAME—CORROBORATION.

In determining whether or not the testimony of an accomplice is corroborated by independent testimony, the fact that a witness, who gives testimony claimed to be corroborative, is himself charged with a similar offense, does not destroy the corroborative effect of his testimony, if he was not concerned in the particular offense with which the defendant stands charged.

Trial upon an indictment charging that the defendant had conspired with one Rankin, contrary to the provisions of section 5440 of the Revised Statutes of the United States, to offer or give to the members of the board of examining surgeons at Cresco, Iowa, money for the purpose of influencing the official action of the board in regard to the examination to be made of Rankin as an applicant for an increase of pension. Trial before a jury. Verdict, "Guilty."

M. D. O'Connell and Cato Sells, U. S. Dist. Att'y., for the United States.

John Day Smith and W. W. Erwin, for defendant.

SHIRAS, District Judge (orally charging jury). Before passing to the consideration of the special questions that are involved in the charge in this case and that are to be submitted to you for your decision, I deem it advisable to briefly call your attention to some general provisions of the statute and general provisions of law that you should bear in mind when you come to decide the case after its final submission to you. By the provisions of section 5451 of the Revised Statutes of the United States it is enacted by congress that "every person who promises, offers or gives, or causes or procures to be promised, offered, or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States, in any official function, under or by authority of any department or office of the government thereof, or to any officer or person acting for or on behalf of either house of congress, or of any committee of either house, or both houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding, which may at any time be pending or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud on the United States,"—commits an offense against the United States, punishable in accordance with the provisions of this section. As you well know, the laws of the United States provide for the payment of pensions, under given circumstances, to those who may have been soldiers or sailors in the army or navy of the United States in the different wars in which this country has been engaged, and more particularly in that known as the "War of the Rebellion." For the purpose of properly controlling the matter of the payment of these pensions, there is an office of the government known as the "Pension Office," or "Pension Bureau." At the head of this office there is a person appointed by the president of the United States, under the provisions of the law, which officer is known as the "Commissioner of Pensions." He acts, in that capacity, as a person at the head of an office of the government of the United States, and upon him is conferred the authority, by acts of congress, to appoint proper persons to act as examining surgeons,—to form "examining boards," as they are termed. And upon these examining boards, or the surgeons who compose the same, is placed the duty of examining into the physical condition of the applicants for pensions, or for increase of pensions, who may be ordered to come before them for examination. The surgeons composing these boards are, therefore, persons "acting for and on behalf of the United States" in an "official function," under and by authority of the government, within the meaning of this section of the statute that I have read in

your hearing. Therefore if any person "promises, offers, gives, or causes or procures to be promised, offered, or given any money or other thing of value" to a board of examining surgeons, or any member thereof, with intent to influence the decision or action of the board, or members thereof, on any question or matter submitted to their examination, and decision,—as, for instance, to influence the action of the board of surgeons in regard to an examination that they may, under the law, be required to make, in regard to the certificate they may be required to make of the results of the examination,—that person commits an offense against the United States, in that he violates the provisions of the section that I have read in your hearing. It is furthermore provided by section 5440 of the Revised Statutes of the United States that, "if two or more persons conspire to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy," such persons commit an offense against the United States, and are punishable as set forth in this section. Therefore, under these two sections, if two or more persons conspire together for the purpose of offering or giving, or procuring to be offered or given to any board of examining surgeons, or to any member thereof, any sum of money, for the purpose of influencing the action of the board of surgeons touching any examination that such board may be required to make of any applicant for a pension or for an increase of pension, they violate the provisions of section 5440, provided it appears that either one of the parties to the conspiracy does some act to carry into effect the conspiracy or concerted action that they may have agreed upon.

Now, for the purpose of this case, and without attempting an exhaustive definition of what is a conspiracy, it is sufficient for me to describe a conspiracy to be a combining between two or more persons for the purpose of committing, by means of their concerted action, some unlawful act; and when one or more of the parties to the conspiracy commits or does some act to carry into effect the purpose of the conspiracy, the offense, if it be against the United States, is complete, under the provisions of the section I have read. It is not necessary to prove that the two or more parties have come together, and in set phrase have agreed that they will do thus and so, but it is sufficient to find that a conspiracy has been entered into, if the testimony shows that an agreement has been reached, and that, in pursuance of this concerted action, some act in furtherance of the conspiracy has been done. I may say—as has been said in your hearing—that at the common law a conspiracy could be made out by simply showing that an agreement had been reached by the parties that an offense was to be committed, but under the statutes of the United States it is necessary that an act to carry into effect the conspiracy should be done, in order to complete the offense. It has seemed wise to congress to provide or require, before parties shall be punished for the offense of conspiracy,—of conspiracy to commit an offense against the United States,—that it be more than a mere agreement; that it be proven that the parties charged with the of-

fense have put the conspiracy into operation by doing some act for the purpose of carrying it into effect. But the act that is required to be done under the statute need not be shown to be the completion of the offense; that is not necessary. For instance, if it be charged that two persons conspire to influence the action of a board of examining surgeons touching application for pension, it is not necessary to show in fact that money was corruptly paid to the board. If two or more parties conspire together to do that, and then they do something to carry the agreement into effect, that would be sufficient, under the statute, without showing that the offense was completed by their actually bribing or corrupting the board of surgeons. It is a settled principle of the law that every person charged with the commission of a crime is deemed and held to be innocent until he is proven guilty, and that presumption of innocence attends him during the entire trial, and until the evidence satisfies the jury beyond a reasonable doubt of his guilt. It is a rule of law, before the government is entitled to a conviction, that his guilt should be proven, beyond a reasonable doubt. After considering the entire evidence that may be submitted to the jury, giving the evidence the weight it is entitled to, and viewing it in all its relations, if there still remains a reasonable doubt of the defendant's guilt, then the duty of the jury is to return a verdict of not guilty. At the common law, as the same existed in England, in the progress and development of that law the conclusion was reached by the judges charged with the duty of presiding over trials of criminal cases that it was unwise for a jury to convict a person upon the uncorroborated testimony of an accomplice, and therefore judges cautioned the juries in this particular, and charged them that it was unwise for the jury to convict upon the uncorroborated testimony of an accomplice. In the state of Iowa it has been enacted as a provision of statutory law that no person shall be convicted of a crime upon the uncorroborated testimony of an accomplice, but there must be corroborative testimony tending to connect the defendant with the commission of the offense. I have always deemed it my duty as a judge of a court of the United States, and trying cases arising in the state of Iowa, and where the defendant is a citizen of this state, to say to the jury that they cannot convict upon the uncorroborated testimony of an accomplice; and when a case stands before a jury on that kind of evidence alone I assume the duty of charging them to return a verdict of not guilty, but, if the testimony of an accomplice is accompanied by evidence tending to corroborate the same in its material statements, then it is the duty of the court to submit the whole to the jury, and it is for the jury to determine whether the corroborating evidence is of such a character and weight as justifies the jury in giving weight to the testimony of the accomplice.

It may be advisable for me to state briefly the reason that underlies the general rule of law in regard to the testimony of an accomplice. If two or more parties are placed upon trial for some offense laid to their charge, and one of them is called as a witness for the prosecution, and is thus made use of as a witness against his code-

endants, there is always present to the mind of that person the belief or understanding that if he testifies on behalf of the government he may be freed from prosecution, or escape punishment. Therefore it is that we give to juries the charge that a conviction should not be based upon the uncorroborated testimony of an accomplice, because he gives his testimony under the influence of the motive named. When, however, in a given case, there is evidence tending to corroborate the testimony of the accomplice in its material points, and to connect the defendant with the commission of the crime charged, then, as already stated, it is for the jury to determine whether the corroborating evidence is such as to justify them in considering and giving any weight to the testimony of the accomplice. If the corroborating evidence is such that the jury feel justified in considering and weighing the testimony of the accomplice, then, in determining the credibility of the witness, and the weight, if any, of his testimony, the jury should take into consideration all the facts and circumstances proven in the case which throw light upon the situation of the witness, and tend to show the motives and influences affecting his testimony,—such as the question whether an indictment is in fact pending against the witness, or whether a prosecution is threatened or not, and whether the witness is or is not endeavoring to escape punishment by aiding to convict his accomplice. All such matters, as well as the demeanor of the witness, his mode of testifying, and in brief all matters appearing in the case which throw light upon the situation and character of the witness, are to be considered in determining the credibility of an accomplice called as a witness on behalf of the government.

In this particular case now on trial before you the charge is contained in the second count of the indictment. As you understand, the indictment originally contained two counts, but at the beginning of the case the government was required to make its election upon which count to go to trial, and in the exercise of this option the government chose to proceed upon the second count of the indictment, and this is the only one before you. You will, therefore, at the outset disregard the matters contained in the first count of the indictment. The second count has been read in your hearing, and, very briefly stated, it is sufficient for me to say that it charges that on or about the 15th day of May, 1892, the defendant and one John Rankin conspired to commit an offense against the United States in this: That the defendant conspired with said John Rankin for the purpose of offering money to influence the action of the board of surgeons at Cresco, in the county of Howard, in this state, the examining board appointed for the purpose of examining applicants for pensions and increase of pensions under the law of the United States. It is further charged that, the conspiracy having been entered into for that purpose, an act tending to accomplish the object of the conspiracy was performed, in that the said Rankin paid to George M. Van Leuven \$15 for that purpose, and that Van Leuven received the same for that purpose. It is not in dispute that John Rankin was an applicant before the pension office of the United States; that he had

been a soldier in the army of the United States; that he had made application for increase of pension; that his agent or attorney was George M. Van Leuven, the defendant in this case. It is not in dispute before you that there was a board of surgeons appointed, under the authority of the commissioner of pensions and under the provisions of the statutes of the United States, at Cresco, for the purpose of examining such persons as might be ordered before them touching applications for pensions or increase of pensions. It is not in dispute before you that the applicant, Rankin, was ordered to go before that board at Cresco, for the purpose of being examined. There has been evidence introduced on behalf of the government showing that Rankin proceeded to Cresco on the day named in this indictment, for the purpose of being examined by the board at Cresco. There has been evidence introduced tending to show that at Cresco, at that time, the defendant was present; that these parties met or came together, or at least were present together, in the rear room of a drug store in Cresco, and in the immediate vicinity of the office or place where the board of surgeons met for the purpose of conducting the examination of the persons who came before them. There has been evidence introduced tending to show that there were present at that time the defendant, Van Leuven, and Rankin, and another applicant for pension, one George E. Allen. On behalf of the government it is claimed that at that interview, or at the time the parties were together in this waiting room, an agreement was then and there reached between Rankin and Van Leuven, in completion of a prior talk or understanding between them, whereby they agreed together that the effort would be made to offer or pay money to this board of examiners, and that in pursuance of that arrangement, then entered into, \$15 was paid to the defendant, Van Leuven, by said Rankin. This is denied by the defendant. Here we reach the pivotal question in this case, and upon the determination of which by you depends the verdict you should render. In the first place, the government has introduced Rankin as a witness to testify as to what his understanding was of the acts that were done, and what transpired at that interview at the time I have named. Now comes up the question, therefore, of the weight, if any, that is to be given to the testimony of Rankin. He stands here before you an accomplice, if it be true that a conspiracy was entered into between him and Van Leuven. If there was no other testimony in the case save that of Rankin, and there was no corroboration of that, it would be my duty, as I have explained to you, to charge you that upon the uncorroborated testimony of Rankin the government could not receive a verdict at your hand. The government has, however, introduced testimony which, it claims, corroborates that of Rankin. The evidence therefore goes before you for your consideration. Now, as I have already said to you, that testimony in corroboration, if any such there be, must be testimony that tends to connect the defendant with the commission of the offense that it is averred was committed. The government has introduced the testimony of George E. Allen, who testifies that he was present at the time of the interview, and you have heard his testimony in regard to what transpired. It is claimed that he also stands in the po-

sition of an accomplice, and therefore his testimony cannot be relied upon in corroboration of the testimony of the accomplice Rankin. The charge that you are investigating and trying in the case is that there was a conspiracy between Van Leuven and Rankin. Does the evidence of any of the witnesses who have testified to the interview that took place in that waiting room show, or tend to show, that Allen was there, agreeing with or conspiring with or in any manner aiding Rankin, in regard to his claim for pension? Had he anything to do with the application of Rankin for pension? Did he agree to do or not to do anything in connection with that,—with the application of Rankin,—or with any effort to influence the board to act wrongfully or improperly in regard to Rankin's application for pension? Unless he did,—unless he was connected in some way with the conspiracy between Rankin and Van Leuven (assuming, in order to explain the proposition of law that there was some arrangement entered into between Van Leuven and Rankin),—or was a participant therein, he cannot be said to be an accessory, or an accomplice to the conspiracy between Rankin and Van Leuven. This must be considered separately and apart from any matter between Allen and Van Leuven in regard to Allen's claim for pension, but, if Allen had no connection with, or did not enter into, the arrangement as between Van Leuven and Rankin in regard to Rankin's application, and he took no part in any arrangement or agreement in regard to influencing the board of examining surgeons touching Rankin's application for examination, providing any such arrangement was entered into, then he cannot be said to be an accomplice in the sense that you must disregard his testimony. If the evidence satisfies you he was a participant in that,—that he actually took part in the agreement, if any such there was, between Rankin and Van Leuven,—he would then occupy the position of an accomplice, and in that case his testimony could not be relied upon as corroborating the testimony of Rankin. If, under the instruction I have given you, you find that Allen was present at that interview; that he was not a participant in whatever arrangement was entered into between Van Leuven and Rankin in regard to Rankin's claim,—then you are to consider and determine the weight to be given Allen's testimony, as to whether it does or not sufficiently corroborate the testimony of Rankin to authorize you to give weight thereto. In determining the weight or credibility to be given to the testimony of witnesses who appear before you, you must take into account all the facts and circumstances that surround the witness, all the facts and circumstances that the evidence shows; and in determining the weight you give the testimony of Allen you should weigh that in the light of what you have seen in regard to Allen,—his demeanor, his mode of testifying, whatever interest he may have in the matter. You have a right to consider all this, and if, in your opinion, the evidence satisfies you he did in fact occupy the position of one who had no interest in the claim of Rankin, and that he took no part in regard thereto, but was simply present at the interview that took place between Van Leuven and Rankin, then you are to determine the weight that is to be given his testimony in corroboration of the testimony of Rankin, or as direct and positive

testimony itself to the commission of the offense. You must remember that Allen's testimony is as to the same interview that Rankin had, and he stands in a double attitude,—you can view him as a corroborating witness and as a direct witness, unless you find that he was in fact a participant in, and an accomplice of Rankin and Van Leuven in regard to, the alleged conspiracy they entered into. In that case, being uncorroborated, his testimony cannot be relied upon in corroboration of Rankin or as direct. But if you find that he was not connected with the arrangement, if any there was, between Rankin and Van Leuven, although he was present, and the conversation embraced the claims of both at the time, but all he was doing was with reference to his own claim, had nothing to do with the claim of Rankin, did not participate in any arrangement in regard to Rankin's claim, then he stands before you as a witness whose testimony is to be viewed as that of any other witness who was not an accomplice with Rankin and Van Leuven.

Now, then, gentlemen, the case of the government turns upon the conclusion you reach in regard to the testimony of these two witnesses, Rankin and Allen. That is the testimony upon which the government relies.

On the part of the defendant, the defendant himself, as he has a right to do under the law, has taken his position as a witness, and testified before you. He denies substantially the material matters in the testimony of Allen and Rankin in regard to the transaction alleged to have been had. In determining the weight, if any, to be given the testimony of Van Leuven as a witness, you of course must bear in mind the position he occupies. He is the defendant in the case. Upon the results of this case—upon your verdict—depends the question of the liberty and honor of the defendant. You are to view it as evidence with reference to that fact. Of course, we cannot shut our eyes to the fact that there are inducements of the most persuasive nature to tempt him so to testify that, if it be possible, he may escape a verdict of guilty. You are to take the facts and circumstances that surround him into consideration, and in your sound judgment determine the weight to be given the evidence he has given before you.

I have not attempted, gentlemen, to go over all the evidence that has been offered in this case. You must not suppose that by any failure or omission on my part in this particular you are to disregard any evidence in the case. You are to take into consideration all the evidence submitted to you. You are the judges of the credibility of the witnesses, of the weight to be given their evidence. You are to determine the questions of fact in the case, including the ultimate fact of the guilt or innocence of the defendant. Taking all the evidence, you are to determine whether or not the government has made out the charge against the defendant beyond a reasonable doubt. In considering the entire evidence, give it the weight you think, in the exercise of your best judgment, it is fairly entitled to; and, if the government has satisfied you beyond a reasonable doubt of the truth of the charge in the second count of the indictment, then that justifies a verdict of guilty at your hands. But if the evidence fails to satisfy



you beyond a reasonable doubt of the truth of the charge laid against the defendant, then your duty is to return a verdict of not guilty. The policy of the government in regard to pensions and the management of the pension office in conducting the affairs committed to its charge are not in issue in this case. The question for your decision is whether or not the defendant is guilty of the charge set forth in the second count of the indictment. If the evidence shows his guilt beyond a reasonable doubt, so say by your verdict. If the government has failed to prove the truth of the charge beyond a reasonable doubt, find the defendant not guilty. The case is one of importance. Consider it impartially, dispassionately. Give to both parties the benefit of the soundest and clearest judgment you can bring to bear upon the questions submitted to you, and return the verdict which in your best judgment the evidence demands and warrants, viewed in the light of the instructions I have given you upon the law.

---

UNITED STATES v. AMERICAN BELL TEL. CO. et al.

(Circuit Court, D. Massachusetts. December 18, 1894.)

No. 341.

1. PATENTS—TWO PATENTS FOR SAME INVENTION—TELEPHONE TRANSMITTER.

Patent No. 463,569, issued November 17, 1891, to Emile Berliner, as assignor to the American Bell Telephone Company, for combined telegraph and telephone, is for a device for transmitting articulate speech, which is identical with the device for the same purpose covered by patent No. 233,969, issued to Emile Berliner November 2, 1880, for electric telephone, and is void.

2. SAME—CANCELLATION—UNLAWFUL DELAY IN ISSUING.

In an action by the United States to cancel patent No. 463,569, issued November 17, 1891, to Emile Berliner, as assignor to defendant, for combined telegraph and telephone, it appeared that the application was filed June 4, 1877; that defendant had ample means to prosecute it; that it then owned a patent which covered the art of electrical transmission of articulate speech, which expired in 1893; that in 1882 defendant was notified that, "as at present advised, it is believed that the claims presented may be allowed," but final action must be suspended in view of probable interferences with other pending applications; that the application with which interference was anticipated was filed July 26, 1880; that there was abundant evidence on file in the patent office showing public use of the device as early as July 26, 1878, and the latter applicant declined to take evidence in contradiction of such public use; that in March, 1888, defendant's application was suspended until May 1, 1888, on the ground of expected interference, and "for the purpose of awaiting the determination of the telephone case in the supreme court"; that defendant acquiesced in a "general understanding" that the decision of its application should await the decision in such case; that it was evident that the claimant in such case was not entitled to a patent, because of prior use of his invention; that the case might not be decided for many years, and, when decided, would not necessarily throw any light on the question of defendant's right to a patent; that the case was decided in March, 1888; and that in 1886 defendant's solicitor wrote it that he was working the "cases along quietly," and thought they would be granted by the examiner without interferences or appeals. *Held*, that the issue of such patent was unlawfully delayed by defendant's fault, for a fraudulent purpose, and that the patent should be canceled.

Bill by the United States against the American Bell Telephone Company and others, to cancel certain letters patent. Decree for plaintiffs.

The Attorney General, the United States Attorney, Causten Browne, and Robert S. Taylor, for the United States.

William G. Russell, James J. Storrow, William W. Swan, and Frederick P. Fish, for defendants.

CARPENTER, District Judge. This is a bill in equity praying the repeal of letters patent No. 463,569, issued November 17, 1891, to Emile Berliner, as assignor to the American Bell Telephone Company, for combined telegraph and telephone. The first ground of the bill to which I shall refer is that the patent is void as being beyond the power of the commissioner to issue, in view of the issue of a former patent, No. 233,969, issued November 2, 1880, to Emile Berliner, for electric telephone. The patent of 1891 is for a transmitter for a speaking telephone. The fourth claim of the patent of 1880 is as follows:

"(4) A system of two or more telephone instruments in electrical connection with each other, each consisting of two or more poles of an electrical circuit in contact one with the other, either or both poles of each instrument being connected with a vibratory plate, so that any vibration which is made at one contact is reproduced at the other, substantially as set forth."

This patent is, therefore, for the "system" or combination of a transmitter and a receiver for a speaking telephone. The whole apparatus is shown in the drawings of both patents, and is identically the same in both. The transmitter and the receiver are identical in form and differ in function according as they are placed at the transmitting or at the receiving end of the telephone wire. It therefore appears that one of the functions of the device shown in the patent of 1880, namely, the function of transmitting articulate speech, is identical with the sole object or function of the device covered by the patent of 1891, and that the device for effecting the transmission is identical in both patents. The patent, therefore, seems to me to be void, and beyond the power of the commissioner to issue. *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310.

The second ground of the bill is that the issue of the patent was unlawfully delayed through the fault of the respondents. The respondent company were the owners of a patent previously granted to Alexander Graham Bell, which covered the art of electrical transmission of articulate speech. The device of Berliner, as both parties in this case agree, covers the only commercially practicable and useful method at present known for effecting such transmission. In this state of facts, the claim of the complainant under this bill is fully and briefly stated by counsel in the following words:

"The proposition is that the Bell Company intentionally delayed the prosecution of the Berliner application and the issue of the Berliner patent for the purpose and with the result of prolonging their control of the art of telephony, which would cease with the expiration of the Bell patent in 1893; and that they did this by submitting to delays on the part of the officers of

the patent office, which delays they, the Bell Company, had it in their power to prevent, and refrained from preventing, for an unlawful purpose. This conduct is alleged to constitute a fraud practiced upon the public through the commissioner of patents and his assistants. And it is claimed that the patent so obtained by such fraud may be and should be annulled by the decree of the court, on the authority of *U. S. v. American Bell Tel. Co.*, 128 U. S. 315, 9 Sup. Ct. 90, because there is no substantial difference between a fraud practiced upon the commissioner as an agent of the public and a fraud practiced upon the public with the commissioner's connivance or acquiescence."

The application for the patent was filed June 4, 1877, and the patent was issued November 17, 1891. The patent to Bell expired in March, 1893. The device covered by the patent in suit had been in public use by the respondent corporation since the year 1878. The respondent corporation was of ample means to prosecute the application. The result of any delay which might take place in the issue of the Berliner patent would evidently be to continue so much longer the practical monopoly of the art of electrical transmission of articulate speech. Under these circumstances, I think it clear that the duty of the respondent corporation was to use the greatest degree of diligence in prosecuting the application to an early issue. There should have been, at least, as great diligence as their own interests would have called for, had their business been unprotected by patent rights.

Thus far there is no dispute between the parties here. It is admitted that the greatest diligence was incumbent on the respondent corporation, and that, if there be unlawful delay, and if there be bad faith and an intention to delay on the part of the applicant, then the patent may be here held to be void. From the filing of the application up to June 9, 1882, it is not contended that there was any delay upon which a decree here should be founded. There were delays in prosecuting the application, but they are said to be no greater than is usual in the patent office. On the date last given the solicitor in charge of the application was notified by the examiner that, "as at present advised, it is believed that the claims presented may be allowed, but final action in this case must be suspended in view of probable interferences with other pending applications." In October, 1883, the solicitor wrote to the office, asking that the case might receive attention, to which it was replied that the apprehended interferences had not yet been declared; and the correspondence was continued in the same sense until March, 1888, when the application was suspended until May 1, 1888, on the ground of the expected interference, and also "for the purpose of awaiting the determination of the telephone case in the supreme court." The application with which an interference was antedated was that filed July 26, 1880, by Daniel Drawbaugh, in which he claimed to be the original and first inventor of the telephone. His claims were rejected on the ground that the instrument which he claimed to have invented had been in public use and on sale for more than two years before the filing of his application. He had filed an affidavit, in which he denied that there had been such public use with his consent and allowance. There was abundant evi-

dence on file in the patent office by which was shown the fact of public use as early as July 26, 1878. It had been declared in *Manning v. Glue Co.*, 108 U. S. 462, 2 Sup. Ct. 860, that the statute then in force did "not allow the issue when the invention had been in public use for more than two years prior to the application, either with or without the consent or allowance of the inventor." The case was then pending of the Bell Company against the People's Telephone Company, owners of the alleged telephone inventions of Drawbaugh, in which was involved the question whether Drawbaugh had in fact invented the telephone at the early day claimed by him, or whether, on the other hand, his claim was entirely false. Under these circumstances there was set on foot a "general understanding," as it is called, on the part of the examiner and the respective counsel for Drawbaugh and for the Bell Company, that the decision of the application for the Berliner patent should await the decision of the pending suit. There seems, on the testimony, no doubt that the Bell Company fully acquiesced in this general understanding; and I think that in so doing they failed in their duty and committed a wrong against the public. It was evident that in no case could Drawbaugh be entitled to a patent. He was clearly barred by the prior use of his invention. On the other hand, it is to be observed that the action against the People's Telephone Company might not be finally decided for many years, and that, when decided, it would not necessarily throw any light on the question then pending in the patent office, namely, whether Berliner or Drawbaugh was the first inventor of the microphone transmitter. The suit was for infringement of two of the early patents issued to Bell, the first for the electrical transmission of sound and the second for a receiver. The answer denied the validity of the patents, alleged anticipations, and further averred generally that Drawbaugh was the first inventor of the speaking telephone. The invention of the microphone, a particular form of the speaking telephone, was therefore not in issue. The case made by the People's Telephone Company, indeed, as was well known, was that Drawbaugh had invented the whole telephone system, as it was then known, including the microphone, long before Bell's invention. If this were found to be the fact, then, of course, it would follow that he had anticipated Berliner as well as Bell. But if this were found not to be the fact, that finding would throw no light on the question whether Drawbaugh had or had not invented the microphone subsequently to Bell and prior to Berliner. It could never appear in the patent office, therefore, that Drawbaugh was entitled to a patent; and only in one aspect of the telephone case could it be decided that Berliner was not entitled to a patent. The plain duty of the respondent corporation, as it seems to me, was to press these considerations on the patent office, and insist on its right to a patent at once, leaving the question which was pending in the courts to be settled whenever a final decision should be reached, and leaving the decision of that case to have whatsoever effect it lawfully might on the validity of the patent. The commissioner, on such an application, might properly have been asked to take proofs, on

notice to Drawbaugh, so as to ascertain *prima facie*, and with sufficient certainty for the purposes of an administrative decision, by whom the first invention of the microphone had been made. It would well have been urged on him that it was his duty to make such an investigation of a question which was not in issue in the pending suit, and which the decision of that suit might furnish no guide in determining.

It is objected that there was no established practice in the patent office by which the question of priority of invention could be ascertained, and that, for other reasons, such an application to the commissioner had no prospect of success. It seems to me clear that the duty of the respondent corporation was to test these questions rather than to consent that they must be decided against them, for an acquiescence in the delay seems to me to be no less than a consent that no favorable result could come from the application. That the unwarrantable delay thus caused was intended by the respondent corporation I can have no doubt. In matters of this consequence, involving the whole business of a company of so large capital and engaged in so large affairs, I cannot doubt that they were fully advised, both as to the facts and as to the law; and I think "that their acts were so gross as to forbid any inference except that they dishonestly delayed" the issue of the patent, taking advantage for that purpose of the perhaps excusable willingness of the officials of the patent office to postpone the decision of a sharply debated question, in which a large public interest was involved, on the chance that a decision of the supreme court might supersede the necessity for a decision on their part.

In March, 1888, a final decision was rendered by the supreme court in the action against the People's Telephone Company (8 Sup. Ct. 778), and the claim of Drawbaugh to the invention of the telephone was held to be unfounded. In June, 1886, the examiners in chief of the patent office had decided that Drawbaugh's application was barred by reason of two years' public use of the invention, and the time for an appeal from this decision expired in June, 1888. The commissioner then set on foot a proceeding to determine whether in fact there had been a public use of Drawbaugh's invention for two years before the date of his application; and the Berliner application was still suspended to await the result of an interference which might be declared in case Drawbaugh should prevail in the public-use proceeding, the rule of the patent office being that no interference could be declared unless in cases where the interfering applicant, if successful in the interference proceeding, would be entitled to a patent. This public-use proceeding, whose purpose is to permit the applicant to be heard on the question of public use when that question has been raised by the office, was strenuously objected to by Drawbaugh, who took no evidence in the proceeding. In October, 1891, the proceeding came to an end by a final decision of the commissioner to the effect that Drawbaugh was barred by the prior use of his invention. On the next day the Berliner patent was ordered to issue, "largely because well-settled principles of public policy forbid us to give any further opportunities for holding this application in the office."

There was no effort, so far as I can see in the evidence, on the part of the respondent corporation to prevent this further delay. There was ample evidence before the commissioner of the fact of prior use. The applicant Drawbaugh declined to take evidence in contradiction; and it seems to me clear that the respondent corporation should have urged upon the patent office a decision on the *prima facie* case which they had made. I am persuaded that the delay thus caused, as well as the delay previous to the decision of the supreme court, was intentionally acquiesced in by the respondent corporation for the purpose of delaying the issue of the patent. This seems to me the only conclusion from a consideration of the whole evidence. It is in proof that during the whole of the time from 1882 to the issue of the patent, and perhaps earlier, the solicitors of the Bell Company were urgently insisting to the officials of the patent office that prompt action should be taken in the application. Even while the "general understanding" was in force, to the effect that the application should await the decision of the Drawbaugh case in the courts, the evidence shows that these urgent applications were made to the patent-office officials. I cannot think that it was by any one expected that such oral applications should have any effect, unless, at least, they were made in support of formal applications made on the record, and of formal arguments and representations made in support of such applications. The officers of the company also testify that at all times they were urgent in pressing for the issue of the patent. As to their state of mind, and their actual intention at the time, I am free to say that I place less reliance on their statements now made than on a single statement made at the time. In February, 1886, while the "general understanding" was in force, Mr. Swan, one of the solicitors for the application, wrote as follows to the president of the Bell Company:

"I am working the Edison and Berliner cases along quietly, and think they will be granted by the examiner without interferences or appeals, so that we can take them out by paying the final fees. We have six months to do that in."

This is but a single paragraph out of many hundreds of pages; but I think it shows clearly what was the purpose of the respondent corporation, consciously formed by their officers, and perfectly understood by their agents at the patent office. The application was to be "worked along quietly," although apparently pushed with great energy. There would be delay, but no substantial obstacle to the grant of the patent; and even after the patent should be ordered to issue there might be a further delay within the limits of the law, and without imperiling the patent. If this letter does not mean this, I am at a loss to know what it does mean. My conclusion, therefore, is that the complainant has made out the case, and that there should be a decree that the patent in question is void, and shall be delivered up to be canceled.

## BUFFINGTON'S IRON BLDG. CO. v. EUSTIS.

(Circuit Court, D. Minnesota, Fourth Division. May 1, 1894.)

## PATENTS—LIMITATION—IRON-BUILDING CONSTRUCTION.

The Buffington patent, No. 383,170, for improvements in iron-building construction, if valid at all, must, in view of the prior art, be limited to the form and arrangement described in the specifications.

This was a bill by the Buffington's Iron-Building Company against William H. Eustis for alleged infringement of a patent.

P. H. Gunkel, for complainant.

D. F. Morgan and A. C. Paul, for defendant.

NELSON, District Judge. This suit is brought to recover damages for an infringement of letters patent No. 383,170, granted May 22, 1888, to Leroy S. Buffington, for "improvements in iron-building construction." He states: "My invention relates to fireproof buildings, composed chiefly of iron." The usual defenses are made by the defendant. The foundation of this controversy, as stated by counsel for complainant, is a claim for iron-building construction, combining masonry and iron in such a manner that the metal is largely used to carry the entire load of the completed building, whereas formerly the masonry was the principal supporting body of the completed building, and the iron columns, girts, etc., were used merely to stiffen it, while tending to make it fireproof or less combustible. In other words, the patent is for an improved plan of constructing iron and masonry fireproof buildings, and the 14 claims described in the specification constitute the plan of the patent.

The patentee states that the objects of his invention are mainly:

"First, the construction of an iron building in a manner that will practically obviate undue expansion and contraction during the extremes of heat and cold; second, a novel construction and arrangement of the main structure, and of the stairs and elevator shafts, whereby there is attained the necessary strength and stability, together with compactness, and the utilization of the space to the best advantage; and, third, an improved plan of floors, and means of bracing the iron beams in fireproof floors in such structures."

The framing posts of the structure are composed of iron or steel plates,—laminated posts. The joints of these plates are broken, so as to make the framing posts continuous, and by the omission, at proper intervals, of the outer plate, the posts taper from the foundation to the roof.

The bill of complaint alleges that the defendant has infringed, in the construction of an iron and masonry building in the city of Minneapolis, the seventh, eighth, and thirteenth claims of the patent, which are as follows:

(7) In a building frame, a series of continuous framing posts, composed of metal plates secured with their flat sides together, and breaking joints, in combination with girts and tiebeams secured thereto at each floor, substantially as set forth.

(8) The combination, with the laminated posts, of the continuous girts secured thereto, and the tiebeams, also secured thereto and to one another, substantially as set forth.

(13) The combination, with the posts and girts, of the angle plates connecting them, and forming supports for the veneer shelves.

All the material parts of the combination are old. Continuous laminated metal posts, metal tie girts, and angle pieces had been used before the patentee adopted this plan of construction. It was not a new discovery that iron and steel were susceptible to the extremes of heat and cold, and that, when used in the construction of bridges, towers, and other structures, this difficulty would be encountered at the outset, and must be obviated to a greater or less extent. The patentee claims by his improvement in construction to have practically obviated the effect of this expansion and contraction of iron or steel used in buildings. He cannot and does not claim that he was the first and original inventor of an iron or masonry building,—that is, a building composed of any kind of iron or metal and masonry work, having exterior walls of masonry of suitable material, supported at proper intervals upon the framework; but he claims to have made an improvement in such structures, consisting of his alleged novel construction and combination of parts described in his specification. Buildings composed entirely of metal, or composed of iron frames encased in concrete, had been described in letters patent before this patent issued to complainant; and these buildings were tied to and bound with the girts connected with the posts by angle pieces riveted thereto, so as to make a complete and durable structure. See patents of Butz, 1884; Sisson & Wetmore, 1872; Fryer, 1869; and Hardy, 1875.

It is doubtful if Buffington's patent is not merely for an aggregation of separate elements, as distinguished from a patentable combination; but, if it be the latter, then, in view of the state of the art, it must be restricted and limited to the form and arrangement described in his specification. Looking at these three claims, which it is charged the defendant has infringed, it is found that the defendant's building has no such specified arrangement of tiebeams and girts, and no such framing posts are used, as are described in the Buffington specification. The defendant, according to the evidence, makes his framing posts of a central iron plate, with what are called Z-shaped irons, riveted thereto. While this possibly may be a laminated plate, from the fact that one plate of iron has another plate lying over a part of it, it is not the framing post composed of metal plates secured with their flat sides together, and breaking joints, described in the Buffington specification. The same may be said of the tiebeams and girts. They are not secured and connected to the posts, nor are they arranged in the same manner as is described in complainant's patent.

In my view, the complainant is limited to the manner of connecting these parts set forth in his specification. The construction of defendant's building, as given in the testimony, upon the view taken by me of the extent of complainant's patent, does not infringe



either one of the seventh, eighth, or thirteenth claims, and a decree must be entered dismissing the bill, with costs. Ordered accordingly.

CUTTER ELECTRICAL & MANUF'G CO. v. CLEVERLY et al.

(Circuit Court, E. D. Pennsylvania. December 18, 1894.)

No. 24.

1. PATENTABLE INVENTION—SUBSTITUTION—ELECTRICAL SWITCHES.

The substitution, in a combination, of one well-known electrical switch for another, without producing any change in function or result, does not involve invention.

2. SAME.

The Cutter patent, No. 437,667, for improvements in electrical switches, held void for want of invention.

This was a suit in equity by the Cutter Electrical & Manufacturing Company against Henry A. Cleverly, Frank Stevens, and Samuel Walsh for alleged infringement of a patent.

Duncan & Page, for complainant.

Ernest Howard Hunter, for defendants.

DALLAS, Circuit Judge. This suit is brought for the alleged infringement of letters patent No. 437,667, issued September 30, 1890, to Henry B. Cutter, as joint inventor with and assignee of Lucius T. Stanley, for "certain new and useful improvements in electrical switches"; and the bill contains the usual prayer for an injunction and an account. The patent contains five claims, but only two of them are involved in this controversy, viz.:

(4) "In an electric switch, the combination with a rocking lever constituting a part of the operative parts of the switch mechanism, of a face plate for inclosing said switch mechanism in a suitable receptacle, and push buttons passing through said face plate and connected with opposite ends of said rocking lever, as set forth."

(5) "A spring-actuated electric switch adapted to be inserted in a recess in a wall, and a pivoted lever for operating the same, in combination with a face plate for covering said recess and inclosing said switch, and push buttons passing through said face plate and connected with the lever of the switch mechanism, whereby the switch may be set in action or operation to make or break circuit by pushing one or the other of the said buttons."

No one of the devices mentioned in either of these claims, separately considered, was new. This is true with respect to the character or form of switch employed, as well as of the other details. The complainant's expert testified:

"I do not understand that the general principles of the switch mechanism shown in the Stanley & Cutter patent were new at the date which the patent bears. This is illustrated by the exhibit, Cleveland 1888 patent, in which a switch operating upon a similar principle is shown and described."

It is, however, insisted that a new organism was created by so combining the old devices as to produce the patented contrivance, with its adaptation to be "fitted in a recess, covered by a face plate flush with the wall, and operated by push buttons, like the ordinary

flush or push-button switches, and yet have the capabilities and functions required of switches used generally in systems of electrical distribution." But careful examination of the evidence as to the prior state of the art has forced upon me the conviction that nothing whatever was done by Cutter and Stanley which entitles them to be ranked as inventors. Mr. Cutter admits in his testimony that the Bosworth patent of 1887 shows a flush push-button device for opening and closing a circuit, and that it was his knowledge of that device which led to the "invention" of the device in suit; but he adds that the earlier one, though used for a number of years to control electric gas-lighting burners, requiring electric currents of very low amperage, would not be applicable for the opening and closing of an electric light circuit, because such a circuit would carry an electrical current sufficiently heavy to destroy it. His design, he says, was to provide a device suitable for controlling electric light currents, and "having the same ornamental features as the Bosworth device." In other words, it was proposed to alter that device only to the extent which might be requisite to adapt it for use in connection with electric light circuits; and to effect this purpose no change in the face plate, push buttons, or inclosing receptacle for insertion in a recess in the wall was necessary or was made. The retention of all these parts was needful to produce the same ornamental features as the Bosworth device, and accordingly they were all retained. The only departure from that device consisted in the character of the switch mechanism which was introduced, and that, as already mentioned, the complainant's expert has conceded to be old, and to be shown by at least the Cleveland patent of 1888, as it certainly is. What is relied upon as evidencing invention amounts to nothing more than the substitution, in an obvious way, and without producing any difference in function or result, of the switch of the Cleveland patent and others, for that shown in the Gisborne patent of 1861. It is unnecessary to refer to any of the several patents which have been produced, in detail. Suffice it to say that investigation of all of them constrains the conclusion that the inventive faculty could not reasonably be said to have been exercised in forming the construction for which protection is now asked. The complainant's expert testified that if the combination desired had been clearly placed before him as a "mechanical problem," he would have experienced no serious difficulty in solving it. He added, it is true, that the idea had not occurred to him or to others, but he defines the word "idea," as used by him, by saying that if he had been told the combination in question "had been thought of and was desired" he would have experienced no difficulty in constructing a mechanical device which would have fulfilled the conditions imposed; that "if an intelligent explanation of the idea had been made, \* \* \* skill alone would have been able to produce the combination described." The testimony of the witness cannot, I think, be read without perceiving that he was unable to claim for Stanley and Cutter any other merit than that of having suggested that by simply substituting one well-known piece

of mechanism for another a beneficial result would be obtained,—that is to say, that their conception was a good one, but was not inventive; that their thought was a happy one, but created nothing, because the concrete expression of their idea was already existent, and derived nothing from them but their perception of its more extended applicability. The learned counsel of the complainant has frankly said that “the invention \* \* \* may be summed up in the statement that it was the result of an intelligent conception or idea,” and that, “this much [the idea of what was wanted] being once in the minds of the inventors, the rest was very easy”; but, unfortunately for the plaintiff, “the rest” was not only easy,—it had actually been accomplished.

There is evidence that the patented apparatus supplied a want, and that it has gone quite extensively into use; and the witness to whom I have before referred has testified that, although he was in the business, “the idea” had never occurred to him. This kind of testimony is of consequence in doubtful cases, but in the present one the effect of the more direct evidence is conclusive, and therefore no weight can be attached to the proof I have adverted to. Bill dismissed, with costs.

---

HEATON-PENINSULAR BUTTON FASTENER CO. v. ROONEY.

(Circuit Court, D. Massachusetts. December 27, 1894.)

No. 432.

PATENTS—PRELIMINARY INJUNCTION—BUTTON FASTENERS.

Preliminary injunction against alleged infringement of the Eggleston patent, No. 293,234, for a device for setting a button having a metallic staple, refused because the court was in doubt on the question of infringement.

This was a suit in equity by the Heaton-Peninsular Button Fastener Company against William Rooney, for alleged infringement of a patent. Complainant moved for a preliminary injunction.

Lange & Roberts, for complainant.

John R. Bennett and Wm. B. H. Dowse, for defendant.

COLT, Circuit Judge. The Eggleston patent, No. 293,234, upon which suit is now brought, and which has been duly assigned to the plaintiff, is for a device for setting a button to which a metallic staple is attached. It is composed of a driver, anvil, and guide. The guide contains a groove for the reception of the staple, which is strung upon the eye of a button, and for the passage of the staple and driver during the operation of setting the staple in the fabric. The guide also has two slots for holding the eye of the button; the front slot, i, “for the reception of that portion of the button eye which is between the staple and the button,” and the rear slot, n, “for the reception of that portion of the button eye that is below the staple.” The single claim of the patent is for the guide, provided with the slot, i, and groove, in combination with the driver and anvil; the groove and slot, i, being so placed with reference to each

other that the groove will receive the staple, and the slot, i, the eye of the button. The slot, n, is not made an element of the claim.

This patent came before this court for consideration in *Peninsular Novelty Co. v. American Shoe-Tip Co.*, 39 Fed. 791, and was held to be valid. The defense of want of invention was overruled mainly on the ground that the alleged prior anticipatory devices were merely staple-setting instruments, while the Eggleston invention was for a device for driving a staple strung upon the eye of a button. The next case was brought by the *Peninsular Novelty Co. v. Olds*,<sup>1</sup> in the circuit court for the Western district of Michigan. In that case Judge Severens decided that the slot, n, was not an essential feature of the Eggleston patent, and that the defendant's machine infringed, although it did not contain this feature. A third suit was brought in the same district by the present plaintiff (assignee of the *Peninsular Novelty Company*) against the *Elliott Button Fastener Company*. 58 Fed. 220. The defendant's machine, in that case, is known as the "First Elliott Machine," and it was held to infringe the Eggleston patent. In the present case the real defendant is the *Elliott Machine Company*, and the machine now in controversy is known as the "New Elliott Machine." The Elliott machine is both a staple former and a staple fastener. The wire is fed from a roll into the machine, and the buttons are fed from a hopper. Each button passes from the hopper, through a raceway, to a staple former, guided by means of a finger and a slot in the guide, which holds the eye of the button. The wire then passes through the eye of the button, and is cut off, and the staple is formed around the former by the downward movement of the guide, the legs of the staple being held by the grooves in the guide. The former is then withdrawn, and the staple driven by the action of the driver.

The construction of the Elliott machine is not complex, but its parts are so compact, and the machine operates with such rapidity, that it is not easy to detect the precise function of each part, or to discover when the function of one part ends, and of another succeeding part begins. There is no doubt that the Elliott machine has the guide, with its groove for holding the staple, as well as the driver and anvil, of the Eggleston patent. The question is whether it contains the slot, i, of the patent, and this is important, because in the slot, i, resides largely the improvement which Eggleston made over prior staple-setting devices. In the First Elliott machine the slot in the guide was cut away in part; in other words, it did not guide the eye of the button during the whole operation of driving the staple. Mr. Justice Brown and Judge Severens decided, however, that, inasmuch as the slot held and guided the eye of the button until the driver was seated upon the crown of the staple, it was in substance the slot, i, of the Eggleston patent, because, after the eye of the button has entered the recess in the driver, there was no longer any necessity for the slot in the guide. The New Elliott machine has been so far modified that the slot in the guide does not hold the eye of the button during any portion of the staple-setting process.

<sup>1</sup> Not reported.

In this machine, after the button is seated upon the former, the slot in the guide is withdrawn, and does not subsequently inclose the eye of the button. There can, therefore, I think, be no controversy that the slot in the guide does not perform any function of the slot, i, in the Eggleston patent. The only question is whether the slot in the former of this machine is the equivalent of the slot, i, of the Eggleston device. Upon this point, on careful consideration, my mind is not free from doubt. If I were convinced that the slot in the Elliott former was only a continuation of the slot in the guide, and that it performed the same function as the slot, i, in the Eggleston device, I should grant the preliminary injunction asked for; but, if I have a reasonable doubt on the question, it is my duty to let the case go over until final hearing, when the full proofs will be presented. The doubt which I have arises from the fact that the slot, i, is defined in the Eggleston patent as receiving "that portion of the button eye which is between the staple and the button"; and I am not clear that the slot in the Elliott former can be considered as receiving and guiding, in the sense of the Eggleston patent, such portion of the eye of the button, it appearing to me that the slot in the Elliott former performs rather the function of the slot, n, of the Eggleston patent. Again, the slot, i, of the Eggleston guide holds a portion of the eye of the button during the operation of driving the staple, while in the Elliott machine the former, with its slot, is withdrawn at or about the time the driver begins its descent; in other words, before the driver strikes the crown of the staple the eye of the button has ceased to be held in any slot whatsoever. Whether or not the finger operates to hold the button in place during the interval between the withdrawal of the former and the time when the driver comes in contact with the crown of the staple, I do not decide. Without in any way intimating what conclusion may be reached on final hearing when the court will have the benefit of full evidence touching all the points in the case, I must, upon the ground of reasonable doubt as to infringement, deny the present motion. Motion denied.

---

DUNHAM MANUF'G CO. v. COBURN TROLLEY TRACK MANUF'G CO. et al.

(Circuit Court, D. Massachusetts. March 7, 1891.)

No. 2,815.

PATENTS—INJUNCTION.

COLT, Circuit Judge. This cause came on to be heard upon motion of complainant for a preliminary injunction, and was argued by counsel for respective parties, and now, to wit, March 7, 1891, it is ordered by the court that writ of injunction issue as prayed for in the bill of complaint herein, enjoining and restraining said defendants from directly or indirectly making, constructing, using, or vending to others, to be used, any door hangers or other articles containing or embodying the invention secured and described in the second and

third claims of the United States letters patent, numbered 7,795 of reissues, reissued July 17, 1877, to Elias E. Pratt, for improvement in door-hanging devices, until the further order of court.

See Pratt v. Sencenbaugh, 64 Fed. 779.

---

PRATT v. WRIGHT et al.

(Circuit Court, N. D. New York. July 12, 1890.)

No. 5,829.

PATENTS—NOVELTY—INFRINGEMENT.

Hey & Wilkinson, for complainant.  
West & Bond, for defendants.

WALLACE, Circuit Judge. It is plain enough in this case that neither the second nor the third claim of the patent in suit is invalid for want of novelty, and that the defendants infringe the second claim. The doubt is whether the second claim is not invalid as being for an invention not described or suggested in the original patent, and whether the defendants infringe the third claim. I am satisfied, however, after carefully examining the case, that I ought to follow the decision of the circuit court for the Eastern district of Pennsylvania<sup>1</sup> in which it was adjudged that both claims were valid, and were infringed by devices substantially the same as those which are employed by the defendants. The record here, so far as it relates to the prior state of the art, does not differ materially from that in the Pennsylvania case. That case was heard by Judges McKennan and Butler, and the opinion shows that it was fully considered. The questions are fairly doubtful; and, that being so, it would be unseemly not to follow a decision which is entitled to the greatest respect, made by a court of co-ordinate jurisdiction, and determining the title to the same property. A decree is therefore ordered for an injunction and an accounting as to both the second and third claims.

See Pratt v. Sencenbaugh, 64 Fed. 779.

---

WESTINGHOUSE AIR-BRAKE CO. v. NEW YORK AIR-BRAKE CO.

(Circuit Court, S. D. New York. December 27, 1894.)

1. PATENTS—CONSTRUCTION OF CLAIMS—AIR BRAKE.

The inventions covered by the Westinghouse patents Nos. 360,070 and 376,837, for improvements in railroad air brakes, are both broad ones, and the claims are entitled to a liberal construction.

2. SAME—INFRINGEMENT.

In an air-brake patent, the claim covered the combination of a main air pipe, an auxiliary reservoir, a brake cylinder, a triple valve, and "an auxiliary valve device, actuated by the piston of the triple valve, substantially as set forth"; and the patent showed a construction in which the auxiliary valve device is actuated by direct impingement of the triple

<sup>1</sup> Pratt v. Lloyd, 65 Fed. 800.

valve upon its stem. *Held*, the invention being a broad one, that the claim also covered a construction in which the triple valve acts upon the auxiliary valve, not directly, but by opening a port which reduces pressure on one side of another piston in a supplementary chamber, thereby causing such piston to open said valve.

3. SAME.

In an air-brake patent a claim which includes, as an element of the combination, a piston "actuated by pressure from an auxiliary reservoir," so as to impart opening movement to the valve controlling communication between the brake cylinder and the brake pipe, is infringed by a construction in which said piston is actuated, not by pressure from the auxiliary reservoir proper, but from a separate chamber, which is charged from the train pipe in the same manner as the auxiliary reservoir.

4. SAME.

The Westinghouse air-brake patents Nos. 360,070 and 376,837 construed, on motion for preliminary injunction, and claims 1, 2, and 4 of the former, and claim 1 of the latter, held infringed.

This was a bill by the Westinghouse Air-Brake Company against the New York Air-Brake Company for infringement of patent. Complainant moved for a preliminary injunction.

Leonard E. Curtis, Frederic H. Betts, and Geo. H. Christy, for complainant.

J. E. Maynadier and F. P. Fish, for defendant.

LACOMBE, Circuit Judge. This is an application for a preliminary injunction under three patents, viz.: No. 360,070, March 29, 1887, to George Westinghouse, Jr.; No. 376,837, January 24, 1888, to the same; and No. 393,784, December 4, 1888, to Harvey S. Park. It is unnecessary to enter into any elaborate statement of the history of the art, and of the impress left upon it by these inventions. That entire subject has been discussed with great care and set forth at great length in the former opinions of this court and of the court of appeals delivered in the earlier actions between these same parties. 59 Fed. 581; 63 Fed. 962. In those opinions it is held that the two patents 360,070 and 376,837 disclosed, the one the emergency valve, the other the supplemental piston or special motor, which, so far as the art has now progressed, appear to be both essential to the structure of a successful quick-action air brake. Both of these inventions achieved great necessities and overcame great hindrances; each is an indispensable part of the "bridge which carried railroad-car builders from failure to success"; both were products of the inventive genius of the same man; nothing anticipating either is shown; and the defense of the defendant in the former action and in this may truthfully be described in terms of another art,—by bringing the two patents into juxtaposition they seek to short-circuit the claims, and thus dissipate the invention. This attempt failed in the former suit, wherein No. 376,837, the patent sued upon, was held to be one of wide breadth; one as to which "a court would not be justified in adopting a narrow or astute construction which should minimize the character of the invention, leave its real scope open to trespassers, and thus be fatal to the grant." Wherefore the court of appeals held it to be entitled to a liberal construction, with a wide range of equivalents. Although No. 360,070 was not declared upon in the

earlier suit, it was discussed at great length, and its meritoriousness was clearly recognized. The statements of the problem to be solved as it stood prior to January, 1888, and of the contribution of 360,070 to that solution, as they are set forth in the opinions above cited, leave no doubt that both the circuit court and the court of appeals regarded it as a patent of wide breadth; the only difficulty being to find sufficient standing room within the field it occupied to permit of according to 376,837 also the necessary breadth of construction to cover the infringing devices then before the court, and thus save to a meritorious inventor the fruits of his novel and most useful invention.

Defendant relies upon the rejection by the patent office of the original first claim of 360,070, and the substitution of the present first claim as an abandonment of the fundamental broad invention therein disclosed. When, however, the reference on which the patent office rejected the original first claim (Boyden's patent, No. 280,285) is consulted, it is apparent that the essential change in the claim is the phrase used to differentiate 360,070, an invention to be used "in the application of the brake," from Boyden's invention, whose object was to provide for replenishing, "while the brake is on," the air reservoir or brake cylinder, when the pressure is reduced by leakage, etc. There is nothing in the file wrapper or contents to show that the patent office required or that the inventor agreed to abandon what was the great feature of his invention,—the emergency valve,—or to give up whatever range of equivalents his patent might, as modified, fairly cover. Both these patents 360,070 and 376,837 are broad ones, and their claims should be construed to cover the meritorious invention they disclose, unless the language of such claims precludes such a construction. The only question really open on this motion is that of infringement.

#### Patent No. 360,070.

The first claim of this patent is as follows:

"(1) In a brake mechanism, the combination of a main air pipe, an auxiliary reservoir, a brake cylinder, a triple valve, and an auxiliary valve device, actuated by the piston of the triple valve and independent of the main valve thereof, for admitting air in the application of the brake directly from the main air pipe to the brake cylinder, substantially as set forth."

Defendant's device has the main air pipe, an auxiliary reservoir, a brake cylinder, a triple valve, and an auxiliary valve device, independent of the main valve, for admitting air in the application of the brake directly from the main air pipe to the brake cylinder. The means for actuating the auxiliary valve device is stated in the claim to be "the piston of the triple valve"; and the way in which it acts, as shown in the patent, is by direct impingement upon the stem of the auxiliary valve device. In defendant's structure the piston of the triple valve acts upon the auxiliary valve device, not directly, but by opening a port, which reduces pressure on one side of another piston in a supplementary chamber, the movement of such supplementary piston opening the emergency valve. None the less is the auxiliary valve device "actuated" by the piston of the triple



valve, though two pistons do the work of one, and the action of the triple-valve piston is indirect instead of direct. Such an addition to the mechanical details of the combination is within the doctrine of equivalents, when the original invention is a broad one, as this undoubtedly is, and the language of the claim fairly covers it, which is the case here; the word "actuated" being applicable equally to indirect and to direct actuation. Nor will it avail defendants, as against the claim of a broad patent, that the addition to the mechanism is itself an advance in the art,—an advance, it may be noted, which is not theirs, but one they have appropriated from a subsequent patent of the same inventor. The person who discovered the advantage of a supplemental motor for the emergency valve, and devised its mechanism, was, as the court of appeals has held, entitled to a broad patent for that highly meritorious invention, which was essential to complete success in the art; but that circumstance did not entitle him to appropriate the meritorious and equally essential emergency valve of the earlier patent, so long, at least, as he actuated his supplemental motor in the way in which such earlier patent claimed, viz. by the piston of the triple valve.

The second claim of No. 360,070 is as follows:

"(2) In a brake mechanism, the combination of a main air pipe, an auxiliary reservoir, a brake cylinder, and a triple valve having a piston whose preliminary traverse admits air from the auxiliary reservoir to the brake cylinder, and which by a further traverse admits air directly from the main air pipe to the brake cylinder, substantially as set forth."

The discussion of the first claim applies equally to this one. In the first claim, actuation by the piston of the triple valve was made an element. In this claim the inventor more closely limits the mode of such actuation. It is to be by a "further traverse" of that piston. The means shown in the patent is by direct impingement upon the stem of the emergency piston. The defendant avails of the "further traverse" to set in motion supplementary devices which act upon the emergency valve. Both these claims are infringed, as is also the fourth. The fifth, which has not been elaborated upon the argument, contains the additional element of a check valve, and the question of its infringement may be left for final hearing.

#### Patent No. 376,837.

The first claim of this patent is as follows:

"(1) In a brake mechanism, the combination of a chamber or casing having direct connections to a brake cylinder and to a brake pipe, respectively, a valve controlling communication between said connections, and a piston or diaphragm which is independent of and unconnected with a triple-valve piston, and is actuated by pressure from an auxiliary reservoir in direction to impart opening movement to said valve, substantially as set forth."

This is the "supplemental chamber system first conceived and embodied by the patentee," an invention which the court of appeals has held to be a broad one, and entitled to a wide range of equivalents. When we speak of anything as actuated by air-pressure, the phrase necessarily implies movement in one direction or another, as the pressure is increased or diminished. Whether it is set from

rest into motion by applying pressure or by withdrawing it, the phrase "actuated by pressure" fairly describes the operation. The question whether defendant's present device infringes this claim, as did the two devices which were before the court in the former suit, is a narrow one. The claim of the patent is so fully discussed in the decision of the court of appeals that it will only be necessary to describe defendant's new device. The supplemental piston, Q, when at rest, is pressed upon from below by train-pipe pressure. It remains at rest because the space between its face and the inclosing walls of the chamber in which it moves is filled with air of like pressure, which reaches such space from the train pipe through two narrow conduits, p and u, and a connection, t. When the device is actuated upon the excess stroke of the triple-valve piston, the connection, t, is moved; the conduit, p, is, for an instant, closed, and then opened to the outer air. Thereupon the space above the piston is voided of compressed air, and the train-pipe pressure from below, being no longer counterbalanced by pressure in the chamber above, moves and unseats the valve. It is actuated therefore by the withdrawal of the air pressure from the chamber above, which, before it is thrown open to admit of such withdrawal, has been cut off from all connection with the train pipe. Pressure from the auxiliary reservoir at no time operates upon it either to hold it at rest or to put it in motion. Defendant contends that the claim of the patent must be restricted so as to cover only supplemental devices which are actuated by pressure from the auxiliary reservoir, and therefore that its present device does not infringe. The phrases "train-pipe pressure" and "auxiliary reservoir pressure" had, prior to the granting of this patent, acquired a well-known meaning in the art, and the use of one in a claim could hardly be construed to mean the other. But complainant contends that the phrase used in this claim to describe the means for imparting motion to the supplemental piston is not "actuated by auxiliary reservoir pressure," nor "actuated by pressure from the auxiliary reservoir," but "actuated by pressure from an auxiliary reservoir." If some one should reproduce every detail of the claim with the single exception of adding a separate and additional chamber or reservoir, which was charged from the auxiliary reservoir, and then cut off from it, and should use the force thus stored in that additional or supplementary chamber or reservoir for the sole purpose of imparting motion to the supplemental piston, his device would, within the ordinary use of words, contain the element of actuation "by pressure from an auxiliary reservoir," whether the additional chamber were contained as a subreservoir within the auxiliary reservoir proper, or were placed entirely outside of the latter. The charging of such additional reservoir, not from the auxiliary reservoir, but in the same way as the auxiliary reservoir itself is charged, viz. by admitting train-pipe pressure into it through a charging port, and then cutting off connection with the train pipe, does not seem to involve any substantial difference; and where the patent is a broad one, as this is, with a full range of equivalents, the maker of such a device may fairly be held an infringer. Whether the device of the defendant contains such an

additional auxiliary reservoir in the chamber, P, above the piston face, is the question in dispute. For the brief moment when, after being charged, it is cut off from the train pipe, it seems to be such, and the compressed air which it contains to be within a broad definition of "auxiliary reservoir pressure," viz. air compressed at the locomotive, and which, passing through the train pipe, has got beyond a charging port, which thereafter cuts off its connection with the source of supply, and detains it as stored-up pressure to be used in an emergency. In view of the broad construction given to 376,837 by the court of appeals, the defendant's device must be held to infringe this claim. Infringement of the third and fourth claims is not so clear, and those questions must be reserved for final hearing.

Patent No. 393,784.

This is the patent to Park, which the court of appeals held to be a subordinate one, entitled to but a narrow construction. Infringement is doubtful, and the question had best be determined upon fuller testimony at final hearing.

Complainant may take an order for preliminary injunction in conformity with this opinion.

---

BURRILL et al. v. CROSSMAN et al.

(District Court, S. D. New York. November 28, 1894.)

1. CHARTER PARTY—DEMURRAGE—CESSER CLAUSE.

The charter party of the bark K. B. provided that her cargo of lumber should be discharged at Rio at the rate of 20,000 feet per day; that the master should sign bills of lading as presented by the charterer; vessel to have a lien on the cargo for all freight and demurrage; and charterer's responsibility to cease when vessel is loaded and bills of lading signed. The lumber was shipped, and a bill of lading presented by the charterer, and signed by the master, deliverable to order, "freight payable as per charter," but without any other reference to the charter party. Delay in discharging having arisen at Rio, through actual naval warfare in the Bay of Rio, *held*: (1) That under the contradictory provisions of the charter party, the charterer was not entitled to exemption from liability under the cesser clause where he had presented for signature a bill of lading which, contrary to the provisions of the charter, did not give the ship a lien on the cargo for the charter demurrage; (2) that the reference in the bill of lading, "freight as per charter party," did not impose on the consignee the duty of paying charter demurrage, without reference to any fault in the consignee; and that the charterer, therefore, remained liable for demurrage, if any, due under the charter provisions.

2. SAME—WARFARE AT PORT OF DISCHARGE—NO SAFE ANCHORAGE—TO DISCHARGE AND RECEIVE, CONCURRENT DUTIES—SHIP'S INABILITY TO DISCHARGE—SETTLEMENT BY MASTER VALID.

The charterer, being required "to designate a safe anchorage ground at Rio," and "to discharge at the rate of 20,000 feet of lumber per day, or pay demurrage on default," pleaded that it was impossible to remove the cargo sooner than was done, by reason of naval warfare in Rio Bay, and a subsequent adjustment with the master at Rio, and payment and satisfaction of all claims. *Held*, on exceptions, that this plea was a complete defense; that the duty of the ship to discharge and of the consignee to receive were concurrent duties; that the answer of "impossibility to remove the cargo" included impossibility of the ship to perform her duty to discharge, which precluded any right to recover demurrage

while that impossibility continued; that the duty of the charterer to designate a safe anchorage ground, no time being named, was to be performed within a reasonable time, according to the circumstances; and that the major force of naval warfare was a valid excuse for the delay in designating a safe place of discharge; and that no "default" appeared for which demurrage could be claimed.

On Further Hearing.

SAME—NAVAL OPERATIONS—MAJOR FORCE—"DEFAULT" IN UNLOADING.

Where the charter contained no definite number of lay days for unloading, but provided for discharge at the rate of 20,000 feet of lumber per day from the time the vessel was ready to discharge, with \$59.46 demurrage for each day of detention by "default of the charterer," and the answer alleged naval operations in the port of discharge in consequence of which it was "impossible to remove the cargo from the vessel sooner than it was removed": *Held* (1) upon exceptions, that the duty of the ship to deliver, and the charterer to receive, were concurrent duties, both of which were included in the "removal" of the cargo from the ship, and that there was no "default" on the part of the charterers so as to incur demurrage during the time that the ship by reason of such naval operations was unable to deliver; (2) that the determination of facts in regard to such obstacles in delivery in a distant port were peculiarly within the province of the master or the ship's local agent, and that a settlement by them in respect to any claim for demurrage dependent on such facts was presumptively valid and conclusive; (3) that it having been admitted on the argument of exceptions that the facts were substantially as pleaded in the answer, and the cause having been submitted for decision, and decided thereon, no amendment of the libel should be allowed in order "to confess, avoid, or explain," under the fifty-first rule in admiralty, where the application therefor showed no mistake, nor any facts incompatible with the legal effect of the facts stated in the answer.

This was a libel by William Burrill and others against William H. Crossman and others to enforce a lien for demurrage. The case was heard as to the effect of a clause in the bill of lading providing that the charterers' responsibility should cease upon the loading of the vessel and the signing of the bills of lading; also upon exceptions to the rest of the answer, as constituting an insufficient defense.

George A. Black, for libelants.

Wheeler & Cortis, for respondents.

BROWN, District Judge. The above libel was filed to recover for 53 days' demurrage, for the detention of the bark Kate Burrill, at Rio de Janeiro in the unloading of a cargo of lumber at the stipulated charter rate of \$59.46 per day. The respondents in their charter of the vessel from the libelants had stipulated that the vessel should—

"Be discharged at the rate of 20,000 feet per day, lay days to commence from the time the vessel was ready to discharge cargo, and written notice thereof given to the libelants or their agent; and that for each day of detention by default of said parties of the second part or their agent \$59.46 should be paid; vessel to discharge at safe anchorage ground in Rio Bay, designated by charterers or their agent."

The charter contained the further stipulations:

"Vessel to have an absolute lien on the cargo for all freight, dead freight, and demurrage; charterers' responsibility to cease when the vessel is loaded

and bills of lading are signed; bills of lading to be signed as presented without prejudice to this charter; the vessel to be consigned to charterers' agents at port of discharge."

The answer alleged that the lumber was shipped to the libelants' vendees in Rio under a bill of lading to order, which was indorsed to the vendees of the timber, and by the latter again indorsed to sub-vendees before the arrival of the bark; that the delay was caused wholly by the acts of public enemies at Rio, to wit, certain vessels of war which were then in the harbor and making war upon the government of Brazil; and that the firing between said vessels of war and the said forts made it impossible to remove the said cargo from the said vessel any sooner than it was removed. And further, that the captain of the vessel and the agent of the libelants acquiesced in the delay and recognized the necessity therefor; and when said cargo was delivered, accepted and received by the vendees, the sum of £515. 6s. 5d. was accepted in full satisfaction and payment of all claims under the charter party. The respondents further claim that they were relieved from all liability by the cesser clause of the charter above quoted.

For the convenience of the parties, and to save the expense and delay of a commission to Brazil to take proof of the facts pertaining to the other defenses, the cause was brought to trial as to the effect of the cesser clause above quoted.

The provisions of the charter party are in form contradictory. One clause declares that for every detention by default in receiving or discharging the cargo by said parties of the second part, or agent (the respondents), the demurrage, as above specified, shall be paid by them. The other clause declares that their responsibility shall cease when the vessel is loaded, and bills of lading are signed. A previous clause also provided that the cargo should be discharged at the port of destination at the rate of 20,000 per day.

The general intent of these provisions taken together manifestly is, that the ship shall be paid, not only freight, but demurrage for detention beyond the stipulated time in discharging. The various clauses of the charter in this regard should be interpreted consistently, so far as possible, with this general purpose, as well as with its further presumed purpose to relieve the charterer from the responsibilities attending a discharge of cargo to purchasers in distant ports, where the ship by means of the other provisions of the charter, having secured to her a lien upon the cargo for both freight and demurrage, has it in her power to enforce payment of her claims by means of that lien, without a resort to the charterers at the port of loading. In the cases of *Clink v. Radford* [1891] 1 Q. B. 625, and *Hansen v. Harold* [1894] 1 Q. B. 612, the relation of these clauses to each other has been recently carefully considered in the English court of appeal, and the rule laid down is, that these different clauses are to be applied and construed with reference to each other, and to the purposes above stated; and that where "the provision for a cesser of liability is accompanied by the stipulation as to a lien, then the cesser of liability is not to apply in so far as the lien, which by the

charter party the charterers are enabled to create, is not equivalent to the liability of the charterers"; and that "where the provisions of the charter party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability."

This is substantially the construction that was given by this court to the cesser clause in the case of *Hatton v. The Belaunzaran*, 26 Fed. 780; where notwithstanding the cesser clause, the charterer was held liable to pay demurrage, because under the right to effect a subcharter, he had required the ship to take a cargo of salt not of sufficient value at the port of discharge to pay anything more than the freight stipulated for in the subcharter.

In the present case the respondents, as charterers, had the right to require the master to sign bills of lading as presented, without prejudice to the charter. This does not mean that the bill of lading itself, or the consignee under it, should be subject to all the obligations of the charter; it means only that the charterers' obligations to the ship and owners should not be affected by the terms of the bill of lading thus signed on the charterers' requirement. *Gledstanes v. Allen*, 12 C. B. 202.

The bill of lading for the lumber in question provided for "paying freight for said lumber as per charter party dated 7th March, 1893, and average accustomed." A bill of lading in this form imposed upon the indorsee of the bill of lading who received the goods under it none of the stipulations of the charter except such as pertained to the payment of freight. *Chappel v. Comfort*, 10 C. B. (N. S.) 802; *Smith v. Sieveking*, 4 El. & Bl. 945; *Fry v. Bank*, L. R. 1 C. P. 689; *Dayton v. Parke*, 142 N. Y. 391, 400, 37 N. E. 642. It was no notice to him of any other provisions of the charter, such as that he must discharge a certain quantity of lumber per day, or in default thereof pay a specified price per day for any further detention of the vessel. Under this bill of lading, the vendee was entitled to take the goods within a reasonable time, according to the circumstances on arrival, and under the ordinary rules of law as to liability to damages for detention, such as apply in the absence of any specific agreement. This is a very different liability from that of a specific agreement that assumes all risks of detention from whatever cause, and agrees upon a specified rate of damages.

Had the bill of lading provided for the payment of freight and "all other conditions as per charter party", the latter provision would have been construed *ejusdem generis* as imposing upon the consignee the payment of something more than freight, and would have included the obligations referred to in the charter party respecting the rate of delivery, and the payment of the demurrage specified; though not necessarily including independent provisions of the charter party relating to different subjects. *Russell v. Niemann*, 17 C. B. (N. S.) 163; *Serraino v. Campbell*, 25 Q. B. Div. 501, [1891] 1 Q. B. Div. 283; *Wegener v. Smith*, 15 C. B. 285; *Porteus v. Watney*, 3 Q. B. Div. 534.

What the respondents, therefore, in this case virtually required the master to do was, to give a bill of lading for this lumber that required the master to deliver it to the indorsee of the bill of lading, without the payment of any charter demurrage at all, such as the respondents had agreed should be paid; but which bound the consignee to pay for such demurrage only as might arise through his own fault. Whether this was done inadvertently, or by design, is immaterial as respects the ship. For the ship could only claim of the vendee according to the bill of lading. The bill of lading required the ship to deliver the cargo contrary to that provision of the charter which provided that the ship should have a lien on the cargo for the charter demurrage. The cesser clause, and the lien clauses, were dependent provisions; each was a consideration for the other; and when the charterers required the ship to forego the benefit of her lien on the cargo for the charter demurrage by presenting, and taking from the master, under the bill of lading clause in the charter, a bill of lading which did not admit of a lien for charter demurrage on this cargo, the charterers could not claim the benefit of the cesser clause as a release of the previous general clause of the charter which made them answerable for demurrage. The decisions above quoted sustain this construction, which will be followed by me, as a just and reasonable construction of these several clauses. The cesser clause, therefore, is not a sufficient defense.

---

### On Further Hearing.

(December 17, 1894.)

**BROWN, District Judge.** The exceptions to the other parts of the answer must be overruled. The facts stated in the answer, the truth of which must be accepted on this argument, amount, in my judgment, to a complete defense. As respects the lay days, the charter provided:

"Lay days to commence from the time the vessel is ready to receive or discharge cargo, and written notice thereof is given to the party of the second part, or agent; and for each and every day's detention or default of the said party of the second part, or agent, \$59.46 shall be paid; \* \* \* vessel to discharge at safe anchorage ground in Rio Bay designated by charterers."

The charter does not fix a definite time from which the lay days are to be computed in any other way than from the time that the ship is "ready to discharge and gives notice thereof." The libel states that the ship arrived at Rio on the 30th of August, and that on the 4th of September, 1893, "notice that she was ready to discharge was duly given," etc.

The answer states, that "by reason of the acts of public enemies, to wit, certain vessels of war which were then in the harbor of Rio de Janeiro, and were engaged in firing upon the forts and making war against Brazil, they were prevented from removing the cargo any sooner than they did"; and that "the firing between said vessels of war and the forts made it impossible to remove the cargo

from the said vessel any sooner than it was removed"; and that after the discharge, the agent of the libelants, and the consignees made a settlement in full satisfaction of all claims under the charter party, and the balance found due was paid.

The substance of this defense is that by reason of the public enemy and actual warfare in Rio Bay, it was "impossible to remove the cargo from the vessel" sooner than was done. It was the vessel's duty "to remove the cargo from the vessel"; for that is the act of discharge; and it was the consignee's duty to receive it as removed; in this case at the rate of 20,000 feet per day. The ship's duty to remove and discharge the cargo, and the consignee's duty to receive, are concurrent duties; and where performance by either is prevented by major force, neither is in "default" unless that risk has been assumed by the charterer or consignee under the contract, which is not the case here. *Ford v. Cotesworth*, L. R. 4 Q. B. 127; L. R. 6 Q. B. 544; *Kay v. Field*, 10 Q. B. Div. 241; *Dahl v. Nelson*, 6 App. Cas. 38; *Carsanego v. Wheeler*, 16 Fed. 248; *The Spartan*, 25 Fed. 44, 51.

This case is quite different from those in which a charterer has contracted to discharge the cargo within a certain time after "arrival," and thereby takes all risks of delay. Under this contract, (1) the charterer was to designate a safe anchorage ground for discharging in Rio Bay, and (2) the vessel was to get in readiness to discharge, and then to give notice thereof, before the lay days would begin. The vessel was not bound to undertake a discharge at an unsafe place; nor was the charterer required to receive the cargo at an unsafe place, nor outside of Rio Bay. No time being stipulated within which the charterer should designate a safe place of discharge, he was bound to do this within a reasonable time, according to all the circumstances. *Henley v. Ice Co.*, 14 Blatchf. 522, Fed. Cas. No. 6,364; *Fish v. 150 Tons of Brown Stone*, 20 Fed. 201, and cases there cited; *Paquette v. Cargo of Lumber*, 23 Fed. 301; *The Spartan*, *supra*. The answer, in effect, alleges that this was done as soon as possible.

The libel does not allege that the vessel was actually ready to discharge at any time before the discharge actually began. It only asserts that notice of readiness was given. That is a very different thing. Such notices are often given by shipmasters in the attempt to set demurrage running, before the ship is ready or able to perform her obligation to discharge. *Carsanego v. Wheeler*, *supra*; *Teilman v. Plock*, 17 Fed. 268, affirmed 21 Fed. 349.

The plea of accord and satisfaction is also a sufficient defense. Questions of safety of the vessel in discharging, of actual ability and readiness to deliver, dependent on the circumstances existing at a distant port, are peculiarly within the province of the master, or the ship's local agent, to consider and to determine in their relations to such a question as that of demurrage; and a settlement by either with the charterer or consignee is presumptively valid and conclusive, and should only be set aside upon such special proofs as in equity would invalidate settlements with the principal, nothing of



which here appears. *Alexander v. Dowie*, 1 Hurl. & N. 152; *The Gulnare*, 24 Fed. 487.

The exceptions are, therefore, overruled.

---

### Motion to Amend Libel.

(December 31, 1894.)

BROWN, District Judge. This case has been twice heard upon exceptions by the libelants to the answer, upon the understanding—at least on the part of the court—that the hearing was to be treated as a trial of the cause, upon the admission of libelants' counsel in open court that the facts were correctly stated in the answer; this course being adopted in order to avoid the expense and delay of a commission to Brazil, in case the facts alleged in the answer should be held to constitute a legal defense. Two opinions have been delivered by the court after these hearings. The latter being adverse to the libelants, their proctor now moves for leave to withdraw the exceptions, and to amend their libel "so as to confess and avoid, explain and add to, the new matter set forth in the answer." This, if allowed, would involve quite a substantial departure from the understanding had, at least by the court, in the previous proceedings, which would have been quite different had it been considered that any such application as the present was to be subsequently made.

The only misunderstanding now alleged by the libelants' proctor I understand to be as to the scope of the words in the answer, "impossible to remove the cargo"; but on the argument and before submission, the court stated that "removal" included delivery by the ship as well as receipt by the consignee.

The last hearing was upon the admission of counsel in open court that the facts were stated with substantial correctness in the answer; viz., that naval warfare in the harbor of Rio "made it impossible to remove the cargo sooner," which the court held to be a major force, under which the consignee or charterer was not in "default"; and further, that the facts respecting such warfare, and the extent of its interference with the vessel's discharge in a distant port were specially within the scope of the master's authority to appreciate and determine, as the representative of the shipowners; and that any settlement made by him in satisfaction of freight and demurrage, or of "all claims," as alleged in the answer, was within his lawful power, and was binding upon the libelants.

The application to confess and avoid, does not set up any facts inconsistent with what was admitted on the previous hearings, and stated in the answer. The affidavit does show that a safe place was at first designated, and the discharge begun; but that the discharge, after it was commenced, was suspended at different times for upward of 53 days, the delay claimed in the libel; and the affidavit does not affirm or suggest that this suspension was not caused solely by the naval hostilities stated in the answer, or that suspension was not the necessary result of those hostilities. The affidavit, there-

fore, inferentially confirms the answer to this extent and the admission made on the argument. The forced interruption of the ship's power to deliver, where no time has been agreed on, stops demurrage, as much as her inability to begin would stop it. It is a case of a concurrent duty in the ship to deliver, because the charterer here did not contract to assume the risk of her inability to deliver 20,000 feet per day; and whenever she was unable to do that, no matter what the cause, she could not claim demurrage. *Ford v. Cotesworth*, L. R. 4 Q. B. 127; *Riley v. Cargo Iron Pipes*, 40 Fed. 605; *The J. E. Owen*, 54 Fed. 185.

The application further states an "intent to allege" that the sum paid was only the amount of the freight due; and to deny the authority of the master, or of Phipps Bros. & Co., agents, to receive that sum in full satisfaction of all claims and demands, and also to deny that they had any authority to make or state an account respecting all claims under the charter party. The denial of the master's authority is a mere question of law. The affidavit does not state that the amount paid at Rio was not there paid and received or intended as a settlement of all claims for freight or demurrage.

The libellant's counsel claims an absolute right under the fifty-first rule of the supreme court in admiralty to amend the libel in order to confess, avoid and explain as above stated. Though such an amendment would undoubtedly be allowed if applied for at a proper time, no such right exists after the parties have proceeded to a hearing upon the pleadings; nor if it did, could it be allowed upon the mere affidavit of the proctor, as in this case, as to what the libellants "intend to allege," where no fact is set forth in the application incompatible with the allegations of the answer, or avoiding their legal effect. As respects mere denials of such allegations, no such amendment is necessary.

The application is, therefore, denied.

---

#### THE KATIE O'NEIL.

#### BLACK DIAMOND COAL CO. v. O'NEIL.

(District Court, N. D. California. December 13, 1894.)

No. 11,065.

#### 1. ADMIRALTY—ENFORCEMENT OF CLAIMS ON MORTGAGES.

Though a court of admiralty has no jurisdiction to entertain independent actions to foreclose mortgages upon vessels, yet, when such court has a fund to dispose of arising from the sale of a vessel, it may entertain claims based on mortgages, pass on their validity and priority, and order them to be satisfied out of the fund, subject to the precedence of all maritime liens and the superior equities of liens and claims other than maritime.

#### 2. SAME—PRIORITIES.

O., the owner of a steam tug, had a running account with the P. Co. for advances and supplies, to secure which, with future advances and credits, he gave his note for \$3,000, secured by a mortgage on the tug. Subsequently he gave a second mortgage on the tug to one B. for advances and supplies. O. made payments from time to time to the P. Co., which called upon him for such payments whenever the amount of his account exceeded

the amount of the mortgage security. When the P. Co. first learned of the mortgage to B., O.'s account exceeded the security by \$612.74, and the P. Co. afterwards made further advances to the amount of \$2,244. The tug having been libeled by another party, and sold, and a surplus remaining in court, claims were presented by the P. Co. and B. *Held* that, as to the advances made by the P. Co. after it learned of B.'s mortgage, its claim was inferior to the equities in favor of B.

**2. SAME—APPLICATION OF PAYMENTS.**

O. made two payments to the P. Co., after it learned of the mortgage to B., of \$2,377.12 and \$300 respectively. The Civil Code of California, where the transactions were had, provides that, in case of application of payments by the court, payment shall be made " \* \* \* (3) of the obligation earliest in date of maturity; (4) of an obligation not secured \* \* \*; (5) of an obligation secured \* \* \*." *Held*, no application having been made by either party, that, in accordance both with this statute and with general equitable principles, the payments made by O. to the P. Co. should be applied, first, to the part of his indebtedness remaining unsecured when the P. Co. learned of the mortgage to B., and then to the reduction of the secured debt.

This was a libel by the Black Diamond Coal Company against the steam tug Katie O'Neil, Patrick O'Neil, claimant. The tug was sold and a surplus remained in the registry of the court. The Pacific Marine Supply Company and William J. Brady file petitions against such surplus.

Petitions against the remainder of proceeds in the registry of the court for supplies furnished and labor done to the tug Katie O'Neil, and for the liquidation of a first and second mortgage given upon the tug to secure debts due and to become due.

M. L. Gerstle and Warren Gregory, for petitioner Pacific Marine Supply Co.

Reddy, Campbell & Metson, for petitioner William J. Brady.

**MORROW**, District Judge. This case now involves the petitions of the Pacific Marine Supply Company and of William J. Brady against the proceeds of sale of the steam tug Katie O'Neil. The claim of the libelant, the Black Diamond Coal Company, and those of several others who intervened, have been previously adjudicated. The claims of the two petitioners above referred to come now before the court on exceptions to two reports filed by the commissioner to whom the above claims were referred for proof. The questions raised by these exceptions involve the priority and liquidation of certain claims made upon the remainder of the proceeds in the registry of the court derived from the sale of the steam tug Katie O'Neil. These claims are as follows: (1) By the Pacific Marine Supply Company, for supplies furnished to the tug, and alleged to constitute a lien, under the state statute, amounting to \$1,107.82. Of this sum the commissioner allowed \$196.70 for coal furnished for the use of the Katie O'Neil. The proof, as to all the other items alleged to have been furnished for the use of the tug, does not satisfactorily establish the claim that the supplies were in fact for the use of that vessel. (2) By William J. Brady, for materials supplied and labor done to the tug, amounting to \$42.20, of which the commissioner allowed the sum of \$35.20, the difference of

\$7 being for an item that was furnished more than a year before suit, and was barred, therefore, by the state statute under which the lien was claimed. No exception was taken to this allowance, and the report of the commissioner in that respect should be confirmed, the charges appearing to be proper and reasonable. (3) A claim for \$3,000, by the Pacific Marine Supply Company as the holder of a note and mortgage for that amount, given by Patrick O'Neil, with the tug as security, on April 29, 1893. (4) A claim for \$1,320.58, by William J. Brady as the holder of a note and mortgage in that sum, given also by Patrick O'Neil, with the tug as security, on July 21, 1893, and constituting a second mortgage on that vessel.

With respect to the claims made against the proceeds to satisfy these two mortgages, it is now indisputable law that this court, as a court of admiralty, would have no jurisdiction to entertain independent actions brought to enforce or foreclose mortgages given upon vessels. *The John Jay*, 17 How. 399. But, when the court has a fund to dispose of, as in this case, it may entertain claims based on mortgages, pass upon their validity and priority, and order such to be satisfied out of the fund in the hands of the court, subject, however, to the paramount precedence of all maritime liens, and the superior equities of liens and claims other than maritime. *The Angelique*, 19 How. 239; *The Lottawanna*, 21 Wall. 558; *The Island City*, 1 Low. 375.<sup>1</sup> The sum realized from the sale of the tug was \$5,200. Of this amount, after satisfying the claim of the libellant and several interveners, there remains in the registry the sum of \$2,317.46. This amount being insufficient to liquidate in full all of the four claims above referred to, it therefore becomes important to determine which of the claims are entitled to priority, and in what amount. As to the two claims for supplies, materials, and labor, no difficulty arises. They are undoubtedly entitled to preference over the mortgages. The contention is with respect to the latter, and it concerns, not so much the priority, as between themselves, of the two mortgages, as it does the application to be made by the court of two payments given by O'Neil, the owner of the tug, upon the running account for advances and supplies which the first mortgage held by the Pacific Marine Supply Company was designed to secure.

The exceptions to the reports of the commissioner are taken by William J. Brady, holder of the second mortgage. He excepts, first, because the commissioner allowed \$196.70 for coal furnished the tug; whereas, it is claimed, he should have found that there was nothing due the Pacific Marine Supply Company for supplies. Secondly, he excepts because the commissioner has not found or reported to the court how much, if anything, is now due and unpaid on the note and mortgage held by the Pacific Marine Supply Company on the tug; whereas, it is claimed, the commissioner should have found that said note and mortgage have been fully paid off and discharged as against the subsequent mortgagee, William J. Brady. Thirdly, he further excepts because the commissioner has not found how much, if anything, is now due and unpaid on the note and mortgage held by

<sup>1</sup> Fed. Cas. No. 7,109.

William J. Brady; whereas, it is claimed, he should have found that the whole amount of said note and mortgage is still due and unpaid.

As to the first exception, which is directed to the allowance of \$196.70 for coal, the report of the commissioner should be confirmed. The aggregate of the claims for supplies alleged to have been furnished to the tug by the Pacific Marine Supply Company, and included in their petition against the proceeds, amounts to \$1,107.82. The commissioner reported in favor of one item only, and then but for one-half of the amount claimed. He reported the sum of \$196.70 as being justly due. This was for coal furnished to the tug and actually consumed by her. While the testimony tends to show that all the coal for which a claim is made was furnished by the company, the evidence of Capt. O'Neil, the owner, established the fact that but one-half of it was used by the tug itself. Therefore, obviously, a lien for but one-half of that quantity could be impressed on the tug or collected from the proceeds of sale. The remaining items included in this claim may be dismissed with the observation that the proof of their being furnished for the use of, and being actually used by, the tug, is too insufficient to justify the vesting of a maritime lien.

The remaining two exceptions will have to be disposed of together. They involve the important question of this case, which is one essentially of the application to be made by the court of two payments by O'Neil upon the running account he had with the Pacific Marine Supply Company for advances and supplies furnished to the tug, which account was secured to the extent of \$3,000 by O'Neil's individual note in that sum and by a mortgage on the tug. A statement of the leading facts is necessary to convey a proper understanding of the law applicable thereto. Patrick O'Neil was the sole owner of the steam tug Katie O'Neil. He had a running account with the Pacific Marine Supply Company, commencing March 17, 1893, and continuing until about the end of that year, for advances in cash and supplies and merchandise furnished for the alleged use of the tug in, and incidental to, her employment of towing barges to and from certain quarries and conveying merchandise and supplies to those places. O'Neil made payments on this running account from time to time. A copy of the account was introduced in evidence and marked "Exhibit A." It shows the various sums advanced and the amounts charged for merchandise furnished to Capt. O'Neil for the alleged use and benefit of the tug, and also the several credits made by the latter. To secure the Pacific Marine Supply Company on this running account, Capt. O'Neil, on April 29, 1893, gave his note to the company for \$3,000, and mortgaged the tug to them as security therefor. The mortgage was duly recorded on that day at the customhouse in San Francisco. It was testified that the consideration for this note and mortgage was \$2,000 in cash and a further credit of \$1,000. Practically speaking, it was for debts due and to become due. The note recited that it was due in four months from date (April 29, 1893), and that it bore interest at 1 per cent. per month. On July 21, 1893, Patrick O'Neil gave a second mortgage on the tug to William J. Brady for

\$1,320.58, to secure his note for that sum, payable November 30, 1893. This mortgage was also duly recorded in the customhouse. The consideration was \$500 in cash, and \$820.58 for labor performed and materials furnished to the tug. The Pacific Marine Supply Company, holder of the first mortgage, had no notice of the existence of the second mortgage until about October 28, 1893. On the other hand, Brady claims that he did not know of the first mortgage when he took his mortgage to secure O'Neil's note for \$1,320.58. Capt. O'Neil says he cannot state whether he informed Brady of the first mortgage on the tug, and Brady displays an equal uncertainty of recollection, and seems to have contented himself with referring the matter to his attorneys for investigation, and cannot now say whether he ever received any reply from them on the subject. The recording of the first mortgage was, however, constructive notice to all subsequent incumbrancers, and Brady, therefore, took his mortgage subject to the prior lien. At the time when the Pacific Marine Supply Company first became aware of Brady's mortgage, which, as stated, was about October 28, 1893, the account of O'Neil with the company showed a total indebtedness of \$14,697.19, upon which payments had been made to the amount of \$11,084.45, leaving a balance due of \$3,612.74. This amount, it will be observed, was \$612.74 in excess of the mortgage security of \$3,000, and hence this balance of \$612.74 was, on October 28, 1893, an unsecured indebtedness in that amount. Subsequent to the 28th of October, 1893, when the Pacific Marine Supply Company received notice of Brady's mortgage, the company continued to make advances and to furnish merchandise. These advances reached the further or additional sum of \$1,988.75 on December 11, 1893, when O'Neil made the next payment of \$2,377.12; and \$2,244 on January 6, 1894, when he made the final payment of \$300 upon the account. With respect to these additional advances of money and charges for merchandise furnished subsequent to the notice of October 28, 1893, I find no difficulty in determining that they stand, in this account with O'Neil, inferior to the equities in favor of the claim of Brady under his second mortgage. *Tapia v. Demartini*, 77 Cal. 383, 19 Pac. 641.

We come now to the real question in controversy. As before stated, O'Neil made two payments to the Pacific Marine Supply Company subsequent to October 28, 1893. The first, on December 11, 1893, was for \$2,377.12, and the other, on January 6, 1894, was for \$300. Together they aggregate \$2,677.12. It is with the application, to be made on this account, of these payments, that the question of difficulty arises. O'Neil made no specific application of these payments to the extinction of any particular debt or debts. But evidence was introduced upon the hearing of the exceptions tending to show that the creditor did make an appropriation of these payments, and that such was made by it with a view of extinguishing that portion of the running account which exceeded the amount of the security of \$3,000. In other words, that the creditor applied the payment of \$2,377.12 on December 11, 1893, first to the unsecured portion of the running account, amounting to \$612.74, and the balance of \$1,764.38 on the secured portion of \$3,000. The secretary of

the company testified that when the debts exceeded the amount of the collateral, viz. \$3,000, payment was urged, and that the account be reduced to the amount of the mortgage. It frequently happened that the account exceeded the sum of \$3,000, whereupon a demand was made upon O'Neil that he should pay money and reduce the indebtedness in excess of the mortgage. O'Neil had a contract with the government, and, as he was paid by drafts on the treasury, he would turn the drafts over to the company as payments on account. The state of this account with O'Neil for the period commencing March 17, 1893, and ending October 28, 1893, was as follows:

Debit side of the account:	
Cash advanced.....	\$ 9,987 80
Merchandise charged.....	4,599 26
Interest .....	110 13
	<u>\$14,697 19</u>
Credit by payments as follows:	
April 17, 1893.....	\$ 338 74
May 31, " .....	1,151 06
June 13, " .....	1,976 03
July 7, " .....	1,999 99
August 4, " .....	1,273 14
September 5, " .....	2,745 49
October 25, " .....	1,600 00
	<u>\$11,084 45</u>
Balance due.....	\$3,612 74

The payments of December 11, 1893, of \$2,377.12, and of January 6, 1894, of \$300, were credited upon the account in the same manner as the preceding payments. The account itself does not show that these payments were applied to the extinction of any particular debt or debts. The two payments are simply entered in the order of their date, just as if they were credits upon the entire account, irrespective of the extent to which the indebtedness was secured. But it was immaterial to the company whether the payments were applied to the first or last items of the account, if they were first applied to extinguish the indebtedness in excess of the security. The mortgage was a continuing obligation, and was so treated by both parties; but whether it remained stationary, and covered only the first items of the account to the amount of \$3,000, or moved up and covered later items as payments were made and applied to the first items of the account, did not concern the company in dealing with the account and its security. In either way, the mortgage was held for the full amount of its pecuniary obligation. The credits in the account, as they are entered, are therefore consistent with the intention of the company to apply the payments, first, to the extinguishment of the unsecured portion of the account, whether applied to the payment of the debts in the order of their priority or not. Hence I conclude that there was an appropriation of the payments by the creditor, first, to the unsecured portion of the account, and then the balance to the account as secured by the mortgage on the tug.

But, if I am wrong in this view,—and the fact was that neither the debtor nor the creditor made any specific appropriation,—it then devolves, in accordance with the well-settled rule relating to the appropriation of payments, upon the court to do so. *Cremer v. Higginson*, 1 Mason, 323, Fed. Cas. No. 3,383; *Stone v. Seymour*, 15 Wend. 19; *Field v. Holland*, 6 Cranch, 8. All of the above authorities agree that the court, in the discharge of this duty, is to be governed by a sound discretion. While it is true that courts of admiralty are not courts of equity, yet whenever the ends of justice require, or the peculiar exigencies of a particular case demand it, they do not hesitate to apply equitable principles. *The Eclipse*, 135 U. S. 599, 608, 10 Sup. Ct. 873. In this case the equitable power in disposing of the fund may be said to be plenary, for the court, in distributing it, will seek to do full and complete justice. This proposition is well stated in *National Bank, etc., v. Mechanics' Nat. Bank*, 94 U. S. 439:

"The rule settled by this court as to the application of payment is that the debtor or party paying the money may, if he chooses to do so, direct its appropriation; if he fail, the right devolves upon the creditor; if he fail, the law will make the application according to its own notions of justice. Neither of the parties can make it after a controversy upon the subject has arisen between them, and a fortiori not at the trial."

But it is claimed that section 1479 of the Civil Code of this state prescribes a rule for the application of payments that must govern the court. This section, after providing that the debtor shall have the primary right of making an appropriation of payment, and, if he fail, that the creditor may then do so, reads as follows:

"If neither party makes such application within the time prescribed herein, the performance must be applied to the extinction of obligations in the following order: \* \* \* (1) Of interest due at the time of performance; (2) of principal due at that time; (3) of the obligation earliest in date of maturity; (4) of an obligation not secured by a lien or collateral undertaking; (5) of an obligation secured by a lien or collateral undertaking."

In support of the claim of the second mortgage, it is contended that O'Neil's payments to the Pacific Marine Supply Company should be applied to the account, in accordance with subdivision 3 of the section of the Civil Code, in extinguishment of the debts in the order of their priority, the oldest being paid first. This method of appropriation, it is claimed, would leave the last items of the account unpaid and unsecured. On the other hand, it is contended, in support of the claim of the first mortgage, that the payments should be applied in accordance with the requirements of subdivisions 4 and 5 of the section; that is to say, first to the extinguishment of the debts not secured by the mortgage, and the balance to the debts so secured. This section of the Code does not appear to have been passed upon by the courts of this state with respect to the relations of these three provisions to each other. In the light of authority, a reasonable construction of these subdivisions would seem to be that subdivision 3 must govern in a case where the obligations are either secured or unsecured, and subdivisions 4 and 5 where one is secured and the other is not secured. In this view of the law, the payment of \$2,377.12 on December 11, 1893, would be applied, first,



to the payment of the indebtedness of \$612.74 in excess of the mortgage, leaving \$1,764.38, and the payment of January 6, 1894, of \$300, aggregating \$2,064.38, to be applied to that portion of the account secured by the mortgage. Deducting this last amount from \$3,000, the amount of the mortgage, and there would remain a balance of \$935.62, for which the mortgage stands as a security.

Upon a careful consideration of the various equities existing and claimed for in this case, I think the method of applying the payments in question as here indicated is correct in principle and in accordance with the requirements of the statute. This same rule of appropriation was sanctioned by the supreme court of the United States in the case of *Field v. Holland*, 6 Cranch, 8. Chief Justice Marshall, in delivering the opinion of the court, thus clearly stated the equitable principle that should govern in such a case. He said:

"The principle that a debtor may control, at will, the application of his payments is not controverted. Neither is it denied that, on his omitting to make this application, the power devolves on the creditor. If this power be exercised by neither, it becomes the duty of the court; and in its performance a sound discretion is to be exercised. It is contended by the plaintiffs that, if the payments have been applied by neither the creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention. The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious. That course has been pursued in the present case."

This rule so commends itself for its fairness and equity, and, in my opinion, applies so well to the facts of the case at bar, that further citation of authority would seem to be unnecessary. It may be stated, however, that it was followed, upon the authority of *Field v. Holland*, in *Schuelbenburg v. Martin*, 2 Fed. 747, by the circuit court, as well as in other cases therein referred to. See, also, *Langdon v. Bowen*, 46 Vt. 512; *Pierce v. Sweet*, 33 Pa. St. 151; *Gaston v. Barney*, 11 Ohio St. 506. It is difficult to conceive of any different rule that would more nearly do justice to all concerned. It is true that, because of the inadequacy of the proceeds to answer all the proved claims, the mortgage debt of Brady will suffer to some extent; but it must be remembered that he holds a second mortgage, and that his claim is the least preferred of those now before the court. And in this respect the claim of the Pacific Marine Supply Company, as to that part of its running account subsequent to notice of Brady's mortgage, which is, confessedly, inferior to the equities of the latter's claim, is in a worse position; for the partial satisfaction of Brady's mortgage will exhaust the remainder of proceeds, and the company, therefore, will derive no satisfaction from the proceeds of the sale of the tug for such advances as were made and merchandise furnished subsequent to October 28, 1893. It may be said that the fault lies with the insufficiency of proceeds to meet all the demands according to their various order and equities, and not with the inherent

justness of the principles applied by the court in making this final distribution, which will be as follows: As the court is advised that there is still pending before the commissioner for his report a claim for seaman's wages, amounting to \$240, this sum should be set apart, with such costs as are likely to accrue, awaiting the adjudication of that claim. The sums of \$196.70 and \$35.20 will be paid to the Pacific Marine Supply Company and William J. Brady, respectively, for supplies, materials, and labor done to the tug. The sum of \$935.62, the balance due on its mortgage on the tug, will be paid to the Pacific Marine Supply Company. The residue, after paying the costs of suit, will then be paid to William J. Brady, in partial satisfaction of his second mortgage. He will also get the benefit of such part of the amount reserved to abide the result of the claim for seaman's wages as the court may decide the latter not entitled to. Let decree for these several amounts be entered and an order of distribution made.

---

THE HATTIE BELL.

JOHNSON v. THE HATTIE BELL (WOOD et al., Interveners).

(District Court, D. Oregon. December 17, 1894.)

No. 3,486.

ADMIRALTY—REARREST OF VESSEL—WHEN PERMISSIBLE.

The rule allowing the rearrest of a vessel in case of misrepresentation and fraud or of an improvident release goes no further than to allow such rearrest before judgment, and after the cause of action has become *res judicata* there is no power in the court to order a rearrest.

This was a libel by A. H. Johnson against the steamer Hattie Bell. Z. C. Wood and others intervened, and petitioned for the rearrest of the vessel, and her condemnation in satisfaction of their claims, as set forth in their libel, under which the vessel had been previously arrested, and discharged upon bond.

James F. Watson, for petitioners.

Robert T. Platt, for claimant.

BELLINGER, District Judge. The Hattie Bell was heretofore libeled, at the suit of the petitioners, to enforce certain liens held by them, and was released upon a bond filed by the claimant. Upon her release the vessel was taken into the custody of a state court by the receiver of a company having a mortgage lien thereon, where she was subsequently sold on foreclosure, and passed by successive transfers to her present claimant, the Washougal & La Camas Transportation Company. The interveners in the suit referred to now petition the court, alleging that the bond upon which the release was had was a fraudulent bond; that the surety therein is without property, or ability to respond to the judgment entered thereon; that he signed such bond through the misrepresentations of the claimant of the vessel; and that the affidavit attached to such bond, purporting to be made by such surety, is false and forged,—and they pray for a rearrest of such vessel, and for her condemnation in satisfaction of the liens of the petitioners, as set forth in their libel.

Subsequent to the release of the vessel, the interveners, with notice of the claim made by the surety in the undertaking for the release of the vessel that a fraud had been practiced upon him, and that said bond was worthless, took a judgment in this court against the stipulators on such bond for the aggregate amount of their claims.

The rule allowing the rearrest of a vessel in case of misrepresentation and fraud, or of an improvident release, goes no further than to allow such rearrest before judgment, and in such case the power must be exercised with great care and caution: It is argued in support of the petition that there is a distinction between cases where it is sought to amend the libel so as to increase the amount claimed, and those cases where no such amendment is sought, and that this explains the restriction, upon the power of the court to order a rearrest, to cases that have not proceeded to judgment. I am of the opinion that such distinction does not exist. The reason why a rearrest will not be allowed after judgment is because the cause of action has passed into *res judicata*. It is true that, in the cases cited by the present claimant, applications were made to amend the libels so as to increase the amount of the claims, as well as for rearrests of the released vessels, but the refusal to order the rearrests had nothing to do with the question of amendment. There could be neither amendment nor rearrest, because of want of power in the court to direct either; the cause of action, as already stated, having become *res judicata*. If it was within the power of the court to grant the prayer of the petition, its exercise, upon the facts presented, would not be justified. In taking their judgment, the interveners chose to rely upon the bond, with knowledge of its character, or with such notice as has the effect of knowledge. The bond is not a nullity. The fraud that is charged in respect to it affects its sufficiency, not its obligatory character. The proceedings and sale in the state court were authorized by what was done here in the petitioners' case. The comity that exists between courts, and the importance that attaches to such sales as this, will not permit them to be disregarded, unless the authority is clear and the circumstances of the case imperatively demand it. The petition is dismissed.

---

#### THE HAYTIAN REPUBLIC.

UNITED STATES v. THE HAYTIAN REPUBLIC (BURCKHARDT et al.,  
Interveners).

(District Court, D. Oregon. December 17, 1894.)

No. 3,403.

**1. MARITIME LIENS—MONEY LOANED TO OWNERS—ADVERTISEMENTS FOR BUSINESS.**

Money loaned to the owners to be used in running the vessel, and in fact applied to that purpose, is a credit to the owners, and not a lien on the ship; and the same is true of bills for the ship's advertisements for business.

**2. SAME—FORFEITURE OF VESSEL FOR SMUGGLING—KNOWLEDGE OF SUPPLY MEN.**

The fact that a ship has been arrested for smuggling, and released on bond, *held* sufficient to put persons subsequently furnishing her with sup-

plies upon inquiry as to her character, and to defeat their claims, as against the government's right to a forfeiture.

3. SAME—SUPPLIES IN HOME PORT—OREGON STATUTE.

The Oregon statute which gives a lien for supplies furnished in the home port applies only to vessels navigating the waters of the state, and not to a vessel used exclusively in navigating the seas between ports of the state and foreign ports.

4. SAME—FORFEITURE—LIENS FOR PREVIOUS SUPPLIES.

Forfeiture of a vessel for smuggling cuts off liens for supplies furnished prior to the cause of forfeiture. The *St. Jago de Cuba*, 9 Wheat. 410, distinguished.

5. SAME—CLAIMS FOR PASSAGE MONEY—ILLEGAL PAYMENTS.

The purchase by Chinese persons of tickets from Vancouver to an Oregon port for about six times the regular fare, *held* to create a presumption of knowledge on their part of the fact that the payments were in large part to secure the landing of Chinese persons in this country in violation of law.

These were interventions by Burckhardt Bros. and others to secure payment of various claims out of the proceeds of the Haytian Republic, which was heretofore adjudged to be forfeited to the United States for smuggling. See 57 Fed. 508; 8 C. C. A. 182, 59 Fed. 476; and 14 Sup. Ct. 992.

John M. Gearin, for libellant.

T. Harris Bartlett, for interveners Burckhardt Bros. et al.

Charles F. Lord, for intervenor Charles Gin Tong.

BELLINGER, District Judge. Burckhardt Bros. intervene on behalf of themselves, and as assignees of a large number of claims against the Haytian Republic, and petition for payment thereof out of the proceeds of the sale of the vessel under forfeiture to the government, now in the registry of the court. Ten of these claims are for supplies furnished and work done during June, 1894, when the vessel was in custody of the marshal. They have no place in this intervention. If they are bona fide claims, they are already provided for in the order which has been made for expenses incurred in taking care of the vessel while in custody. The claim of Mark Levy for supplies during July, 1893, is in the same category. The vessel was arrested on July 7th, and there is no inference from all that appears that these supplies were furnished prior to that time. So, too, of the claims for marine insurance, which are stated as being for insurance "for one year last past." During the whole of such time, and longer, the vessel was under arrest. The claims made for expense of telegraphing "in and about the business" of the vessel are not entitled to consideration. If the expense of telegraphing can, upon any state of facts, become a maritime lien, there is nothing in this case to place these claims in that category. During the greater part of the time covered by this expense, the vessel was under arrest at this port, or at Seattle, where she was arrested on June 6th. So far as appears, this telegraphing was by or between the owners and agents of the vessel. Nor is the character of the business of the ship, about which this telegraphic correspondence was carried on, disclosed. It may have related to the criminal business on account of which the ship was forfeited, or to the various proceedings against the ship on account of such proceedings.

The claim on account of money loaned the owners to be used, and

in fact used, to defray the expense of running the vessel, was a credit to the owners, and not to the ship. The ship's advertisements for business stand upon the same footing.

The holders of all the various claims for supplies furnished and work done during and subsequent to June, 1893, are fairly chargeable with knowledge, or with notice having the effect of knowledge, that the ship was a smuggler. She had been arrested at Seattle in the state of Washington on the 6th of June for smuggling and released on bonds. On July 7th she was arrested at this port for causes of forfeiture occurring prior to the first arrest. At least, these facts were enough to put those dealing with the ship upon inquiry.

So far as these claims are for repairs and supplies furnished the vessel in her home port, they are not liens, unless they are within the state statute. The lien provided by such statute is restricted to boats or vessels used in navigating the waters of the state, or constructed within the state. I am of the opinion that vessels used exclusively in navigating the seas between ports in this state and foreign ports are not within this statute, that they are not vessels used in navigating the waters of the state, and that no lien exists for repairs or supplies furnished such vessel in her home port.

One of the claims for which intervention is made is for supplies of coal furnished in British Columbia in February, 1893. The subsequent forfeiture cuts off this lien. In the case of *The St. Jago de Cuba*, 9 Wheat. 410, the claims of seamen for wages, and of material men for supplies, where the parties were innocent of all knowledge of or participation in the illegal voyage, were preferred to the claim of forfeiture on the part of the government. The interveners rely on this case, but it is a case of services contemporaneous with or subsequent to the cause of forfeiture. The court says that "the whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to the forfeited hull; to get it back for the benefit of all concerned,—that is, to complete her voyage." These creditors were privileged because their contribution of service in enabling the vessel to complete her voyage had benefited the government, which was concerned in her return. Claims antecedent to the forfeiture are not within the reason which gives preference to subsequent services and material men. Such antecedent claims are subject to the general rule which makes the last lien supersede the preceding one.

Charles Gin Tong also intervenes for what he alleges is passage money paid by some six Chinamen, whose claims have been assigned to him, for the purchase of tickets for steerage passage from Vancouver, British Columbia, to this port. These tickets are alleged to have been purchased from William Dunbar, who is alleged to have been the agent of the owners of the vessel. Some of these tickets were purchased for \$33.33, some for \$35, and others for \$40. It is admitted that the regular rate for such passage is \$6. I am satisfied, from facts disclosed in certain criminal cases tried in this court, that the several purchases of tickets in question were criminal transactions; that the amount paid was, in larger part, for services in securing the landing of Chinese passengers into the country in violation of its laws. This is the most favorable light in which the

matter can be put. It is argued that at least the purchasers of these tickets were innocent, and were imposed upon. That they were not innocent is more than an inference. To my mind, it is a conclusive presumption. Without taking into consideration the knowledge derived from other cases in this court, and that knowledge which is common to the community, the amount of these payments proves that they were less for passage than for other objects. There were other means of reaching this city from British Columbia, at an expense not much above the regular steerage rate by steamer; and it is inconceivable that Chinese persons entitled to land in this country were engaged in buying tickets merely for passage worth \$6, and were paying \$35 and \$40 therefor. The prayer of the petitioners is denied.

#### THE ILLINOIS and THE GLADISFEN.

#### THE MABEL JORDAN v. THE ILLINOIS and THE GLADISFEN.

(District Court, E. D. Pennsylvania. January 2, 1895.)

No. 61.

#### **COLLISION—EXCESSIVE SPEED IN CROWDED CHANNEL.**

A steamship was running at full speed down a narrow and crowded channel, the attention of her officers being absorbed in the effort to pass another vessel; and when libellant's schooner was discovered, in the channel ahead of her, no effort was made to avoid collision until it became plain that she could not pass on either side of the schooner, when the order for full speed astern was given, but too late to avoid collision. *Held*, that the steamship was in fault, and responsible for the collision.

This was a libel by the owners of the schooner Mabel Jordan against the steamship Illinois for damages for collision. The Illinois brought in the tug Gladisfen as co-respondent.

John F. Lewis, for the Mabel Jordan.

J. Rodman Paul and N. Dubois Miller, for the Illinois.

Henry R. Edmunds, for the Gladisfen.

BUTLER, District Judge. The schooner, laden with coal, was taken in tow by the tug Gladisfen at Greenwich Piers, on the Delaware river, June 7, 1893, as she lay in dock, and drawn out into the river, to proceed downwards. The tide was running up, and as the schooner came out into the river it carried her upwards and eastwards, as the tug passed downwards. At this time the Illinois, coming down the river, ran into and sunk her. The Illinois, on being libeled for the loss, had the Gladisfen brought in as co-respondent.

Did the collision result from fault of the Illinois, or of the Gladisfen or of both?

1. Was the Illinois in fault? Several faults are charged against her—substantially that she was running too fast, that she had not a proper lookout, and that she did not make proper efforts to keep off when the libellant was first seen.—The channel is narrow and crowded. The piers at its side, with vessels and tows passing in and out, rendered its navigation even more difficult. It was

therefore the duty of the Illinois to run slowly, and maintain a very vigilant lookout.

While the testimony is conflicting the weight of it justifies a conclusion, I think, that she did neither. I believe it also justifies a conclusion that she failed to make proper effort to avoid a collision when the libellant was first seen.

She did not hear the Gladisfen's signals, did not see her until the danger was imminent, and did not then take immediate measures to keep off.

That the signals were sounded is proved beyond doubt. They were heard and heeded by others, who were nearly, if not quite, as far away as the Illinois. Nor did she see either the tug or tow as early as she should. The testimony satisfies me she could and should have seen them materially earlier. I think this failure to hear and see was because she allowed her attention to be absorbed by an effort to pass a vessel in her front at that time. Not only was her attention concentrated on this object, but in making the effort she so increased her speed that when the libellant was seen the collision was possibly inevitable. It is true the log does not show that the order for "full speed" was obeyed; other evidence however seems to leave little doubt of it. The collision occurred so soon after the order was given that it is not surprising the entry does not appear. Why should the order have been disobeyed?

It was given long enough before the order to reverse to have been executed. The increase of speed was necessary to the object in view; and the engineer would naturally obey the order immediately. Disinterested witnesses say she was running fast, and give reasons for saying so. The character and effect of the blow support this view. I am not unmindful of what her master, and others on board, say on the subject, but the preponderance of testimony is against them. The fact that her first order, with a view to escape, was "Full speed astern," is of itself evidence, that she was not proceeding with proper care. The collision was then imminent, or this order would not have been given. Such danger could not have arisen if she had proceeded slowly and with due caution. Why did she approach so near—what excuse is there for it? She says the schooner's hawser parted and allowed her to drift off suddenly; but the testimony disproves this. The hawser was cut just as the collision occurred, for prudential reasons. She further alleges that the Gladisfen and her tow suddenly emerged from the dock, almost immediately in her front; but this allegation is not justified by the proofs. The Gladisfen had been out in plain view for several minutes, otherwise the tow could not have been over in the channel where the collision occurred.

Not only was the Illinois running too fast, and the schooner not seen as early as it should have been, as before stated, but I believe no measures were immediately taken to keep off when she was seen. The answer inferentially admits this when it says, "As soon as it was seen that the schooner was going so slowly that she would continue in mid-channel, and that it would be impossible to get either to the eastward or westward, the engines were put full speed astern." Thus it appears that the schooner was observed

without any order whatever being given while calculation was made respecting the chances of passing without diminution of speed or change of course, until the accident became so imminent as to call for the order "Full speed astern." I incline to believe that immediate attention to her duty on first sight of the schooner would have avoided the accident. Her helm would have responded quickly in the state of the tide, and a very short distance would have served to change her head and secure safety.

The attempt to pass the vessel in her way, shortly before the accident, which required "full speed," in the narrow, crowded channel where vessels and tows were passing in and out at the piers, shows a careless disposition and was well calculated to produce the result which followed.

It is a significant fact that the people on board the schooner, who are disinterested and were well placed to see what occurred, all attribute the accident to fault of the Illinois, and that her master proceeded, and still presses his claim for compensation against the latter vessel alone.

2. Was the Gladisfen also in fault? The Illinois accuses her and complains, principally, that she ran out into the channel without signaling, with a hawser of improper length, and did not take necessary measures to see whether the channel was clear. It was her duty to signal and observe proper care to see that the way was open for passing out with safety. That she did signal as she passed through the dock and after getting outside is, as before stated, fully proved. She gave ample warning which others heard and heeded. She had a lookout well located forward. It is said she should have had a man on the end of the pier before passing out. Possibly this is so; but the question is not important here, inasmuch as her lookout and others testify that the opportunity of seeing up and down the river from his station was better from the pier, after the vessel passed that point, and that when she got into the river the Illinois was not within view. Finding nothing in her way it was her duty to proceed, which she seems to have done in the customary manner. Her hawser was of the usual length, and she seems to have been blameless of any fault tending to the accident.

While I have read the voluminous testimony with care, I have not thought worth while to cite and analyze it here, nor to discuss the case at length. I have sought to do little more than state conclusions.

---

#### THE SAM SLOAN.

#### DINNINY v. THE SAM SLOAN.

(District Court, S. D. New York. November 30, 1894.)

**COLLISION—HELL GATE—HALLETT'S POINT—OVERTAKING—CROWDING—SIGNALS  
DELAYED—ABSTRACTION OF RECORD.**

The large passenger steamer S. S. in going eastward through Hell Gate against the strong ebb tide, overtook and came in collision with the yacht A. in rounding Hallett's Point, going very near shore between A. and the point. The evidence was conflicting as to which boat swung against the



other. *Held*, (1) that in the absence of impeaching testimony, a vessel's own witnesses as to her maneuvers are more trustworthy than the evidence of persons on another moving vessel, and that it was the S. S. that in this case swung against the yacht, upon meeting the strong ebb tide; (2) that the steamer was solely to blame for attempting to round that dangerous point so near the shore, meeting the tide so suddenly; and attempting to pass the yacht in that situation; and for not signaling earlier; also *held*, (3) that the unexplained abstraction from the files of the local inspectors of the first report of the S. S., and the filing of an amended report four days after, both of which were in the handwriting of a clerk of the claimant, was irregular and unlawful, and presumably chargeable upon the claimant, and would throw discredit on the claimant's case if the merits were otherwise doubtful.

This was a libel in rem by Ferral C. Dinniny, Jr., against the steamboat Sam Sloan, to recover for damages sustained by collision.

Benedict & Benedict, for libellant.

Stewart & Macklin, for claimants.

BROWN, District Judge. At about noon on the 1st of July, 1894, as the libellant's steam yacht Aztec, about 80 feet long by 14 feet beam, was going eastward through Hell Gate, and rounding Hallett's Point, she was struck on her starboard quarter, near the stern, by the overtaking side-wheel passenger steamer Sam Sloan, bound for Glen Island. The yacht's stern was carried away, and she ran a few moments afterwards upon the rocks near the lighthouse, and became, as is claimed, a total loss, to recover for which the above libel was filed.

The yacht had come up on the easterly side of Blackwell's Island, and when at the upper end of the island, and near the Astoria ferry, she was somewhat ahead of the Sam Sloan, which had come up on the westerly side of the island. The yacht, under the supervising inspector's rules, had, therefore, the right of way, and the Sloan was forbidden to pass her in Hell Gate. The Sloan had many passengers on board. She was going considerably faster than the yacht, and from Blackwell's Island had come up on a course slightly crossing the channel and heading a little toward the Long Island shore; so that when she had reached a point a few hundred feet below Hallett's Point light, she had come within about 80 feet of the shore. When making the turn to starboard, she gave a signal of one whistle to the yacht when very near her, meaning that she wished to pass the yacht on the right, between her and the shore, to which the yacht gave an answer of one whistle. Almost immediately afterwards, the vessels were in collision, as above stated.

There is no dispute as to the principal facts, except those that happened a few moments before collision. The Sloan contends that the yacht, instead of keeping her course and permitting the Sloan to pass, ported her wheel and swung around to starboard, right across the bows of the Sloan, when so near that the Sloan could not avoid her. The witnesses for the yacht testify that the bow of the Sloan swung to port, and striking the starboard quarter of the yacht near the stern, threw her stern to port so that the yacht, being near the shore, and going in the water at about ten knots, ran speedily upon the rocks.

Most of the testimony, and its apparent discrepancies, excepting, perhaps, the pilot's location of the collision, which is manifestly grossly erroneous, is easily capable of being reconciled by the fact that persons on one boat observing the motions of another are apt to ascribe apparent changes of position to the other boat rather than to their own.

"Daily experience in the trial of collision causes," says Blatchford, J., in *McNally v. Meyer*, 5 Ben. 240, Fed. Cas. No. 8,909, "shows that nothing is more unreliable than testimony from those on one moving vessel as to the absolute actions of another moving vessel. The irresistible propensity is to regard your own vessel as stationary with reference to the other vessel, and to attribute all deflecting movement to the other vessel."

Accordingly, the ordinary rule in cases of conflict, is to give superior weight to the testimony of a vessel's own men as to her movements, rather than to that of those on board the other moving vessel, when the former are in no way discredited by other testimony, or by the circumstances and probabilities of the case. *The Governor*, 1 Abb. Adm. 108, 113, Fed. Cas. No. 5,645; *The Neptune*, Olcott, 495, Fed. Cas. No. 10,120; *The Glaucus*, 4 Cliff. 166, Fed. Cas. No. 683; *The Empire State*, 1 Ben. 60, Fed. Cas. No. 17,586; *The Columbia*, 29 Fed. 716, 718.

The situation, and the well-known conditions of navigation in rounding Hallett's Point, afford an easy, and no doubt a true, explanation of this collision, and of the contradictions in the testimony concerning it. The tide was strong ebb; the yacht had come up close to the easterly shore, keeping in the eddy until near Hallett's Point. In attempting to pass around the point under a port wheel, on running out of the eddy near shore into a strong ebb tide, the swift current would necessarily set the yacht's stem a little to port, though she would quickly recover herself and turn to starboard. The yacht had ported, and was attempting to make the turn before the Sloan's signal to her was given. As the yacht passed up near the Astoria shore before reaching the point, she had seemed to persons on board the Sloan to cross the Sloan's bows from starboard to port, although she had in fact kept straight up the channel course along the shore, because the Sloan was headed a little towards the land and continued this course until she brought the yacht on her port bow.

When the Sloan straightened up within 80 feet of the shore, only a little below the turn of the point, and undertook to go to the right of the Aztec, she gained very rapidly on the yacht, which was then in the stronger ebb current; and it was impossible for the Sloan to port her wheel while so near the shore, until she reached the turn; and then the swift ebb struck her starboard bow with such increasing force as she rapidly approached the Aztec, as the latter was rounding the point, that her bow was carried to port against the Aztec's starboard quarter, giving the appearance to those on the Sloan of that sudden sheer by the Aztec across the bows of the Sloan to which the latter's witnesses testify. This would agree substantially with the testimony of the Aztec's witnesses, whose testimony

on this point is the more credible. The collision was a little to the westward of the light along the turn, and within 100 or 200 feet of the shore. There was nothing to cause the Aztec to swing towards the shore; every influence was to the contrary.

The blame for the collision must rest wholly upon the Sloan, whose duty it was to keep out of the way of the yacht: (1) For attempting to pass the Aztec while both were rounding the turn at Hallett's Point so near to the shore, the most dangerous place in Hell Gate; (2) for delaying her signal to indicate her purpose, until she was close aboard of the Aztec, when there remained no time for safe maneuvering. The attempt to pass in that way was in the highest degree dangerous. The pilot's testimony shows, that the Sloan pursued her usual course, regardless of the presence of the yacht; that she ported her wheel to turn the point inside of the yacht, without waiting for the Aztec's reply; and I credit the testimony of the Aztec's witnesses, that the signal was not given until the Sloan was very near to the yacht; so near that the Aztec, whose slower speed was still further diminished by the strong ebb she was meeting, had no time to do anything effectual to prevent collision. The Aztec's answer of one whistle was immaterial. It did not induce the Sloan's course, which was taken before the reply, and when so near that the reply made no difference.

The case in its essential features, is much like that of The Governor, above cited, although in the present case the attempt of the overtaking vessel was even more dangerous than in that; and as in that case, the whole responsibility must rest with her.

Another circumstance on the part of the claimant ought not pass unnoticed; viz., the abstraction of all the material parts of the first report made by the master of the Sloan concerning this collision, and filed in the office of the local inspectors, pursuant to law, on July 2d, the day following the collision. On July 6th, what is termed an amended report, was filed, and nothing now remains of the original report except a few lines of the beginning; all the rest having been torn off. So far as could be ascertained no one knows by whom this was done. What it amounts to is both a suppression of the original official account filed by the party charged with fault, and also an abstraction of a part of an important official paper from the official custodian, serious misconduct in both points of view. If the custodian had authority to permit an amended report to be filed, there was no authority to permit any removal or obliteration of the one already on file. Both reports were in the handwriting of a clerk in the claimant's office; and without explanation, the claimant would inferentially stand chargeable with the responsibility for this abstraction. If there were otherwise any doubt about the merits of the collision, such an abstraction of the original report would reasonably throw great discredit on the claimant's side of the case.

Decree for the libellant, with costs.

## POWERS v. CHESAPEAKE &amp; O. RY. CO.

(Circuit Court, D. Kentucky. January 7, 1895.)

**1. REMOVAL OF CAUSES—ESTOPPEL TO ALLEGE EXPIRATION OF TIME—FRAUDULENT JOINDER AND DISMISSAL OF DEFENDANTS.**

Though a nonresident defendant is not entitled to removal of a cause to a federal court because plaintiff joins resident defendants merely to prevent removal by the nonresident, where the complaint states a good joint cause of action for tort, yet on plaintiff's dismissing—before trial, but after expiration of the statutory time for removal—the resident defendants, the nonresident defendant is entitled to removal, and plaintiff is estopped to allege the expiration of the time therefor.

**2. SAME—JOINDER OF DEFENDANTS TO PREVENT REMOVAL—INFERENCE.**

Where plaintiff, after removal to a federal court of an action against a nonresident railroad for tort, dismisses it, and brings action in a state court for the same tort against the same defendant, joining with it, as defendants, resident employes of the road, and, after expiration of the time for removal, voluntarily dismisses it as to the employes, their joinder will be *held* to have been merely to prevent removal.

**3. SAME—PETITION—JURISDICTION OF STATE COURT.**

A state court cannot pass on issues of fact involved on petition for removal, but can deny an application only when, as matter of law, on the face of the petition, and the facts disclosed by the record, the right does not exist.

**4. SAME—AMENDMENT OF PETITION.**

A petition for removal, notwithstanding expiration of the statutory time therefor, because of fraud estopping plaintiff, which correctly states the ultimate jurisdictional facts, may be amended in the federal court to more perfectly state the facts concerning the fraud, they all appearing in the record.

Action by John T. Powers against the Chesapeake & Ohio Railway Company. Heard on motion to remand to state court.

This is a motion to remand a cause removed from the circuit court of Kenton county, Ky. On April 14, 1893, the plaintiff, Powers, a citizen of Kentucky, filed his petition in the Kenton circuit court against the Chesapeake & Ohio Railway Company and David T. Evans, alleging that the defendant railway company was a citizen of Virginia, and that Evans was a resident of Kenton county, Ky., and that both defendants were jointly guilty of negligence in the operation of a train on the Chesapeake & Ohio Railroad, which resulted in severe injuries to the plaintiff, for which he asked damages against both in the sum of \$25,000. On April 29th, before an answer or plea was required to be filed under the laws and practice of Kentucky, each defendant filed a petition to remove the cause to this court on the ground that both defendants were citizens of Virginia, while the plaintiff was a citizen of Kentucky. The plaintiff, by answer to the petition for removal, raised an issue of fact as to the citizenship of Evans, alleging that he was a citizen of Kentucky, and moved to remand the case. This court found that Evans was a citizen of Virginia, and denied the motion. The plaintiff, thereupon, on May 17, 1893, dismissed his action in this court, and filed a new petition on the same cause of action in the Kenton circuit court, in which he made defendants, not only the Chesapeake & Ohio Railway Company and Evans, but also William D. Boyer and Edward Hickey. The petition alleged that the plaintiff was a switchman in the employ of the Chesapeake & Ohio Railway Company; that, while engaged in throwing a switch at night, he was run down by an engine of the company, and severely injured; that the engine was running backwards, drawing a caboose; and that the accident occurred and the injuries were inflicted because of the joint, gross, and wanton negligence of the railway company and Boyer, the conductor, Evans, the engineer, and Hickey, the fireman, the last three of whom had possession, direction, and control of the engine and caboose, as

agents of the company. Damages were asked in the sum of \$25,000. Before it was required by the law of Kentucky to answer or plead, the Chesapeake & Ohio Railway Company filed a petition for removal to this court, which, after generally describing the suit and the amount involved, proceeded as follows: "That there is in said suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them, to wit, between your petitioner, the Chesapeake & Ohio Railway Company, defendant in said suit, who avers that it was at the commencement of this suit, and still is, a corporation organized under the laws of the states of Virginia and West Virginia, and of no other state, and that it was then, and still is, a citizen and resident of the states of Virginia and West Virginia, and of no other state; that it was not then, and is not now, a resident or citizen of the state of Kentucky,—and the plaintiff, John T. Powers, who was at the commencement of this suit, and still is, a resident and citizen of the state of Kentucky. Your petitioner further says that the said defendants Wm. D. Boyer, David Evans, and Edward Hickey are fraudulently and improperly joined as parties defendants for the sole purpose of defeating the right of petitioner to remove to the United States circuit court." Bond was given, and the cause was removed. Plaintiff answered the petition for removal in this court, denied that the controversy was wholly between citizens of different states, and denied that the three defendants, Boyer, Evans, and Hickey, had been fraudulently or improperly joined to defeat their codefendant's "pretended right of removal." It being admitted that Boyer and Hickey were citizens of Kentucky, this court granted the motion to remand, holding that as plaintiff's petition stated a good cause of action against Boyer, Evans, and Hickey, the plaintiff had the right to unite them as defendants with the railway company, even if it was done with the intention of defeating the jurisdiction of the federal court; that when a tort was committed by several, the injured person had an election to sue one or all, and the motives for the election could not be made a ground for treating as a separable cause of action against a single defendant that which the plaintiff had chosen to treat as a joint one; that in a federal court the petition, as against the Chesapeake & Ohio Railway Company, was probably demurrable, but it was not so against the other defendants, and because a removing defendant had a good defense, in law or fact, to a joint action, it did not thereby become, with respect to such defendant, a separable controversy. The cause proceeded to issue in the state court, and on October 16, 1894, the plaintiff discontinued his cause as to all the defendants except the Chesapeake & Ohio Railway Company. The defendant at once filed a petition for removal to this court, and tendered a bond. The plaintiff objected, and the court denied the petition, and declined to approve the bond, "but not for lack of sufficiency thereof." The cause then proceeded in the state court to trial, verdict, and judgment for plaintiff in the sum of \$10,000. The defendant filed the transcript of the proceedings in this court before the first day of this term,—the next after the denial of the second petition for removal by the state court. That petition was like the first, except in the following clauses: "Your petitioner further says that in the bringing of this suit heretofore, on the — day of —, 189—, David Evans and Edward Hickey were fraudulently and improperly joined as parties defendant in the above-entitled cause for the sole purpose of defeating the right of your petitioner to remove this cause to the United States circuit court; that, because of the joinder of the said Evans and Hickey, said cause was remanded to the state court. Your petitioner says that the suit, as to said Evans and Hickey, was on the 16th day of October, 1894, dismissed; that the said cause is now for the first time pending as to the said Chesapeake & Ohio Railway Company alone." Plaintiff filed an answer to the petition in this court, and also a motion to remand. The answer denies that the defendants other than the Chesapeake & Ohio Railway were fraudulently or improperly joined to defeat the latter's alleged right of removal. In support of the petition for removal, the defendant has filed the affidavits of Evans and Boyer, stating that the discontinuance, as to them, was made by plaintiff without consideration moving from them, and without their request or knowledge. The record shows that Hickey was never served with summons.

Wm. Goebel, for plaintiff.

Wm. H. Jackson, for defendant.

Before TAFT, Circuit Judge, and BARR, District Judge.

TAFT, Circuit Judge (after stating the facts). A plaintiff has a joint and several cause of action against a citizen of another state and citizens of his own state. He joins them in a single action in the state court for the sole purpose of preventing removal by the non-resident to the federal court. After the statutory time for removal has passed, and the joinder of the resident defendants has, as he thinks, effected his purpose, the plaintiff discontinues the case as to all but the nonresident defendant. Does this conduct estop the plaintiff from making the objection that the petition for removal filed immediately after the discontinuance is too late? This is the question which the defendant seeks to raise, and we must first determine whether it is squarely presented for our decision.

The circumstances shown by this record leave no doubt that the purpose of the plaintiff in the joining of Evans, Boyer, and Hickey as defendants was to defeat the railway company's right to remove the case. In the first suit, Evans, the fireman, was made codefendant with the company. When it was found that his citizenship was not such as to defeat removal, the suit was dismissed, and a new one brought, with the engineer and conductor as additional defendants. They were shown to be citizens of Kentucky, and thereby the removal of the new case was defeated. Just before the trial, without request or knowledge on their part, the defendants, except the company, were dismissed. Counsel seek to explain the dismissal on the grounds that Hickey, one of the defendants, had not been served with summons, and that the presence of the others as parties defendant was made the basis of an unfounded claim that the trial in the state court should be transferred from Independence to Covington. The record does not show that either of the defendants Evans or Boyer moved to transfer, or that their presence in the cases made the transfer necessary. Even if it did so appear, the explanation is not sufficient. It is a virtual confession that they were not joined in good faith to obtain judgment against them. Courts are not required to be blind to plain facts. The joinder of a fireman or an engineer or a conductor as defendants in an action to recover \$25,000 against a railroad company, without explanation, of itself raises a suspicion that it is not done merely to recover judgment against the employés; and when a cause is dismissed in the federal court in order to make such employés parties defendants to a new suit, and after fear of removal is passed they are then dismissed, the inference as to the purpose of their joinder is too plain to need much discussion. In *Arrowsmith v. Railroad Co.*, 57 Fed. 165, Judge Lurton made a similar inference from an analogous, though not the same, state of facts.

But it is said that the petition for removal is defective, in that it does not aver that Boyer was fraudulently joined as a defendant, and subsequently dismissed. The petition for removal stated the necessary jurisdictional facts, namely, the diverse citizenship and the

jurisdictional amount, and averred that removal within statutory time had been prevented by fraud of plaintiff. It is true that, in mentioning the names of the defendants who were alleged to have been joined fraudulently in order to defeat the jurisdiction of the federal court, and to have been dismissed after serving this purpose, Boyer, was, by an evident mistake, omitted; but this was merely an omission to state all the evidential facts on which the claim of fraudulent estoppel was based, but it did not destroy the legal sufficiency of the petition to show an estoppel. It is settled beyond controversy that it is not for the state court to pass upon the facts involved in the averments of a petition for removal. It can only deny an application to remove when, as matter of law, on the face of the petition, and the facts disclosed by the record, the right does not exist. *Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692; *Railway Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262; *Carson v. Hyatt*, 118 U. S. 279, 6 Sup. Ct. 1050. An examination of the record in this case would have shown the joinder of Evans, Hickey, and Boyer; the averment in the first petition for removal that they had all been fraudulently joined to defeat removal; and their subsequent dismissal from the case. This is a case, therefore, where an amendment to the petition for removal can be permitted in this court, to state more fully and exactly all the facts upon which the removal was prayed, because the ultimate jurisdictional facts are correctly stated, and the detailed facts concerning the fraud, though imperfectly stated in the petition for removal, all appear in the record. *Carson v. Dunham*, 121 U. S. 421, 427, 7 Sup. Ct. 1030; *Ayers v. Watson*, 113 U. S. 594-598, 5 Sup. Ct. 641; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692; *Jackson v. Allen*, 132 U. S. 27, 10 Sup. Ct. 9; *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673-691; 14 Sup. Ct. 533. It is true, also, that there is in the petition no direct statement that the reason why the joinder of Hickey and Boyer defeated the jurisdiction of the federal court was because they were citizens of the same state as the plaintiff, though this is a necessary inference from the averments made. But it does appear from the ruling of this court on the first petition for removal, which was made part of the record in the state court, that it was then admitted by both plaintiff and defendant that Boyer and Hickey were citizens of Kentucky, and that for this reason the motion to remand was granted. Defendant has been given leave to amend its petition for removal to restate the facts as above suggested, and an amended petition has been filed.

On the whole, therefore, we conclude that the question is fairly before us whether the joinder by a plaintiff, in a state court, of resident defendants, against whom a good cause of action is stated, solely to prevent removal by a nonresident defendant, and the subsequent dismissal of such resident defendants from the case, leaving the suit against the nonresident alone, estop plaintiff to plead the time limitation against removal. The question is a new one, but we think its answer is not difficult, in view of the ruling of the supreme court of the United States in analogous cases. It has long been held that the joinder of a sham defendant to defeat the jurisdiction of the federal court

could not prevent removal; but those cases were where, on the face of the declaration of the plaintiff, no cause of action was stated against the defendants whose joinder was charged to be fraudulent. Such were the cases of *Arapahoe Co. v. Kansas Pac. Ry. Co.*, 4 Dill. 277, Fed. Cas. No. 502, and *Arrowsmith v. Railroad Co.*, 57 Fed. 165. Here, in plaintiff's petition, a good cause of action was stated against the defendants alleged to have been fraudulently joined; and, if the cause had proceeded to judgment against or in favor of these defendants, no removal could have been had at any stage of the case. This court has already decided in this case that the motive a plaintiff has in suing defendants against whom he can state a good cause of action cannot affect the question of removing the case to the federal court, so long as they remain parties to the cause. We see no reason now to question that conclusion. But the motive of plaintiff in joining such defendants does become material if he subsequently dismisses them, and makes the case, before final trial, one which would have been removable, had it been thus originally brought. If the court can gather from the circumstances that the joinder and subsequent dismissal of the other defendants were a mere device to defeat a removal by the nonresident defendant within the statutory time, and with no purpose of ever pushing the case to judgment against the others, we are very clear that the plaintiff ought not to be allowed to take advantage of a delay in removal which his own fraud brought about, and that he must be estopped to use that delay as an objection. It has been several times decided by the supreme court that the time for removing the case, fixed by the statute, is not indispensable to the jurisdiction of the federal court, but that it may be waived by the consent and acquiescence of the parties, and that a party may be estopped by his conduct to allege it as an objection to removal. In *Ayers v. Watson*, 113 U. S. 594, 598, 5 Sup. Ct. 641, a defendant filed his petition for removal to the federal court after the time had elapsed within which the statute required it to be filed. The cause was removed, and resulted in a judgment against the defendant, who, on appeal, sought to reverse the judgment on the ground that the circuit court was without jurisdiction, because the petition for removal was not filed in time. The supreme court held that, as the party objecting had himself removed the case, he was estopped to make such an objection. This was under the removal act of 1875, but, though the time for removal is changed, this question is not different under the acts of 1887 and 1888. We quote in full the language of Mr. Justice Bradley upon the point:

"By section 2 of the act of 1875, any suit of a civil nature, at law or in equity, brought in a state court, where the matter in dispute exceeds the value of \$500, and arising under the constitution or laws of the United States, or in which the United States is plaintiff, or in which there is a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign state, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district, and when, in any such suit, there is a controversy wholly between citizens of different states, which can be fully determined as between them, one or more of the plaintiffs or defendants



actually interested in such controversy may remove said suit to the circuit court of the United States for the proper district. This is the fundamental section based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal. By section 3 it is provided that a petition must be filed in the state court before or at the term at which the cause can be first tried, and before the trial thereof, for the removal of the suit into the circuit court, and with such petition a bond, with condition, as prescribed in the act. The second section defines the cases in which a removal may be made. The third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record. The directions of the third, though obligatory, may, to a certain extent, be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived; and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed. *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510. Application in due time, and the proffer of a proper bond, as required in the third section, are also essential, if insisted on, but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond, or any information in it, or informalities in the petition, provided it states the jurisdictional facts; and, if these are not properly stated, there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, as it seems to us, there is no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It does not belong to the essence of the thing. It is not, in its nature, a jurisdictional matter, but a mere rule of limitation. In some of the older cases the word 'jurisdictional' is often used somewhat loosely, and no doubt cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the court. We do not so regard it. And, since the removal was effected at the instance of the party who now makes the objection, we think that he is estopped. In *Railroad Co. v. Koontz*, 104 U. S. 5, 17, we held that where the state court disregarded a petition for removal, properly made, and the plaintiff continued to prosecute the suit therein, he would be deemed to have waived any objection to the delay of the defendant in entering the cause in the circuit court of the United States until the decision of the state court is reversed."

*Ayers v. Watson* has lately been reviewed by Mr. Justice Gray, speaking for the supreme court, in *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533. In that case it was held that an objection that a petition for removal was not filed in time, under the acts of 1887 and 1888, was waived, if not taken before the trial in the circuit court. *Ayers v. Watson*, *supra*, and *French v. Hay*, 22 Wall. 238, are cited in support of this conclusion. After quoting at some length from Mr. Justice Bradley's opinion in the former case, Mr. Justice Gray says:

"His whole course of reasoning leads up to the conclusion that the time of removal, not being a jurisdictional and essential fact, is a subject of waiver and estoppel, alike." "The decision in *Ayers v. Watson*, as to the waiver in the circuit court of the United States of the objection that the petition for removal had not been seasonably filed in the state court, has never been doubted or qualified." Pages 690, 691, 151 U. S., and page 533, 14 Sup. Ct.

The circuit court of appeals of this circuit has applied the same principle in *Newman v. Schwerin*, 10 C. C. A. 129, 61 Fed. 865; and the circuit court of appeals in the Fifth circuit, in the case of *Knight v. Railway Co.*, 9 C. C. A. 376, 61 Fed. 87. See, also, *Tod*

v. Railway Co. (decided by the circuit court of appeals for this circuit December 4, 1894), 65 Fed. 145.

The nearest approach to an authority for the case at bar is to be found in language of the present chief justice in the case of Railroad Co. v. Austin, 135 U. S. 315, 318, 10 Sup. Ct. 758. In that case a plaintiff brought suit for \$475, making a controversy involving less than \$500, which was then the minimum limit of the jurisdiction of the United States circuit courts, and thus prevented removal. After the jury was impaneled in the state court, and the trial begun, the trial court, against defendant's objection and exception, permitted an amendment increasing the amount claimed in the ad damnum clause to \$1,000. Verdict and judgment of \$750 were rendered, and on a writ of error the case was brought to the supreme court of the United States. The error alleged was in permitting the amendment. The court held that the only way by which the defendant could protect himself against the action of the court in allowing the amendment was by at once filing a petition for removal, and that, not having done so, no right secured by a statute or the constitution of the United States had been claimed by him or denied him, and the action of the court in permitting the amendment was not, therefore, reviewable by the supreme court of the United States. After reaching this conclusion, the chief justice continued:

"If the application had been made, the question would then have arisen whether it came too late, under the circumstances. The defendant was not entitled to remove the suit, as originally brought, 'before or at the term at which such cause could be first tried, and before the trial thereof.' But the objection to removal, depending upon the absence of the jurisdictional amount, was obviated by the amendment. As the time within which a removal must be applied for is not jurisdictional, but modal and formal (*Ayers v. Watson*, 113 U. S. 594, 598, 5 Sup. Ct. 641), it may, though obligatory to a certain extent, be waived. And as, where a removal is effected, the party who obtains it is estopped upon the question of the time, so, if the conduct of the plaintiff in a given case were merely a device to prevent a removal, it might be that the objection as to the time could not be raised by him. If, on the other hand, the motives of the plaintiff could not be inquired into, or, if admitted, would not affect the result, as in most cases of remittitur (*Thompson v. Butler*, 95 U. S. 694; *Cable Co. v. O'Connor*, 128 U. S. 394, 9 Sup. Ct. 112), the defendant would simply suffer for want of comprehensiveness in the statute. The amendment here was held to have been properly allowed, and we have no power or disposition to interfere with the action of the court in regard to it. The only importance it has is in its bearing upon the charge of bad faith in respect to the right of removal, and that question cannot properly arise, in the absence of an application to remove."

Now, it may be admitted that this language was not necessary to the decision of the case, and that it is not in the form of a positive statement of law, but is rather only an intimation of a possible or probable conclusion which the court would reach, were a case of the kind suggested, presented for its decision. Nevertheless, the conclusion intimated is such a necessary sequence from the reasoning of the court in *Ayers v. Watson*, *supra*, in *Martin's Adm'r v. Railroad Co.*, *supra*, and in *French v. Hay*, *supra*, that we have no difficulty in applying it in the case at bar. It is sought to distinguish *Austin's Case* from the one at bar on the

ground that the amendment in that case changed the cause of action, while here the cause of action remained the same, and was not changed by the dismissal of the resident defendants. The distinction is untenable. The cause of action in Austin's Case was the same after the amendment as before. The maximum limit of recovery was increased by the amendment. That was all. In the case at bar, that which had been declared on as a joint tort was changed by the plaintiff, voluntarily, into a several liability. In each case, though the cause of action remained the same, the plaintiff so changed its form as to bring it within the jurisdiction of the federal court, so far, at least, as the indispensable elements of that jurisdiction were concerned. In each, the first form of action was evidently adopted as a device to prevent removal seasonably under the statute, with intent to restore the cause of action to a removable form when the statutory time had elapsed. The cases are quite parallel, and the estoppel is as plain in the one as in the other. In the Austin Case, it was not the reduction of the amount claimed below \$500, with intent to defeat removal, which made the case removable; but it was the reduction with such a purpose, accompanied by a subsequent change of the form of the action, so as to bring it within the removal jurisdiction of the federal court. Had the plaintiff never amended, the case would not have been removable, however plain the intent of the plaintiff to defeat removal by limiting his own recovery. He would have the right to defeat removal in this way by giving up part of his claim. So, in the case at bar, had the plaintiff retained the resident defendants as parties until judgment, however clear it was that his intent in so doing was to defeat removal, the case could not have been removed, because, in his petition, he stated a good cause of action against the defendants so joined. But when he dismissed the resident defendants he made a removable case, and the palpable device adopted to prevent an earlier removal disables him from pleading the time limitation. Whether, if a plaintiff, in good faith, and not for the purpose of defeating the federal jurisdiction, unites defendants resident and nonresident in a single, joint cause of action, and before trial is had and judgment rendered dismisses the resident defendants from the case, leaving a controversy between the plaintiff and nonresident defendant within the removal jurisdiction of the federal court, except that the time for removal is passed, the case can be removed, against the plaintiff's objection, we need not decide. It would seem that the complainant in such a case would not be estopped to plead the time limitation, if it begins to run from the beginning of the suit, and not from the time when the case assumes the form of a removable controversy.

A case like the one at bar is not to be confused with cases like that of *Arrowsmith v. Railroad Co.*, 57 Fed. 165, and *Arapahoe Co. v. Kansas Pac. Ry. Co.*, 4 Dill. 277, Fed. Cas. No. 502. In those cases the plaintiff's pleading showed that the resident defendants were merely nominal or sham defendants, because no cause of action was stated against them in the one case, and no relief was asked against them in the other. In such a case, of course,

the petition for removal must be filed within the statutory time, or the right is lost. The joinder of the sham defendants does not prevent the removal, and is no excuse for any delay in perfecting it. But in the case at bar the plaintiff's petition stated a good cause of action against all the defendants. Until the resident defendants were dismissed, the case was not within the jurisdiction of a federal court, and the right of removal did not accrue. Hence, it was necessary to file a new petition for removal after the dismissal, because then, for the first time, the controversy was one of which the federal court could take cognizance. If this distinction is borne in mind, the case of *Railroad Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, will be found to have nothing in it to conflict with our conclusion here. In that case, the plaintiff brought suit in a state court of Tennessee against the Kansas City, Ft. Scott & Memphis Railroad Company, a citizen of Arkansas, and the Kansas City, Memphis & Birmingham Company, a citizen of Tennessee, for the recovery of damages for the death of John W. Daughtry, alleged to have been occasioned by the negligence of the defendants. The first-named company was in default for plea to the declaration for four terms of court, and then filed its petition for removal, averring that the jurisdictional amount was in controversy; that the plaintiff was a citizen of Tennessee; that it (the petitioner) was a citizen of Arkansas; that its codefendant was a citizen of Tennessee; that the acts alleged to have been done jointly by petitioner and its codefendant were, if done at all, done by the petitioner alone, and its codefendant did not at the time, and "does not now, and never did, own, possess, control, or use the said railroad track upon which said acts were done," etc.; "that the said Kansas City, Memphis & Birmingham Railroad Company has been joined in this action as a nominal party defendant for the sole purpose of preventing your petitioner from removing this case to the circuit court of the United States." The plaintiff then filed an affidavit stating that he was a citizen of Arkansas,—the same state as that of the petitioning defendant. The state court, on the petition and affidavit, found that the plaintiff was a citizen of Arkansas, and refused to grant the petition. A few days later the cause came on for trial, and the Kansas City, Memphis & Birmingham Railroad Company was dismissed by plaintiff from the case. The resulting judgment against the other company was carried to the supreme court of Tennessee, and that court affirmed the action of the court below in denying the petition for removal, on the ground that it had power to pass on the issue of fact as to the citizenship of the plaintiff. The supreme court of the United States, to which the case was carried on error, held that in this the Tennessee court erred, because all issues of fact were for the circuit court of the United States alone to decide, but that the action of the state court must be affirmed for the reason that, as matter of law, the petition for removal was bad, because it was filed after the time for removal, as limited in the statute. In the opinion there is no reference made to the last averment in the petition for removal, that the

Birmingham Company had been joined as a nominal party solely to prevent removal; and we can merely supply the obvious reason why such an averment, under the circumstances, did not remove the objection that the petition for removal came too late. The petition for removal was filed while the Birmingham Company was still a party defendant. The averment that it was joined to defeat removal could have been made as well within the statutory time for removal as when it was made. If the Birmingham Company was merely a nominal defendant, and this appeared on the face of the declaration, the conduct of plaintiff did not prevent the seasonable filing of the petition for removal, and there was no room for an estoppel. If the declaration made a good case against the Birmingham Company, it is difficult to see how the federal court could hold it to be a nominal defendant, and remove the case without trying the merits of the case, and no authority has held that this can be done. It may truly be said, therefore, of the Daughtry Case, that either the averment as to the joinder of the resident defendant was something which could have been made the basis for a removal within statutory time, or it made no case for removal at all, as long as the resident defendant remained a party. The marked distinction between the case at bar and that of Daughtry is that in the latter case no petition for removal was filed after the dismissal of the resident defendant, and the change of the cause to a removable form. In this case, not only was a petition for removal filed within the statutory time, but a second petition was filed immediately after dismissal of the resident defendant.

We think the conclusion we have reached is a fair and just one. It is often within the power of a plaintiff to deprive a defendant of the right to go into the federal court by questionable means, which a want of comprehensiveness in the statute prevents the court from defeating. But, as Mr. Justice Miller said on the circuit in the case of *Arapahoe Co. v. Kansas Pac. Ry. Co.*, in speaking of the constitutional right of persons with the requisite citizenship to resort to the federal courts, and the necessity of preserving it, "we must therefore be astute not to permit devices to become successful which are used for the very purpose of destroying that right." The facts of the present case seem to us clearly to show that here was a device to deprive the Chesapeake & Ohio Railway Company of its constitutional and statutory right to come into this court, and we find no difficulty in defeating the device, on principles well supported by decided cases. The petition for removal is granted, the bond is approved, and the motion to remand is denied.

---

#### HUKILL v. CHESAPEAKE & O. RY. CO.

(Circuit Court, D. Kentucky. January 7, 1895.)

#### REMOVAL OF CAUSES—TIME OF APPLICATION—DELAY CAUSED BY FRAUDULENT JOINDER OF DEFENDANTS.

Where plaintiff joins, with a nonresident defendant, resident codefendants, in a joint action for a tort, solely to prevent a removal to the United

States court, and, after the time for removal is passed, dismisses the resident defendants, the case may then be removed, since all the indispensable elements to federal jurisdiction are present, and plaintiff is estopped by his conduct from raising the objection that the removal is not within the prescribed time.

Action by Eugene Hukill, administrator of L. A. Hukill, deceased, against the Chesapeake & Ohio Railway Company, for the death of plaintiff's intestate, commenced in the state court of Kentucky, and removed by defendant to the circuit court of the United States. Plaintiff moves to remand. Motion denied.

This is a motion to remand. On May 16, 1894, Eugene Hukill, as administrator of L. A. Hukill, deceased, filed his petition against the Maysville & Big Sandy Railroad Company, the Chesapeake & Ohio Railway Company, C. E. Acra, George W. Shumate, Henry Thien, and John Schappart. The petition averred that the Maysville & Big Sandy Railroad Company owned a railroad extending into the city of Covington, Ky.; that this road was leased by the Chesapeake & Ohio Railway Company without legislative or other authority, and that the Chesapeake & Ohio Railway Company was operating the road at the time the death of the plaintiff's intestate occurred; that the plaintiff's intestate was in the employ of the Chesapeake & Ohio Railway Company, as one of the crew of a switching locomotive engine in the yard of the company at Covington; that, while engaged in operating a train of cars in the yard of the said company, he was struck by a board projecting from the roof of a car upon another train of the said company, which, through the gross and wanton negligence of all the defendants, had been permitted to project in such a way as to make it very dangerous; that the plaintiff's intestate was thereby thrown under the train of cars upon which he was, and was run over, and soon after died from the injuries thus received; that the projecting board was part of the roof of the car from which it projected, and that all the defendants, with joint, gross, and wanton negligence, permitted the defect in the car to remain; that the defendants Acra, Shumate, Thien, and Schappart were at all times in said railroad yard, and were servants of the Chesapeake & Ohio Railway Company, and were employed by it as car inspectors and repairers; that they had inspected the car before the accident to the deceased, but, through their joint, gross, and wanton negligence, had failed to repair the same. The cases were set for hearing in the town of Independence, in the county of Kenton, Ky. All the defendants, except the Maysville & Big Sandy Railroad Company, moved to transfer the cause to Covington. Before the motion was ruled upon, the plaintiff, of his own motion, discontinued the action, as against all the defendants but the Chesapeake & Ohio Railway Company. The demurrer and motion to transfer to Covington were then each overruled. The defendant the Chesapeake & Ohio Railway Company thereupon filed a petition and tendered a bond for the removal to the circuit court of the United States, at Covington. The court declined to grant the removal or accept any bond, but not for any lack of sufficiency thereof. To this ruling the defendant excepted. The petition for removal was in the words following: "Your petitioner, the Chesapeake & Ohio Railway Company, shows that it is the defendant in the above suit; that the matter and amount in dispute in the above-entitled action, exclusive of interest and costs, exceed the sum or value of two thousand (\$2,000) dollars; that the said suit is a civil action, to recover the sum of ——— dollars, seeking to recover damages for wrongfully causing the death of L. A. Hukill, at Covington, Kentucky, on or about the ——— day of ———, by reason of allowing a defect in a certain car in the custody of the Chesapeake & Ohio Railway Company, by which said L. A. Hukill was struck, and knocked from a car upon which he was riding, and was thereby killed; that there is in said suit a controversy wholly between citizens of different states, and which can be fully determined as between them, to wit, between your petitioner, the Chesapeake & Ohio Railway Company, the defendant in said suit, who says that it was at the commencement of this suit, and still is, a corporation organized under the laws of the states of Virginia and West Virginia, and of no other state, and that it was then, and still is, a citizen and resident of the states of Virginia and

West Virginia, and of no other state; that it was not then, and is not now, either a resident or citizen of the state of Kentucky,—and the plaintiff, L. A. Hukill's administrator, Eugene Hukill, was at the commencement of this suit, and still is, a resident and citizen of the state of Kentucky. Your petitioner further says that in the bringing of this suit heretofore, on the — day of —, 189—, C. E. Acra, George W. Shumate, Henry Thien, John Schappart, and the Maysville & Big Sandy Railroad Company were fraudulently and improperly joined as parties defendant in the above-entitled cause, for the sole purpose of defeating the right of your petitioner to a removal of this cause to the circuit court of the United States; that because of the joinder of said C. E. Acra, George W. Shumate, Henry Thien, John Schappart, and the Maysville & Big Sandy Railroad Company, said cause was not heretofore removed to the circuit court of the United States within the time originally allowed by law; and that the aforesaid parties, on the 16th day of October, 1894, were dismissed, and said cause is now pending for the first time as to the said Chesapeake & Ohio Railroad Company alone. And your petitioner offers herewith a bond, with good and sufficient surety, conditioned according to law, for its entering in the circuit court of the United States for the district of Kentucky, being the proper district, on the first day of its next session, a copy of the records in this suit, and for paying all costs that may be awarded by said court if said court shall hold that this suit is wrongfully and improperly removed thereto; and your petitioner prays this honorable court to proceed no further herein, except to make the order of removal required by law, and to accept such surety bond, and to cause the record herein to be removed to the said circuit court of the United States for the district of Kentucky, and he will ever pray."

At the next term of this court after the petition for removal was filed in the state court, a transcript of the record was filed in this court; and a motion has now been made to remand the case, by the plaintiff, on the ground that the petition for removal was not filed within the time required by statute. The answer day fixed by the Kentucky law is admitted to be 20 days after the filing of the petition, and it is conceded by the petition for removal itself that the petition was not filed within this time. Plaintiff filed an answer to the petition for removal, denying that there is a controversy wholly between citizens of different states, and denying that the other defendants were fraudulently joined with the Chesapeake & Ohio Railway Company to prevent its removal of the case to this court. Affidavits have been filed by defendant in support of his petition for removal, showing that the Chesapeake & Ohio Railway Company is, and always has been, a citizen of Virginia and West Virginia, and not of Kentucky, and that the plaintiff and the other defendants were citizens of Kentucky when suit was brought. The affidavits also set forth a part of the speech of plaintiff's counsel made to the jury in the trial in the state court, in which he, in effect, stated that the reason for his joinder and dismissal of the resident defendants was to avoid a trial in this court.

Wm. Goebel, for plaintiff.

Wm. H. Jackson, for defendant.

Before TAFT, Circuit Judge, and BARR, District Judge.

TAFT, Circuit Judge (after stating the facts). In the case of *Powers v. Railway Co.* (just decided) 65 Fed. 129, we have had occasion to consider much the same question which is here presented. We have no doubt whatever that the sole purpose of plaintiff and his counsel in joining the other defendants with the Chesapeake & Ohio Railway Company was to defeat the latter's right to remove the case to this court. The statement of counsel to the jury was in effect an admission that such had been his purpose in the joinder, and that, having served that purpose, he had dismissed them. It is attempted to explain the dismissal of the defendants

by referring it to a desire of plaintiff to avoid a transfer of trial from Independence to Covington, by dismissing those defendants who claimed to have the right to insist on it, although such right is not even now conceded by plaintiff's counsel. This would hardly explain the dismissal of the Maysville & Big Sandy Railroad Company, which did not ask a transfer. But even the explanation offered shows a juggling with the names of resident defendants to enable the plaintiff to select that forum deemed most favorable for his interest, without any bona fide intention of securing judgment against the persons whose names were thus used. We have no difficulty whatever in finding that the joinder of the resident defendants was without any bona fide intention of taking judgment against them, but was solely to prevent removal to the federal court, and that their subsequent dismissal before trial was in accordance with the original plan and device. The petition for removal states the indispensable jurisdictional facts as to diverse citizenship and amount in controversy; and, on the point of time of removal, it avers that the five defendants other than the Chesapeake & Ohio Railway Company were fraudulently and improperly joined as defendants to prevent the removal of the case to this court by the Chesapeake & Ohio Railway Company; that the presence of these defendants did prevent such removal within the statutory time; that they have now been dismissed, and the cause is now pending for the first time against the Chesapeake & Ohio Railway Company alone. There is no averment that the defendants who were fraudulently joined were citizens of Kentucky, but this is a necessary inference from the statement that the cause was not removed because they were joined as defendants. The fact that they were citizens of Kentucky has now been established by affidavit. The petition for removal does not, in terms, plead an estoppel against the plaintiff on the question of the time of its filing, but it states facts on which such a plea may rest, and is therefore sufficient.

The averment of the petition for removal that the joinder of the resident defendants prevented removal is borne out by an examination of the plaintiff's petition. A joint cause of action is stated against all the defendants. The averment that the Maysville & Big Sandy Railroad Company had leased the railroad on which the injury happened, without statutory or other authority, would seem to make it jointly liable with the Chesapeake & Ohio Railway for torts inflicted in the operation of the road. *Arrow-smith v. Railway Co.*, 57 Fed. 165. The averment against the other defendants is that the injury was the direct result of their wanton negligence, in not properly repairing the roof of the car, by the defective condition of which the injury happened. Had an attempt been made to remove the cause to the federal court within the statutory time, it must then have resulted, as did such an attempt in the *Powers Case*, in an order remanding it to the state court. The defendant was not required to do a vain thing, and therefore can be in no worse condition because he did not file a petition for removal when it must have been denied.



We have already decided, in the Powers Case, that where a plaintiff joins, with a nonresident defendant, resident codefendants, in a joint action for a tort, solely to prevent a removal to the United States court, and, after the time for such removal is passed, dismisses all but the nonresident defendant, the case is then removable to the United States court, because all the indispensable elements to federal jurisdiction are present, and the objection as to time is removed by the conduct of the plaintiff, which disables him from taking advantage of the delay which he purposely caused. Applying this principle to the case before us, the removal must be sustained, and the motion to remand be overruled.

---

SHEPHERD v. BRADSTREET CO. et al.

(Circuit Court, W. D. Missouri, W. D. January 7, 1895.)

1. REMOVAL OF CAUSES—REFUSAL OF STATE COURT TO MAKE ORDER.

When a defendant has made proper application for removal of a cause from a state court to a United States court, and has filed a transcript of the record in the United States court, jurisdiction eo instanti attaches in that court, though the state court has refused to make an order of removal, and has assumed to enter a nonsuit.

2. SAME—SEPARABLE CONTROVERSY—PRACTICE.

An action for libel was brought in a state court against a commercial agency, a corporation of another state, and its local agent, a citizen of the state where suit was brought, the gravamen of the complaint being the publication of certain statements concerning plaintiff's credit. It was alleged, upon a petition for removal and severance of the action, that the local agent was made a party solely to prevent removal of the cause. *Held*, that the court would examine closely into the actual relation of the agent to the facts constituting the alleged cause, of action, and into the motives of plaintiff in joining him as a party, and, finding him probably not a necessary party, would deny a motion to remand, leaving it for the court upon the trial to remand the cause as improvidently removed, if plaintiff could then make it appear that he was a real party to the action.

This was an action by H. C. Shepherd against the Bradstreet Company and Harry Roloff, for libel. The action was brought in a court of the state of Missouri, and was removed by the defendant the Bradstreet Company to the United States circuit court. Plaintiff moves to remand.

Davis, Loomis & Davis, for plaintiff.

William A. Wood, Dowe, Johnson & Rusk, and W. S. Leeper, for defendants.

PHILIPS, District Judge. This suit was instituted in the state circuit court of Caldwell county by the plaintiff, a citizen of said county, against the defendant the Bradstreet Company, a citizen of another state, and the defendant Harry Roloff, a citizen of said Caldwell county, state of Missouri. The defendant company in due time filed its application for a removal of the cause as to it into this jurisdiction. The application is predicated upon the diverse citizenship of said company, accompanied with the further alle-

gation that the cause of action is separable, and that the plaintiff joined the resident defendant, Roloff, solely for the purpose of giving a cause of action against it in the local jurisdiction of Caldwell county, and to prevent it from the exercise of its right to remove the cause as to it into this court. On the filing of said petition for removal the plaintiff undertook to enter a nonsuit therein, which the court permitted, and thereupon denied the petition to remove the cause into this court. It is well settled that, after proper application made for removal, the state court loses jurisdiction over the case, save for the purpose of making the order of removal. And on filing the proper transcript in this court, as the defendant company has done, jurisdiction *eo instanti* attaches here. The plaintiff has filed in this court a motion asking that the cause be remanded to the state court. The motion alleges as grounds therefor that the state court made no order removing the cause into this court, and "that this court has no jurisdiction in this action neither of the subject-matter therein, nor of the defendants therein, nor of any of them." From this motion it would seem that plaintiff's notion is that no jurisdiction over the subject-matter, nor over the defendants, nor either of them, attaches here because of the fact that the state court failed to make the order of removal, as no other ground is assigned for the motion to remand. The motion might properly enough be denied on this ground alone. But the parties have argued the question as to whether or not the cause of action is severable as to the defendants, and in support of and against the motion many affidavits have been filed by the respective parties. To understand this controversy, it may be briefly stated that the gravamen of the complaint in the petition is that the defendant Roloff is the local agent of the Bradstreet Company, a nonresident corporation, and that the defendant the Bradstreet Company, by its servants, agents, and employes and the defendant Roloff, falsely, etc., composed, and published, telegraphed and reported and circulated over the country, by a written or printed telegram, and by a written or printed commercial report, that the plaintiff had been attached, etc., whereby he was greatly injured in his business, etc. The second count in the petition merely charges that "defendant" did the acts complained of; but which defendant is not stated. It is charged by the defendant the Bradstreet Company, in its petition for removal, and affidavits filed herein, that the joinder of defendant Roloff was merely for the purpose of denying to the Bradstreet Company its right of trial in this jurisdiction. It quite clearly enough appears from these affidavits that Roloff resides in the county of Caldwell, and was the local agent of the Bradstreet Company for a limited purpose, which did not embrace the publication of such information, and that said Roloff is insolvent. The plaintiff, in his counter affidavits, seeks to show that the imputed agency of Roloff was broader than that claimed for him on the part of the defendants; that it extended to the matter of collecting information for the company as to the solvency and financial condition of business men in that locality.

But this contention is predicated merely upon acts and declarations of the imputed agent. "It is well-settled law that an agency cannot be established by the mere acts or declarations of the imputed agent, nor from the mere fact that he assumes to act as agent." *Anderson v. Volmer*, 83 Mo. 406, and citations. But it is clearly apparent from all the affidavits that the agency of Roloff, reasonably implied, did not extend further than the act of forwarding to the company information respecting the credit and solvency of persons in the given locality. No averment is made in the petition nor the affidavits that Roloff's agency extended to the matter of giving publicity to any reports he might make; and, in the absence of such averments, it does not sufficiently appear that he was authorized by the company to make such publications. On the contrary, it is reasonably inferable from the usual course of such business that the agency of the local agent extended to the simple duty of giving by telegram, letter, or report information to the company respecting the financial standing and solvency of persons in his locality. If the publication was subsequently made by the principal, that was an act independent of the report sent in by the agent, and no joint action would lie therefor, in the absence of an averment and proof of a conspiracy.

The joinder of an agent with his principal under such circumstances, should be narrowly scanned by the courts, where its effect is to deny to the nonresident defendant a right of trial in the federal court. It is permissible to this court, in a contention like this, to entertain affidavits to get at the real state of the facts respecting the object of such joinder, to enable the court to see whether or not there be a joint cause of action against all the defendants, or whether or not it be one only by averment. *Nelson v. Hennessey*, 33 Fed. 113; *Rivers v. Bradley*, 53 Fed. 305; *Ferguson v. Railway Co.*, 63 Fed. 177; *Dow v. Bradstreet Co.*, 46 Fed. 824. It is true, in this case, that the plaintiff and his attorneys make affidavit denying the fact that it was understood or discussed between lawyers and client that Roloff should be joined in the action for the purpose of defeating the removal of the cause into this court by the company, and the plaintiff also states that he had no such purpose. But it is a noticeable fact that, while his attorneys state that the matter was not canvassed between them and their client, it is not stated that they did not canvass the matter among themselves as attorneys. Ofttimes actions speak louder than words. Immediately on filing the petition by the company asking for a removal of this cause, as to it, into the United States circuit court, the plaintiff sought to dismiss his action. Why did he do this, but for the fact that he was unwilling to litigate this controversy with the nonresident defendant on more common, neutral ground? And as proof that this was the real incentive to the action of the plaintiff in thus attempting to defeat the removal, one of the defendants' attorneys makes affidavit that upon the attempted dismissal of the suit plaintiff's attorneys said to him that they would now reinstitute the action in the state court for a sum less than the jurisdiction of the federal

court, so the defendant could not remove it. This affidavit is not denied by the plaintiff or by his attorneys.

Another fact is significant from the affidavits filed by the plaintiff in this case: That, although advised by the contention of the defendants that there was no community of action between the report of the defendant Roloff to the company and its subsequent publication, none of the affiants on the part of the plaintiff state or show that the defendant Roloff was instrumental in making the alleged publication, or that he authorized the same to be published. As the publication is the gist of the libel, this statement was important under the issues joined on this motion. The failure of the plaintiff to support this averment in his petition, after accepting the gauge of battle thrown down by the challenge of the defendant in the affidavits filed herein, by his own or any other affidavit, is little less than an admission of the truth of defendant's charge. If, as a matter of fact, the defendant Roloff, in connection with other servants, agents, and employes of the defendant company, made the libelous publication which is the gravamen of this action, the plaintiff can make that fact appear on the trial of this cause in this court; and when he does so this court will discontinue the case here, and remand the same to the state court on the ground that it was improvidently removed. The motion to remand is denied.

---

TOD v. CLEVELAND & M. V. RY. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1894.)

No. 202.

1. REMOVAL OF CAUSES—LOCAL PREJUDICE—AMOUNT IN CONTROVERSY.

The record presented upon an application for removal of a cause from a state to a United States court, on the ground of local prejudice, in order to authorize the latter court to assume jurisdiction, must show that the amount in controversy exceeds \$2,000.

2. SAME—WAIVER OF OBJECTIONS.

A plaintiff whose cause has been removed from a state to a United States court, and who fails to prosecute a motion to remand, thereby waives all objections to the removal which he is competent to waive, including the objection that the showing of local prejudice was not sufficient, in a case where the removal was on that ground.

3. SAME—ORDER OF REMOVAL.

An entry in the record of the circuit court, upon an application for removal of a cause from a state court, on the ground of local prejudice, which is in form simply a finding of the right to removal, without an order that the cause be removed, does not effect the removal of the cause.

4. SAME—WAIVER.

Whether, when such an entry is brought to the attention of the state court, and it thereupon treats the cause as removed, and the plaintiff follows it to the United States court, and proceeds therein without objection, the defect is not thereby waived, *quaere*.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

This was an action by Henry Tod against the Cleveland & Mahoning Valley Railway Company, the New York, Pennsylvania & Ohio Railroad Company, and the New York, Lake Erie & Western Railroad Company, to recover possession of certain lands. The action was originally brought in a court of the state of Ohio. The New York, Lake Erie & Western Railroad Company took proceedings for its removal into the United States circuit court, in which court a verdict and judgment were rendered for the defendants. Plaintiff brings error.

The plaintiff in error brought suit in the court of common pleas for Mahoning county, in the state of Ohio, to recover the possession of certain land in that county then in the possession of the defendants, who claimed as owners or lessees thereof. The defendant companies appeared and answered, admitting the incorporation of the several defendants, the first two alleging that the demanded premises were in the possession of the third, and the third alleging the possession to be in itself, and each denied all the other allegations of the petition. Subsequent to the time when the case could, upon other grounds, be removed into the circuit court of the United States, and on the 3d day of February, 1891, the defendant the New York, Lake Erie & Western Railroad Company presented its petition to the court below for the removal of the cause into that court, upon the ground that, by reason of prejudice and local influence, it could not obtain justice in the state court. This petition was accompanied by an affidavit designed to show the existence of that ground, and a proper bond. From the record in the state court, and the petition for removal, it then appeared that the plaintiff was a citizen of Ohio; that the first two named defendants were also citizens of that state; and that the petitioning defendant was a citizen of New York. Neither by the record in the state court, nor by the petition for removal, nor the affidavit accompanying it, was it shown what was the value of the matter in controversy in the suit. In the petition and affidavit it was alleged in direct terms "that, from prejudice and from local influence, said New York, Lake Erie & Western Railroad Company will not be able to obtain justice in said court of common pleas, or in any other state court to which it has a right under the laws of the state of Ohio, on account of such prejudice and local influence, to remove said cause." Upon the filing of the petition, the court below directed the following entry: "This day came on to be heard the petition of the defendant for an order for removal of the case from the court of common pleas of Mahoning county, Ohio; and it appearing to the court that the defendant has filed in this court his petition, bond, and affidavit under the second section of the act of congress of March 3, 1887, entitled 'An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes,' etc., from which it appears to the court that said affidavit is in compliance with the said second section of said act of congress, and that said bond is sufficient and satisfactory, and that said defendant, by his petition, affidavit, and bond, has shown he is entitled to remove said cause to this court." The transcript was filed on the same day. It appears, also, that a similar petition, with an affidavit and bond, had previously, and on the 27th day of January, 1891, been filed in the state court, upon which that court, on the 28th day of January, had made an order that the cause be removed into the United States court. After the transcript was filed, the plaintiff entered a motion to remand, upon the ground that the circuit court of the United States had not acquired jurisdiction. This motion was not brought on for hearing, and there is nothing to show that the attention of the court was ever called to it. Thereupon the plaintiff applied for and obtained leave to amend his petition, which was done accordingly, and the defendants, by leave, filed amended answers. The case went to trial before a jury, and a verdict and judgment were entered for the defendants. The plaintiff brings the case here, and assigns for error several matters involved in the rulings of the court upon the trial. By leave of the court, counsel for the plaintiff was permitted to argue several questions touching the jurisdiction of the court below, that is to say—First,

whether it was competent for the one defendant to remove the cause upon the ground alleged without joining the others in its petition; second, whether the fact of prejudice and local influence was sufficiently made to appear to justify an order of removal; third, whether it was necessary that it should be shown that the value of the matter in dispute was such as to constitute the case, in that respect, one within the jurisdiction of the court; and, fourth, whether the entry above set forth amounted to an order of removal.

George F. Arrel and H. K. Taylor, for plaintiff in error.

Hine & Clarke, for defendant in error the New York, L. E. & W. R. Co.

Before TAFT, Circuit Judge, and SEVERENS and SWAN, District Judges.

Having stated the case as above, SEVERENS, District Judge, delivered the opinion of the court.

Before entering upon the consideration of the rulings occurring on the trial upon which error is specially alleged, it is necessary to look into the questions submitted affecting the jurisdiction of the circuit court; for, unless it appears that that court acquired jurisdiction by the removal proceedings, it is clear that we cannot proceed to discuss the merits of the controversy.

It is well known that, upon the first and second grounds above stated upon which the want of jurisdiction is alleged, there has been much difference of opinion in the subordinate courts; but, inasmuch as we are of opinion that the jurisdiction of the circuit court must be denied upon another ground, we do not deem it necessary to examine the questions whether one of several defendants can proceed for the removal of the cause for the special reason here alleged to exist, where the other defendants are citizens of the same state with the plaintiff, and whether such a showing as was made in this case in regard to prejudice and local influence is sufficient. It seems proper, however, to say that in the present case the question last referred to does not present itself in the same way in which it would have done if the plaintiff had prosecuted his motion to remand. By omitting to do that, he waived all objections which he was competent to waive, and there remains not the question whether there was sufficient fullness in the showing of prejudice and local influence in the petition and affidavit, but the question whether they constituted any evidence at all of the fact stated. Mere defects in the form and mode of procedure may be waived, though the essentials of jurisdiction cannot be. *Ayers v. Watson*, 113 U. S. 594, 5 Sup. Ct. 641; *Martin's Adm'r v. Railroad Co.*, 151 U. S. 673-687, 14 Sup. Ct. 533.

Another question presented by the record is whether it was necessary, in order to justify the removal, that it should have been shown to the circuit court that the value of the matter in controversy was such as to bring it within the jurisdiction of the court. We are of opinion that it was, and that the case must be remanded to the state court, for the reason that it nowhere appeared from anything in the record or petition or affidavit that the sum or value of the thing sued for exceeded the sum of \$2,000. The first section

of the act of March 3, 1887, defines the general jurisdiction of the circuit courts in suits originally brought there, and, in respect to the value of the subject-matter, requires that it shall exceed the sum of \$2,000, besides interest and costs. By the second section, provision is made for the removal by defendants from state courts of cases of the same general character. The cases made removable by this section are divided into four classes. The first and second classes, taken together, cover generally all cases of which original jurisdiction is given by section 1; and in these it is necessary that all the defendants, if there be more than one, join in the removal. The third class is of cases of the same description as those included in classes 1 and 2, but it is a subclass as respects them, consisting of cases included in the former classes, in which part of the defendants are citizens of different states from that of the plaintiff, and have a separable controversy. In these the defendant or defendants in that controversy may remove the suit without joining codefendants. The fourth class is also a special class of cases included in classes 1 and 2, and consists of controversies between citizens of different states, in which justice cannot be obtained in the state courts, on account of prejudice and local influence. The first and second clauses of this section expressly refer to section 1 for the elements of jurisdiction. The third refers to the first two, of which it is a subclass; and, although the reference in the fourth clause is not quite so distinct, it is held by the supreme court, in the case of *In re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141, that the words "and where," with which the fourth clause commences, are equivalent to the words "and when in any such case," in the third clause. Thus, the essentials of the jurisdiction in removal cases conferred by section 2 appear to be identical with those in original cases as defined in the first section (with certain conditions added by the third and fourth clauses of section 2); and one of those essentials is that the controversy must involve a sum exceeding \$2,000. In *re Pennsylvania Co.*, above cited. And it has long been the established rule that all the essential conditions must appear in the record (which includes the petition), as it is presented to the circuit court of the United States, before it is authorized to assume jurisdiction. It is only "in any such case" that an order of removal can be made. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799; *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518; *Crehore v. Railway Co.*, 131 U. S. 240, 9 Sup. Ct. 692; *La Montagne v. Lumber Co.*, 44 Fed. 645. In the cases in the supreme court here cited, the element lacking was that of an allegation of diverse citizenship; but in the case in 44 Fed. 645, it was that of the value in controversy, and Judge Jenkins applied the same rule; and we can see no difference in the principle involved. See, also, *Oleson v. Railroad Co.*, Id. 1.

In regard to the other question, it seems doubtful whether there was any valid order for removing the case. The authority to make such an order is vested by the act solely in the circuit court of the United States. The entry recited in the foregoing statement of the facts was merely of a finding that the petitioner was entitled to remove the case into that court. It was not an order. The entry

in question was identical with the one which had been made by the United States circuit court in *Pennsylvania Co. v. Bender*, 148 U. S. 255, 13 Sup. Ct. 591. The state court, declining to treat the case as thereby removed, proceeded with it, and, after final judgment in the supreme court of the state, the case was removed to the supreme court of the United States, where Mr. Justice Brewer, in delivering the opinion of the court, treated the entry as a finding simply, and said:

"But such finding does not remove the case any more than an order overruling a demurrer to a petition makes a judgment. Such an order is simply an adjudication of the right of the plaintiff to a judgment. Upon it alone, execution cannot issue. There must be a judgment, or, in other words, an order based upon the determination of the right. A mere finding that the party is entitled to a removal is no order, and does not of itself work removal."

In that case, however, it does not appear that a copy of the entry was filed in the original state court, as was done here. There was in this case also an order made in the state court that the cause be removed. But that court had made the order previously, and it was in no wise responsive to the action of the federal court. The state court had no authority, either under state or federal law, to make the order when it did, and it was therefore void.

Whether, in view of the facts that the proceeding which had taken place in the United States court was brought to the attention of the state court, that the latter suffered the case to be removed, and that the plaintiff followed it into the United States court, and proceeded to trial without raising objection to the removal, the infirmity of the removal proceedings ought not to be treated as a matter of irregularity only, such as a party may waive, and not as of the essence of jurisdiction, is a question which we have not found it necessary to decide.

The judgment must be reversed, and the case remanded to the court below, with instructions to remand it to the state court. The defendant who removed the case must pay the costs of this court and of the court below. *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726; *Hanrick v. Hanrick*, 153 U. S. 192, 14 Sup. Ct. 835.

---

#### VERMILYA v. BROWN.

(Circuit Court, S. D. New York. November 26, 1894.)

##### FEDERAL COURTS—JURISDICTION—SERVICE OF PROCESS.

Where a state court, by levy made under an attachment against the property of a defendant residing out of its jurisdiction and personal service on such defendant out of the jurisdiction, effected before removal, has acquired jurisdiction of the case, to the extent, at least, of being entitled to enforce its judgment against the attached property, the federal circuit court will not, where the nonresident defendant has voluntarily removed the cause, allow him to dismiss it, as to that property, on the sole ground that that court could not have acquired original jurisdiction of such property by the issue of an attachment.

This was an action by Peter B. Vermilya against Mary Brown. It was commenced in a court of the state of New York by the issue and



levy of an attachment and service on the defendant out of that state. Defendant removed the cause to this court, and now moves to vacate the attachment, set aside the service of summons, and dismiss the action, appearing specially for that purpose.

This was a motion to vacate a warrant of attachment, to set aside service of summons without the state, and to dismiss the action. The action was originally brought in the state court, and a warrant of attachment issued September 11, 1894, against the property of the defendant, on the ground that she was a nonresident. Immediately thereafter, notice of the attachment was filed in the office of the county clerk, whereby, under section 649 of the New York Code of Civil Procedure, a levy was made upon certain real estate of the defendant situated in New York City. On October 9, 1894, an order was entered authorizing service of the summons upon defendant by publication, or without the state, and personal service without the state was made pursuant to that order. Under the law of the state, when a defendant is thus served, and he does not voluntarily appear, any judgment which may be obtained against him in the action can be enforced only against the property which has been levied upon by virtue of the warrant of attachment. Code Civ. Proc. N. Y. § 707. Subsequent to service, and on October 26, 1894, a petition and bond was presented to the state court for removal of the cause to this court, and on October 30th the record was duly filed here. There has been no personal service of the summons within the jurisdiction of this court or of the state court. The defendant resides in and is a citizen of New Jersey. Her appearance in obtaining the removal was special, and for that purpose alone. Her appearance now is special, and for the purpose of this motion only.

A. G. N. Vermilya, for plaintiff.

Howard A. Taylor, for defendant.

LACOMBE, Circuit Judge (after stating the facts). There is a distinction to be made between this case and those heretofore decided in this circuit, and cited on the argument, namely: *Good Hope Co. v. Railway B. F. Co.*, 22 Fed. 635; *Golden v. News*, 42 Fed. 112; *Bentlif v. Finance Corp.*, 44 Fed. 667; and *Clews v. Iron Co.*, Id. 31. In those cases the service of process in the state court had given that court no jurisdiction, either of the person or of the property of defendant; and under the doctrine laid down in *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, and *Pennoyer v. Neff*, 95 U. S. 714, the federal courts would have treated any judgment rendered in the state court upon such service as a nullity. In the case at bar, however, the state court had, even under the theory of the United States supreme court decisions above cited, acquired jurisdiction of the property attached within the state.

When a precisely similar point was presented in *McKay v. Central Railroad & Banking Co. of Georgia* [no opinion], this court, the writer then sitting, followed the opinion of Judge Colt in *Perkins v. Hendryx*, 40 Fed. 657, and dismissed the summons and attachment. But attention was not at that time called to *Railroad Co. v. Estill*, 147 U. S. 591, 13 Sup. Ct. 444. Although much of that opinion is obiter, it affords a strong indication of the views of the supreme court upon the questions raised here. In conformity thereto, it should be held that where the state court has, by levy made under attachment and personal service effected before removal, properly acquired jurisdiction of the case, to the extent, at least, of being entitled to enforce

its judgment against such property, the federal circuit court will not, where the nonresident defendant has voluntarily removed the cause, allow him to dismiss it as to that property, on the sole ground that this court could not have acquired original jurisdiction of such property by the issue of an attachment. The motion is denied.

GLOTIN et al. v. OSWALD et al.

(Circuit Court, D. Minnesota. December 12, 1894.)

CIRCUIT COURT—JURISDICTIONAL AMOUNT—PLEADING.

St. 1881, giving the right to commence suit, in a trade-mark case, without alleging the amount in controversy, is not repealed by the statutes of 1887 and 1888, requiring the amount involved to be \$2,000, to give the circuit court jurisdiction.

Suit by Marie Brizard Glotin and others, doing business as Les Heritiers de Marie Brizard & Roger, against John C. Oswald and another, partners as J. C. Oswald & Co. Defendants demur to the complaint. Demurrer overruled.

In this case an injunction is asked by complainants to restrain defendants from selling or offering for sale a spurious brand of liqueur called "Crème de Menthe," whereby the bottles, labels, and trade-marks duly registered in compliance with the laws of the United States, which have been used by the complainants for many years, are so closely imitated as to deceive the public into the belief that the goods so put up are the genuine liqueurs manufactured by these complainants. A demurrer is interposed by defendants, on the ground that it does not appear by the bill of complaint that the sum of \$2,000 is involved in this action, and hence this court has no jurisdiction.

Boardman & Boutelle, for complainants.

Taylor & Spooner, for defendants.

NELSON, District Judge. The complaint shows that these complainants, residents and citizens of the republic of France, are making a liqueur called "Crème de Menthe" in France, and exporting it to this country; and having filed their trade-mark here, and complied with the law in that respect, they are entitled to protection. The statute of 1881, which gives them the right to commence a suit without alleging the amount in controversy, was not repealed by the statutes of 1887 and 1888, which make it necessary, in order to give jurisdiction to the United States circuit court, that the amount involved be \$2,000. The demurrer is overruled, and the motion for a temporary injunction granted, and defendants will be given until next rule day to file their answer.

GREGG v. SANFORD et al.

(Circuit Court of Appeals, Third Circuit. January 2, 1895.)

No. 15.

1. TAXATION—PENNSYLVANIA STATUTES—JOINT-STOCK ASSOCIATIONS.

A joint-stock association is not subject to taxation under the acts of Pennsylvania of May 1, 1868, April 24, 1874, March 20, 1877, and June 7, 1879, imposing taxes upon the capital stock of "incorporated" companies.

**2. CONSTITUTIONAL LAW—SUIT AGAINST A STATE.**

A suit against an officer of a state, charged with the duty of assessing and collecting taxes, to restrain him from levying upon complainant a tax not authorized by law, is not a suit against the state.

**3. EQUITY JURISDICTION—CLOUD ON TITLE—ILLEGAL TAX.**

Equity has jurisdiction to restrain the assessment of taxes when such assessment is without authority of law, and would create an apparent lien upon real estate, and so a cloud upon the title thereto, and evidence aliunde the assessment is required to show its invalidity.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit by Henry Sanford, Clarence Seward, and Levi C. Weir against D. McM. Gregg, auditor general of the commonwealth of Pennsylvania, to restrain the assessment of a tax. The circuit court rendered a decree for the complainants. Defendant appeals.

W. U. Hensel and Lyman D. Gilbert, for appellant.

George Tucker Bispham and B. H. Bristow, for appellees.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

ACHESON, Circuit Judge. The first question which we will consider is whether the Adams Express Company is subject to taxation under the several acts of assembly of the state of Pennsylvania recited in the bill, namely of May 1, 1868, of April 24, 1874, of March 20, 1877, and of June 7, 1879, whereby an annual tax was imposed upon the "capital stock" of all companies "incorporated" by or under any law of the state of Pennsylvania, and of every company "incorporated" by any other state and doing business in the state of Pennsylvania. It appears that the Adams Express Company was formed by certain individuals, by articles of agreement dated July 1, 1854, signed in the city of New York, where the principal office of the company was located, for the purpose of carrying on the express business for a limited period. The articles of association provide that the proportionate interests of the associated members shall be represented by shares of stock—having, however, no par or fixed money value—transferable on the books of the association; that the death of a shareholder shall not dissolve the association; that the business of the association shall be conducted by a board of managers, and its property held by three trustees. By statutes of the state of New York existing at the date of the formation of the Adams Express Company, it was enacted that any joint-stock company or association might sue or be sued in the name of the president or treasurer thereof, and that no suit should abate by reason of the death, removal, or resignation of such officer; that it should be lawful for such association to provide by their articles of association that the death of any stockholder or the assignment of his stock should not work a dissolution of the association, and to devolve upon any three or more of the "partners" the sole management

of their business. These statutes, however, declared that nothing therein contained should be construed to confer on joint-stock companies or associations any of the rights or privileges of corporations, except as therein specially provided. In the case of *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96, the court of appeals of New York carefully considered the question whether the National Express Company, a joint-stock association of that state, having an organization similar to that of the Adams Express Company, was liable to taxation on its capital stock as a corporation. The court there held that, notwithstanding various legislative enactments extending the powers of joint-stock companies, and clothing them with many of the essential attributes possessed by and characteristic of corporations, the distinction between the two classes of organizations was still preserved, and a joint-stock company was not taxable upon its capital stock under the provisions of the statute of New York subjecting "all moneyed or stock corporations deriving an income or profit from their capital or otherwise" to such a tax. This construction of the statutes of New York by the highest judicial tribunal of that state is conclusive here. *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121; *Stutsman Co. v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227. We therefore may affirm confidently that the Adams Express Company was not incorporated by or under the laws of the state of New York. It is not pretended that it was constituted a corporation elsewhere. The answer expressly admits that it was not incorporated by or under any law of the state of Pennsylvania. Upon what principle, then, can it be held to be taxable under acts which impose a tax upon the capital stock of incorporated companies? In truth, the Adams Express Company was brought into being wholly by the contract of its individual members inter se, expressed in their articles of association, and was not of statutory origin. It is, we think, very clear that such a joint-stock association is not a corporation, but a partnership. This, as we have seen, has been adjudged by the court of appeals of New York. It is the settled rule in Massachusetts. *Taft v. Ward*, 106 Mass. 518; *Railroad v. Pearson*, 128 Mass. 445; *Gleason v. McKay*, 134 Mass. 419. The supreme court of the United States, in the case of *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, distinctly laid down the same doctrine.

It will be perceived that the question before us is one of construction. By the express provisions of the acts of assembly here involved, a tax is imposed upon every "company incorporated" by or under the laws of Pennsylvania, or by or under the laws of any other state. It is, however, certain that the Adams Express Company is not incorporated. It is, therefore, without the terms of the acts. There is no language whatever in any of these acts to bring within their operation an unincorporated joint-stock company. This the legislature of Pennsylvania has recognized; for the act of June 1, 1889, imposes for the future an annual tax upon the capital stock of "every corporation, joint-stock association and limited partnership whatsoever, now or hereafter

incorporated or organized by or under any law of this commonwealth, or of any other state, \* \* \* doing business in this commonwealth." We find no decision by the courts of Pennsylvania giving any countenance whatever to the idea that a voluntary association, such as the Adams Express Company, is to be deemed a corporation. The case of *Coal Co. v. Rogers*, 108 Pa. St. 147, relates to a class of artificial persons formed under the act of June 2, 1874, and thereby clothed with every essential attribute of a corporation at common law, and scarcely differing therefrom except in name. Nor can we accept as sound the argument based on section 13 of article 16 of the constitution of Pennsylvania, which article imposes restrictions and liabilities upon, and reserves legislative control over, private corporations, but does not relate to the subject of taxation. That section reads thus:

"The term 'corporations,' as used in this article, shall be construed to include all joint stock companies or associations having any of the powers or privileges of corporations, not possessed by individuals or partnerships."

The definition of the term "corporations" here, it will be perceived, is expressly confined to that particular article of the constitution, and the section does not at all sanction, but rebuts, the suggestion that the term "corporations," as used in general legislation, is to be construed as covering joint-stock companies or associations.

We discover nothing in the ruling of the supreme court of Massachusetts in *Oliver v. Insurance Co.*, 100 Mass. 531, or in the ruling of the supreme court of the United States in that case upon error (*Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566),—especially in view of the later above-cited decisions of those courts,—to excite any doubt as to the correctness of our conclusion here. The Massachusetts statute expressly applied to every "insurance company incorporated or associated under the laws of any government, or state other than one of the United States"; and the Liverpool Company, although organized under a deed of settlement, had been invested by several acts of parliament with all essential rights of a corporate nature, and was empowered to act independently of the rules which govern an ordinary partnership. As, therefore, it came within the express terms of the Massachusetts statute, and had been permitted by the comity of the state to exercise its functions therein, it was held that no exemption from regulations appropriate to the action of the collective body could be claimed on account of the citizenship or nationality of individual members of the association. We fully concur with the court below in the opinion that the Adams Express Company was not chargeable with taxes under the acts of assembly in question, and that in proceeding to settle an account for taxes against the company from May 1, 1868, to the first Monday of November, 1868, and for each succeeding year thereafter down to the first Monday of November, 1888, together with a superadded penalty of 20 per cent. for default, amounting in all to the sum of \$61,749.99, the defendant below, D. McM. Gregg, auditor general of Pennsylvania, acted without any lawful authority.

But it is objected that this was substantially a suit against the

state of Pennsylvania, within the inhibition of the eleventh amendment to the constitution of the United States. We have seen, however, that the taxes which the defendant sought to impose upon the Adams Express Company were not authorized by the state. The defendant, therefore, while claiming to act in his official capacity, was really proceeding without any legal warrant. This case, then, belongs to that class of suits which have been sustained against individuals who, under color of state authority, have been guilty of, or threatened to inflict, personal trespasses and wrongs. In *Cunningham v. Railroad Co.*, 109 U. S. 446, 452, 3 Sup. Ct. 292, 609, the general subject was discussed; and, recognizing the jurisdiction of the court in cases of this kind as resting on a sure foundation, the court said:

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him."

Suits against persons holding office under a state for illegal acts done under color of an unconstitutional law of the state are not suits against the state. *Pennoyer v. McConnaughy*, 140 U. S. 1, 10, 11 Sup. Ct. 699. In the last-cited case the court, speaking through Mr. Justice Lamar, reaffirmed the doctrine of the leading case of *Osborn v. Bank*, 9 Wheat. 738, that, where grounds of equity jurisdiction exist, an injunction from a circuit court will lie to restrain a person who is a state officer from performing an official act directed by an unconstitutional statute of the state. In the case of *Reagan v. Trust Co.*, 154 U. S. 362, 390, 14 Sup. Ct. 1047, the court said:

"A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it, in the matter of assessment or collection, as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

These authorities sufficiently answer the objection to jurisdiction based upon the eleventh amendment.

It is, however, further urged against the decree of the circuit court that the complainants' case, if the facts be as they allege, was not one for equitable relief; and it remains for us to consider this point. Here, in the first place, we may remark that, in a suit by a citizen of Pennsylvania in one of her own courts to enjoin the collection of a tax not authorized by law, this objection would have no force. The supreme court of Pennsylvania has repeatedly held that where there is a want of power to tax, without anything more, equity will enjoin. *Appeal of Conners*, 103 Pa. St. 356; *Harper's Appeal*, 109 Pa. St. 9, 1 Atl. 791; *Banger's Appeal*, 16 Wkly. Notes Cas. 289, 295. Now, in *Cummings v. Bank*, 101 U. S. 153, 157, the fact that relief by injunction against the collection of illegal taxes was given in the state

courts under a statute was regarded, upon the question of remedy in the federal court, as entitled to the greatest weight. But we do not put our decision upon the practice in the courts of Pennsylvania. Having regard to general principles, we think this case presents clear ground for equitable redress, aside from the mere illegality of the tax. The proceeding for the settlement of taxes here is under the provisions of the act of March 30, 1811 (P. L. 145; *Purd. Dig.* 1747), the twelfth section of which provides that the amount or balance of every account, settled agreeably to this act, due to the commonwealth, shall be a lien from the date of such settlement on all the real estate of the debtor within the commonwealth. The bill alleges that the Adams Express Company is the owner of valuable real estate in the state of Pennsylvania, within the cities of Philadelphia and Pittsburgh, upon all of which the settlement of taxes will create an apparent lien and a cloud, and prevent the company from selling or disposing of the same until all the litigation concerning said taxes shall have been ended. Now, to prevent a threatened cloud upon the title to real estate, or to remove it if existing, is an acknowledged head of equity jurisdiction. *De Witt v. Van Schoyk*, 110 N. Y. 7, 11, 17 N. E. 425; *Dull's Appeal*, 113 Pa. St. 510, 6 Atl. 540; *Story, Eq. Jur.* § 711a. Preventive relief by injunction against an illegal tax which would cast a cloud upon the title to real estate is within the settled powers of a court of equity; and where a tax on its face appears to be valid, and evidence aliunde is necessary to show its invalidity, equity will interfere. *Cooley, Tax'n*, 542, 543; *High, Inj.* §§ 524, 526. The books are replete with cases in which equity has interposed to prevent or cancel a cloud upon title to land arising from illegal tax assessments or sales thereunder, or from tax deeds, where the proceeding sought to be enjoined or set aside was *prima facie* valid, and it was necessary to prove extrinsic facts to show its illegality. *Tilton v. Road Co.*, 3 Sawy. 22, *Fed. Cas. No.* 14,055; *Holland v. Mayor, etc.*, 11 Md. 186, 197; *Leslie v. City of St. Louis*, 47 Mo. 474; *Stewart v. Chrysler*, 100 N. Y. 378, 3 N. E. 471; *Hamilton v. City of Fond du Lac*, 25 Wis. 496; *Litchfield v. Polk Co.*, 18 Iowa, 71; *Scofield v. City of Lansing*, 17 Mich. 437; *Reed v. Tyler*, 56 Ill. 288. The supreme court of the United States, in *Gage v. Kaufman*, 133 U. S. 471, 10 Sup. Ct. 406, proceeding as well upon general equitable principles as upon the Illinois decisions, sustained a bill in equity to remove a cloud upon title created by a tax deed. In *Railway Co. v. Cheyenne*, 113 U. S. 516, 525, 5 Sup. Ct. 601, the court distinctly ruled that a bill charging that the collection of an illegal tax would involve the plaintiff in a multiplicity of suits as to the title of lots being laid out and sold, which would prevent their sale, and would cloud the title to all the plaintiff's real estate, states a case for relief in equity. And, speaking for the court, Mr. Justice Bradley there said:

"Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief."

In all the decisions of the supreme court relating to the general subject of the appropriate relief against the collection of taxes ille-

gally imposed, it is laid down as a proposition not to be doubted that, where the illegal tax is upon real estate, and would throw a cloud upon the plaintiff's title, the case comes under a recognized head of equity jurisdiction. *Dows v. City of Chicago*, 11 Wall. 108, 110; *Shelton v. Platt*, 139 U. S. 591, 594, 11 Sup. Ct. 646; *Express Co. v. Seibert*, 142 U. S. 339, 348, 12 Sup. Ct. 250. In the present case the proceedings complained of would most certainly throw a cloud upon the title of all the real estate of the Adams Express Company within the state of Pennsylvania; for those proceedings *prima facie* are valid, and extrinsic evidence, to wit, proof that the company was not in fact a corporation, would be necessary in order to show that the taxes were illegally imposed. Thus there was a firm basis for equitable intervention.

We have not overlooked the act of assembly of April 14, 1827 (*Purd. Dig.* 1774), nor the rulings thereunder that, to give the commonwealth *priority* over other lien creditors, a certified copy of the settlement under the act of 1811 must be filed in the county where the land is. *Wm. Wilson & Son Silversmith Co.'s Estate*, 150 Pa. St. 285, 24 Atl. 636. No case, however, decides that a purchaser would not be affected by the lien expressly created by the twelfth section of the act of 1811, and no prudent counsel would advise that the purchaser would take free of the lien. Moreover, the act of 1827 makes it the imperative duty of the auditor general to transmit to the prothonotaries of the respective counties where the lands lie certified copies of the liens. The filing of these transcripts is a part of the procedure, and is positively enjoined by the act. Therefore, the suggestion that the defendant does not intend here to file transcripts amounts to nothing. In this court he defends his right to make the tax settlement, and impliedly asserts his right to do whatever may be necessary to make it an effective lien.

Having thus seen that the threatened cloud upon their title justified the complainants in seeking redress in an equitable forum, we need not consider the other alleged grounds for sustaining the bill, namely, the element of a trust, and the avoidance of a multiplicity of suits.

In conclusion, it may be observed that, if the taxes in question were paid, there is no way in which they could be recovered back, for the payment would be into the state treasury, and the statutes of Pennsylvania do not authorize a suit against the state. Aside from this bill, the only remedy open to the complainants was an appeal to the court of common pleas of Dauphin county; but the existence of that special statutory mode of redress did not bar the equity jurisdiction of the circuit court of the United States. *Barber v. Barber*, 21 How. 582, 592; *Kirby v. Railroad Co.*, 120 U. S. 130, 138, 7 Sup. Ct. 430. The decree of the court below is affirmed.



**PULLMAN PALACE-CAR CO. v. CENTRAL TRANSP. CO.****CENTRAL TRANSP. CO. v. PULLMAN PALACE-CAR CO.**

(Circuit Court, E. D. Pennsylvania. December 19, 1894.)

No. 44.

**1. UNLAWFUL CONTRACT—RESTITUTION.**

When property has been transferred under an unlawful contract, a court of equity will compel the restitution thereof by one who repudiates the contract, except when such contract involves moral turpitude.

**2. SAME—ULTRA VIRES.**

The C. Co. and the P. Co., in 1870, were both engaged in the business of building and operating sleeping cars. In that year it was agreed between them that the property and business of the C. Co., including a large number of cars and their equipment, valuable patent rights, and contracts with railroad companies, should be leased to the P. Co. An act was secured from the legislature of Pennsylvania, in which state the C. Co. was organized, which was supposed to authorize the lease, which was accordingly executed, and the P. Co. took possession, and continued to operate and use the property of the C. Co. until 1885. In the meantime, cars and equipment of the P. Co. took the place of those of the C. Co., and the property and business of the latter were completely merged in the former, as was intended by the parties. In 1885, the P. Co. repudiated the lease, and resisted the payment of rent, when sued for by the C. Co., on the ground that the lease was in excess of the lessor's authority, and against public policy. This contention was finally sustained by the courts. The C. Co. then sought, in equity, to obtain restoration of or compensation for the property transferred under the lease, which the P. Co. refused, upon the ground that it was not responsible for the property, because transferred under an unlawful contract. *Held*, that the contract between the companies, having been made in reliance upon a statute believed by both parties to confer authority to make it, and without any intention to injure the public, involved no moral turpitude, and the P. Co., which had received the property of the C. Co. without right, must account for the same to the C. Co.

**8. SAME—MEASURE OF COMPENSATION.**

*Held*, further, that the measure of compensation upon such accounting should be the value of the property of the C. Co. at the time of the transfer, together with its earnings thereafter, less the amount of rent received.

This was a suit by Pullman Palace-Car Company against the Central Transportation Company, and a cross bill by the latter company against the former. The cause was heard on pleadings and proofs.

John G. Johnson and Frank P. Prichard, for complainant.

A. H. Wintersteen, Geo. Tucker Bispham, Edward S. Isham, and John S. Runnells, for defendant.

**BUTLER**, District Judge. The Central Transportation Company, a Pennsylvania corporation, chartered December 30, 1862, with a capital of \$200,000, authorized to construct sleeping cars and run them under contract with such railroad companies as might contract with it, entered upon the exercise of its franchises, built cars, and operated them in pursuance of such contracts. At this time the sleeping-car business was in its infancy; but soon a great demand arose for such cars, and with the improvements made from

time to time for the accommodation and comfort of travelers using them, it quickly became profitable. The business of this company so increased that in 1865 an enlargement of its capital became necessary, and under authority of the laws of the state it was made \$2,000,000. From that time forward its earnings and net profits appear to have been large. By 1870 it had become the owner of 119 cars with their equipments, at a cost, including repairs, of over a million and a half of dollars, was the licensee of various patents for such cars, and the owner of others, on account of which it had paid (probably) half a million of dollars; it had also acquired valuable contracts with many railroad companies, whose roads mainly traversed the country between the Mississippi river and the Atlantic Ocean, forming an important and valuable system on which to prosecute its business of operating sleeping cars.

The Pullman Company was incorporated in 1867, having similar franchises, and was engaged in the same business, with an original capital of \$1,250,000, which was increased, two years later to \$1,750,000. It also had prospered, and in 1870 was the owner of many cars, which it operated under contracts with various railroad companies, mainly in the western sections of the country.

At this time controversy arose and litigation commenced between the parties; and in view of the situation they mutually agreed that a union and consolidation of the two systems and their business was desirable. In consequence, on February 17, 1870, a lease of the property and business of the Central Transportation Company to the Pullman Company was agreed upon and executed, the rent being fixed at \$264,000 per annum subject to specified contingencies.

Shortly before entering into the lease the Central Transportation Company purchased the patents under which it had previously paid royalties as licensee, for the sum of \$266,000 thereby adding this much to the cost value of the property transferred.

Question having arisen respecting the authority of the Central Transportation Company to make the proposed lease, application was made to the legislature of Pennsylvania, at the instance of both parties, on this account, and the following statute, dated February 9, 1870, was passed:

"Be it enacted \* \* \* that the charter of the Central Transportation Company \* \* \* be and the same is hereby extended for ninety-nine years from the expiration of its present charter; and said company is hereby empowered to enter into contracts with corporations of this state or any other for the leasing or hiring and transfer to them of their railway cars and other personal property; and shall have power to increase their present capital stock \$200,000."

Exhibit A, attached to the original bill, is a copy of the lease, to which we need not at present make further reference.

The Pullman Company took possession of the property and business transferred, consolidating it with its own, thereby creating one harmonious system of sleeping-car transportation, that extended throughout the country. Some of the cars received were subsequently sold, as unsuited to existing requirements of the lessee's business and others were abandoned as worn out. Some of the railroad contracts were replaced by new ones taken in the name of the

Pullman Company, and some were canceled. The evidence seems to warrant the defendant's statement that "of the one hundred and nineteen cars transferred, five have disappeared, without compensation to the Pullman Company, seventy-seven have been sold, that thirty-seven are on hand; and that a total of seven hundred and thirteen thousand three hundred and thirty-four dollars has been received by the Pullman Company," on account of the sales. The car equipments have disappeared. Whether this statement is entirely accurate is not important at this time. Pullman cars and equipments have taken the place of the cars and equipments of the Central Transportation Company, and the property and business of the latter company are completely merged in the property and business of the former—as the parties no doubt contemplated they should be, when executing the lease. The consolidation intended, of the interests and prospects of the two companies, could not otherwise be accomplished. The effect of uniting the business in the Pullman Company appears to have fully justified the expectation of the parties. The increase of profits over the separate earnings of the two companies was immediate, continuous, and very large.

The Pullman Company paid the stipulated rent as it matured, until January, 1885, when a dispute arose between the parties, (the nature of which is unimportant here), and further payments were refused. The Central Transportation Company sued for the next installment, and recovered a judgment, which was reversed. A second suit being commenced for the following installment the defendant repudiated the lease, by pleas denying its validity, as in excess of the lessor's authority and against public policy. This defense was sustained in the court below, and also in the supreme court. While the case was pending the Pullman Company filed the original bill, now before us, praying an injunction against further prosecution of the suit, and against bringing other suits for subsequent installments; setting up as grounds for equitable interference (in substance): First, that the net earnings of the business had fallen below \$264,000, and that the company therefore, desired to surrender the lease in pursuance of its terms, that it was impossible to restore the cars and equipments, or reassign the contracts, and that therefore the aid of a court of equity was necessary to ascertain what compensation should be made; and second, that the lease is invalid because the lessor had no authority to make it, and consequently that the Pullman Company was under no obligation except to return such part of the property as could be returned, and render compensation for what could not; that it desired to do this and needed the court's aid in the premises.

After hearing the parties the court declined to interfere with the suit pending, on the ground that the validity of the contract could be there tried as well as in equity, but enjoined against bringing other suits for subsequent installments.

After the decision referred to had been rendered the plaintiff moved for leave to discontinue the bill, and the defendant for leave to file a cross bill to enforce return of the property or compel compensation. The first of these motions was dismissed, and the second allowed.

Many facts which may be important in a subsequent stage of the case are omitted here as unimportant.

The Pullman Company's answer to the cross bill, denying responsibility for the property received, raises the principal question before us. The denial rests on the fact that the property was transferred under an unlawful contract.

The following propositions respecting such contracts, may be affirmed with confidence: First, that the courts will not enforce them; second, that the courts will not interfere for the relief of either party when they have been executed; third, that the courts will interfere to compel restitution of property received under such a contract by one who repudiates it,—except when the contract involves moral turpitude. These propositions find ample support from text writers and the courts. The third only is involved here; and omitting what is embraced by the exception, it is indisputable. What constitutes "moral turpitude," or what will be held such, is not entirely clear. A contract to promote crime certainly involves it. A contract to promote public wrong, short of crime, may or may not involve it. If parties intend such wrong, as where they conspire against the public interests, by agreeing to violate the law or some rule of public policy, the act doubtless involves moral turpitude. When no wrong is contemplated, but is unintentionally committed, through error of judgment, it is otherwise. Turpitude is defined by Webster to be "inherent baseness or vileness of principle, or acting, shameful wickedness." No unintentional wrong, or improper act innocent in purpose, can involve it. When individuals or corporations enter into contract in excess of authority or violate some rule of law unintentionally, the act does not involve moral wrong, much less turpitude. The subject has been much before the courts, and while loose and misleading expressions appear occasionally, the decisions are all reconcilable with this statement. The numerous cases cited by the plaintiff present no exception. *Bank v. Owens*, 2 Pet. 538, decides, only, that the courts will not enforce an unlawful contract. *Wheeler v. Sage*, 1 Wall. 518, is altogether inapplicable. *Coppell v. Hall*, 7 Wall. 542, was a suit, substantially, for the fruits of an unlawful contract. *St. Louis, etc., R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393 [12 Sup. Ct. 953], decides that the court will not set aside an unlawful contract which has been so far executed as to make this inequitable. *Higgins v. McCrea*, 116 U. S. 671 [6 Sup. Ct. 557], decides that the defendant's counterclaim, for money expended in promoting an "offense against the law," cannot be recovered. In *King v. Green*, 6 Allen, 139, the contract was fully executed, and the court therefore refused to interfere. *Atwood v. Fisk*, 101 Mass. 363, was a bill to recover property parted with under an unlawful contract, while the plaintiff held the consideration. In *Johnson v. Hulings*, 103 Pa. St. 498, the plaintiff's cause of action rested on an unlawful consideration—compensation for selling property in violation of the license laws. *Myers v. Meinrath*, 101 Mass. 366, is identical with *King v. Green*, 6 Allen, 139, being a suit to recover back property parted with under an executed contract. *Thomas v. City of Richmond*, 12 Wall. 349,

was a suit to enforce an illegal contract, and *Brown v. Tarkington*, 3 Wall. 377, is the same in principle. *Dent v. Ferguson*, 132 U. S. 50 [10 Sup. Ct. 13], decides that "where one transfers property to defraud creditors, and for years acquiesces; concurring in devices, collusive suits and impositions on courts, to further the purpose," equity will not aid him to recover it back. *Clements v. Yturria*, 81 N. Y. 290; *Holt v. Green*, 73 Pa. St. 200; *Thomson v. Thomson*, 7 Ves. 473; *Sykes v. Beadon*, 11 Ch. Div. 193; *Snell v. Dwight*, 120 Mass. 15,—were all suits to enforce illegal contracts.

It is thus seen that not one of these cases is inconsistent with the proposition stated.

On the other hand, Morawetz on Corporations at section 721, says:

"The general rule is that if an agreement is legally void and unenforceable by reason of some statutory or common-law prohibition, either party to the agreement who has received anything from the other party, and has failed to perform the agreement on his part, must account to the latter for what has been so received. Under these circumstances, the courts will grant relief irrespective of the invalid agreement, unless it involves some positive immorality, or there are other reasons of public policy why the courts should refuse to grant any relief in the case."

In a footnote he says:

"It is sometimes said to be a maxim '*in pari delicto melior est conditio possidentis*.' The word '*delicto*' in this instance, however, means something more than mere illegality. It is difficult to define what constitutes such immorality as will cause the courts not only to declare a contract legally void, but to refuse all relief to the parties, irrespective of the contract. The decisions indicate that the matter rests largely in the discretion of the court in each particular case.

"Persons who, at the expense of a corporation, have received benefit from an ultra vires transaction, even a transaction that is illegal as against public policy, may have to refund to the corporation to the extent of the benefit they have received."

Taylor on the Law of Private Corporations (section 314) says:

"The general rule in regard to contracts which are not immoral, or where there are no other reasons of public policy why courts should refuse to grant relief, but are simply illegal and unenforceable on account of some statutory or common-law prohibition, is that either party to them who has received anything from the other party, and has failed to perform the agreement on his part, must account to the other for what has been so received. \* \* \* These principles have been repeatedly applied in actions growing out of contracts entered into by corporations. Though illegal and unenforceable as contracts, recovery of the consideration has generally been allowed where higher public consideration than the immediate equities between the parties, were not involved."

Spelling on Private Corporations (section 167) says:

"Why should not a corporation be always liable to refund the money or property of a person which it has obtained improperly and without consideration, or if unable to return it, to pay for the benefit obtained thereby? To say that a corporation cannot sue or be sued upon an ultra vires arrangement is one thing. To say that it may retain the proceeds thereof, which have come into its possession, without making any compensation whatever to the person from whom it has obtained them, is something very different, and savors very much of an inducement to fraud. On the other hand, a person who has obtained corporate property or funds in an ultra vires transaction, has obtained what the parties dealing with him had no power, no authority, to alienate. It belongs to the corporation, not to him. Therefore, as in every case of a person obtaining, however bona fide, that which belongs to another, such person must make restoration, in specie or in value, it seems

necessarily to follow that restoration must similarly be made when the alienation is *ultra vires*."

Waterman on Corporations (section 161, p. 608) says:

"Though a corporation cannot be sued, any more than any other citizen, directly upon a contract or analogous transaction which does not bind it, yet if it sets up this defense, it must restore to the other party what it has obtained from him. It may repudiate the transaction if it chooses, but if so, it must repudiate altogether; it cannot reprobate and approbate; it cannot keep what in another form it has rejected."

The case of *Spring Co. v. Knowlton*, 103 U. S. 49, is worthy of particular notice. The suit was for property parted with under an unlawful executory contract. The court, after remarking on the absence of moral turpitude, says:

"The question is whether, conceding the contract to be unlawful, the property parted with under it can be recovered back from the other, who has not performed."

The court holds that it may, and attributes importance to the plaintiff's ignorance of the unlawfulness.

*Parkersburg v. Brown*, 106 U. S. 487 [1 Sup. Ct. 442], is to the same effect. Here again the court points to the fact that the illegal transaction is free from moral turpitude, and says:

"But notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act. \* \* \* To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of the contract does not arise from any moral turpitude. \* \* \* In such a case the party receiving may be made to refund to the person from whom he has received property for the unauthorized purpose, the value of that which it has actually received. See *White v. Bank*, 22 Pick. 181; *Morville v. Society*, 123 Mass. 129; *Davis v. Railroad*, 131 Mass. 258, 275; and cases there cited. The O'Briens having indorsed and sold the bonds, the holders succeeded to such right of the O'Briens, as an incident to the ownership of the bonds. The O'Briens suffered the city to take possession of and administer the property. They were made parties to this suit originally, and have made no defense to it. The right which the plaintiffs so have to call on the city to render an account of the property is one which can be properly adjudicated in this suit in equity."

In *Central Transp. Co. v. Pullman Palace-Car Co.*, 139 U. S. 24 [11 Sup. Ct. 478] (where the contract now under consideration is involved), the court said:

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

"In such case, the action is not maintained on the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

In *Bank v. Townsend*, 139 U. S. 67 [11 Sup. Ct. 496], the bank was required to refund property received under an unlawful executory contract, the court saying:

"The bank admitting that it obtained the property in violation of law is bound to return it. The obligation to do justice, as we said in *March v. Fulton*, 10 Wall. 676, rests upon all persons, natural and artificial, and if one obtains the property of another without consideration or authority of law he will be compelled to make restitution. \* \* \* This is a very different thing from enforcing an illegal contract."

*Atlantic & P. Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 188 [1 Fed. 745]; *Farmers' Loan & T. Co. v. St. Joseph & D. C. R. Co.*, 1 McCrary, 247 [2 Fed. 117]; *W. U. Tel. Co. v. Union Pac. Ry. Co.*, 1 McCrary, 558 [3 Fed. 423]; *Railroad Co. v. Simpson*, 23 Fed. 214; and *Manchester & L. R. Co. v. Concord R. Co.* (N. H.) 20 Atl. 383,—are to the same effect.

It seems to be true that the distinction between "*malum prohibitum*" and "*malum in se*" (which never had the support of just reason) has disappeared. This however is unimportant. The distinction had no legitimate bearing on the question.

Thus it follows that unless the execution of the contract between the Central Transportation Company and the Pullman Palace-Car Company involves moral turpitude as before described, the former may recover back the property parted with under it. That it does not involve such turpitude seems clear. Neither party contemplated any wrong. Both believed the contract to be lawful. The statute of 1870 was supposed to confer full authority to make it. The state had unquestionable power to grant the authority; and the evidence shows that the statute was procured for the express purpose of granting it. The question whether the statute did or did not grant it was a close and difficult one. The learned counsel of the parties and the court disagreed on the subject. It is a question of interpretation. In the court's view the lease was *ultra vires* and void; in the counsel's it was authorized and lawful. True it violated a rule of public policy, but this was only because the court construed the statute more narrowly than the legal advisers of the parties had done. The legislature is the judge of what the public interests require in the premises, and if it had authorized the lease, as the parties honestly believed it had, no question of public policy could have arisen. All that can justly be said, therefore, is that the parties misconstrued their authority, and that the lease is consequently *ultra vires*. Whether the lease actually tended to the public disadvantage may be doubted, in view of the evidence. Certainly, the Pullman Palace-Car Company cannot assert that it did, against its own unqualified declaration to the contrary,—found in the lease. It would seem difficult to state a case more distinctly and completely within the principle invoked than the one before us. The right to restitution is indeed distinctly admitted by the original bill in this case.

The property must therefore be returned or paid for. The former is impossible. The property has substantially disappeared. It has become incorporated with the business and property of the plaintiff, and cannot be separated. Compensation must therefore be made. What then is the measure of compensation? Clearly, we think, the value of the property when received, together with its earnings since, less the amount paid as rent. In ascertaining the value the annual rental may be considered; but it does not afford a conclusive, nor

entirely safe measure of value, because the unlawful consideration (that the Central Company would abstain from exercising its franchises) entered into it. For the same reason the earnings cannot be measured by the rent. The value of the property and earnings must be ascertained from a careful examination of the property and the business at the time they passed into plaintiff's hands, and subsequently. It is not their value to the plaintiff we want, but to the defendant. In effect what it lost by parting with them. The value of both property and earnings may have been worth more to the plaintiff with the business united. But this cannot be considered.

For the purpose of ascertaining these values the court refers the subject to Theodore M. Etting, Esq., as master, with direction to report within 60 days (from the testimony taken and such further as may be produced), unless the time shall be extended by agreement of counsel, or on application to the court.

The question of jurisdiction need not be discussed. The character of the relief required and the nature of the inquiry necessary to afford it, puts this beyond controversy. Besides the point is conceded by the bill originally filed.

The propriety of allowing the defendant to file a cross bill may rest upon what was said when the allowance was granted.

DALLAS, Circuit Judge, concurs.

---

SYNDICATE INS. CO. v. BOHN et al. NEW HAMPSHIRE FIRE INS.  
CO. v. SAME. SAME v. NATIONAL LIFE INS. CO. SYN-  
DICATE INS. CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. December 3, 1894.)

Nos. 434-437.

**1. FIRE INSURANCE—INTEREST OF INSURED.**

Provisions in policies of insurance to the effect that the policies shall be void if the interest of the insured is not the sole and unconditional ownership of the property described in the policies, or if that interest is not truly stated to the companies or in the policies, or the indorsements thereon, constitute a complete defense to actions by the sole stockholders of a corporation upon the policies issued to themselves, as owners, upon property owned by the corporation.

**2. SAME—INTEREST OF MORTGAGEE—UNION MORTGAGE CLAUSE.**

The effect of the "union mortgage clause," providing, among other things, that the insurance, as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor, nor by any change in title or possession, provided the mortgagee shall notify the company of any change coming to the mortgagee's knowledge, and that when the company shall pay the mortgagee for a loss, and claim that no liability existed as to the mortgagor, it shall be subrogated to all rights of the mortgagee under securities held, when such clause is attached to an existing policy of insurance running to the mortgagor, is to make a new and separate contract between the mortgagee and the insurance company, and to effect a separate insurance of the interest of the mortgagee, dependent for its validity solely upon the course of action of the insurance company and the



mortgagee, and unaffected by any act or neglect of the mortgagor, of which the mortgagee is ignorant, whether such act or neglect was done or permitted prior or subsequent to the issue of the mortgage clause.

In Error to the Circuit Court of the United States for the District of Nebraska.

These were four actions by William G. and Conrad Bohn and the National Life Insurance Company, of Montpelier, Vt., against the Syndicate Insurance Company, of Minneapolis, Minn., and the New Hampshire Fire Insurance Company, upon policies of insurance. Upon the trial in the circuit court, judgment was rendered for the plaintiffs in all the actions. Defendants bring error.

A. S. Churchill, for plaintiffs in error.

B. G. Burbank, for defendants in error William G. Bohn and Conrad Bohn.

Charles Offutt (James B. Meikle, on the brief), for defendant in error National Life Ins. Co.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Are the sole owners of the capital stock of a corporation, who have procured policies of insurance against fire, running to themselves, in their individual names, upon a building, the title to which was in the corporation, debarred from any recovery on the policies by the provisions therein to the effect that the policies shall be void if the interest of the assured is not the sole and unconditional ownership of the property described, or if that interest is not truly stated to the companies, or in the policies or in the indorsements thereon? If so, is a mortgagee whose interest is insured by the "union mortgage clause" attached to such policies also debarred from any recovery by these provisions of the policies? These are the principal questions presented in these cases. They were raised by separate exceptions to the refusal of the court below to instruct the jury to return a verdict in favor of either of the plaintiffs in error in any of these cases at the close of the trial, when the evidence established the following undisputed facts:

In 1888 the defendants in error William G. Bohn and Conrad Bohn were the owners in fee simple of the building destroyed, and the lot on which it stood. Mr. Doud, the agent of the plaintiff in error the Syndicate Insurance Company, solicited their insurance, and William G. Bohn, one of the defendants in error, told him that he and Conrad Bohn were the owners of the building, and directed him to insure it in the companies he represented, in their names. Thereupon he issued to them a policy of the Syndicate Insurance Company, for the sum of \$5,000, for the term of one year, covering this building, and delivered it to the Bohns. In October, 1888, they mortgaged the insured property to the defendant in error the National Life Insurance Company, for \$25,000, and covenanted in the mortgage to keep it insured for that amount for the benefit of the mortgagee. Thereupon the policy of the Syndicate Insurance Company was presented to its agent,

and, at the request of the Bohns and the mortgagee, he attached to this policy the union mortgage clause, and delivered it to the mortgagee. That mortgage clause reads as follows:

"It is hereby agreed that any loss or damage that may be ascertained and proved to be due under this policy to the assured shall be held payable for the account of said assured to the National Life Insurance Co., mortgagee or beneficiaries, or its assigns, subject to the following stipulations: (1) It is agreed that this insurance, as to the interests of the above-named mortgagee or beneficiary, or its assigns, only, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupancy of the premises for purposes more hazardous than are permitted by the terms of this policy, nor by any change in title or possession, whether by legal process, voluntary transfer, or conveyance of the premises, or for nonoccupancy of the premises: provided, that the mortgagee or beneficiary shall notify this company of any change of ownership or increase of hazard which shall come to the knowledge of said mortgagee or beneficiary, and shall have permission for such change of ownership or such increased hazard, as shall come to his notice, duly indorsed on this policy: and provided, further, that every increase of hazard not permitted to the mortgagor or owner shall be paid by the mortgagee or beneficiary, on reasonable demand, and after demand made by this company upon and refusal by the mortgagor or owner to pay, according to the established scale of rate; the company reserving the right to cancel the policy at any time on the terms in said policy provided, on giving to the mortgagee ten (10) days' notice of their intention so to do, and after such ten (10) days the policy and this agreement shall be void. The foregoing stipulations, however, shall not be held, under any circumstances, to modify the terms of contribution provided in the printed conditions of this policy, in case of other insurance on the same property; it being expressly understood that this insurance is upon the interest of said mortgagor or owner, or assigns, and that other insurance on the interest of said mortgagor or owner, or assigns, is to contribute according to said conditions. (2) It is also agreed that whenever this company shall pay to the mortgagee or beneficiary any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party on the property in question, for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured, or this company may, at its option, pay to said mortgagee or beneficiary the whole of the debt so secured, including such sums as said mortgagee or beneficiary may then have paid for taxes or fire insurance upon the property described in such mortgage or trust deed, pursuant to the terms thereof, with all interest that may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payments shall be made an assignment and transfer of said debt, with all the securities held by said party on the property in question for the payment thereof. If the above-named mortgagee should assign this mortgage, the above agreement shall be binding between said insurance company and the assigns without notice to said insurance company of said assignment."

The original policy of the Syndicate Insurance Company, and the policy here in suit, insured the Bohns against loss or damage by fire to "their four-story brick warehouse \* \* \* situated on tax lot 12, Omaha, Neb., \* \* \* not exceeding the sum insured, nor the interest of the assured therein," and contained the following provisions:

"The assured, by the acceptance of this policy, hereby covenants and agrees (1) that any application, plan, survey, or description referred to in this policy is true, and shall be and form a part of this policy; that no fact material to the risk, or relating to its condition, situation, or ownership, has been concealed; and that the interest of the assured therein has been truly stated to

this company. (If the interest of the assured be other than the unconditional and sole ownership of the property, or if the building insured stands on leased ground, it must be so expressed in the policy.)" "This policy shall become void and of no effect (1) by the failure or neglect of the assured to comply with its terms, conditions, and covenants; (2) by the sale or transfer, or any change in the title or possession of the property insured (except in case of succession by reason of death of the assured), whether by legal process or judicial decree, or voluntary transfer or conveyance."

In May, 1889, the Bohns conveyed the building insured, and the lot on which it stood, by warranty deed, subject to the \$25,000 mortgage, to the Bohn Sash & Door Company, a manufacturing corporation, the capital stock of which they owned; but this fact was unknown to all the other parties to these actions until after the fire. About the 1st of September, 1889, Mr. Doud, the agent of the Syndicate Company, inquired of the Bohns whether he should renew the policies he had issued on this building, and they directed him to do so; and thereupon he issued a new policy of the Syndicate Company for the term of one year, and delivered it to the mortgagee. He told the Bohns that he had lost the agency of one of the companies that had issued a policy to them the year before, and that he was not the agent of the New Hampshire Fire Insurance Company, but that he proposed to place \$2,500 with that company, and they authorized him to do so. He then told the agents of that company that the Bohns owned the building, and directed them to issue in their name a policy of that company, for \$2,500, for one year, and to attach the union mortgage clause to it. They did so, and the policy was delivered to the mortgagee. About the 1st of September, 1890, Mr. Doud again inquired of the Bohns if he should renew the policies. They authorized him to do so, and he issued the policy of the Syndicate Company, and procured the issue of the policy of the New Hampshire Company, here in suit. The policy of the plaintiff in error the New Hampshire Fire Insurance Company declares that that company insures William G. and Conrad Bohn against loss or damage by fire, except as thereafter provided, to an amount not exceeding \$2,500, "on their four-story brick warehouse, situate on tax lot 12, Omaha, Neb.," and provides that:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated herein." "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void \* \* \* if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

The building insured was destroyed by fire May 12, 1891. It was then worth \$34,000. The amount of insurance upon it under these and similar policies, payable to the mortgagee under the mortgage clause we have set forth above, was \$25,000, but payments had been made upon the mortgage debt until there was only about \$21,000 owing upon it. The two policies here in suit contained the usual contribution clause. The mortgagee, the National Life Insurance Company, and the Bohns, brought separate actions upon each of these policies. These actions were consolidated by order of the court,

and tried to the same jury. The mortgagee recovered a judgment against each of the plaintiffs in error for such a proportion of the amount owing on the mortgage debt as the amount of its policy bore to the \$25,000 insurance, and the Bohns recovered a judgment against each of them for the remainder of the amount of the face of their policies respectively. These are the four judgments before us for review. Can they be sustained? Let us first look at the judgments in favor of the Bohns.

By the provisions of these policies which we have quoted, the Bohns made plain contracts with the insurers that they had truly stated their interest in the property insured, and that if that interest was not the sole and unconditional ownership of that property the policies should be void. At the time these policies were issued, and at the time of the fire, they were neither the sole and unconditional owners of this property, nor had they any legal title to it, or any equitable title that they could convert into a legal title. The legal title was in a corporation, and they were mere stockholders in that corporation. They could not convey or incumber the title to this property by their deed or mortgage, nor could the title to it be passed or affected by any sale of their interest in it under judgment and execution against them. Stockholders of a corporation are entitled to a distributive share of its profits while it continues in operation, and, at its dissolution, to a just proportion of the proceeds of the corporate assets remaining, if any, after all the corporate debts are paid, but they are far from being the unconditional owners of the property of the corporation. The title and ownership of such property is vested in the corporation itself,—in an entity as distinct and separate from its stockholders as is any individual trustee from his *cestui que trust*. The corporation itself can sell, convey, mortgage, and deal with the corporate property as its own, subject only to the restrictions of its charter, while its stockholders can do none of these things. These stockholders were not, therefore, the sole or unconditional owners of the property described in these policies. *Riggs v. Insurance Co.*, 125 N. Y. 7, 25 N. E. 1058; *Plimpton v. Bigelow*, 93 N. Y. 593; *Van Allen v. Assessors*, 3 Wall. 573; *McCormick v. Insurance Co.*, 66 Cal. 361, 5 Pac. 617; *Philips v. Insurance Co.*, 20 Ohio, 174, 184.

It is not unworthy of notice here that one of the errors assigned in this record is that the court below excluded evidence of the insolvency of the Bohn Sash & Door Company at the time of the fire. This would have been a fatal error, if it could be conceded that the interest of the Bohns, as stockholders, was insured by these policies. The insurance companies were not liable, in any event, to pay to the Bohns any more than the loss that resulted to their interest from this fire. The extent of that loss was much less if the corporation was insolvent, if the amount of its debts was greater than the value of its assets, and if its stock was consequently worthless, than if the value of its assets exceeded its debts by the par value of its stock, as the court seems to have conclusively presumed.

But we are unable to conclude that the interest of the Bohns, as stockholders of this corporation, was insured by these policies. These

are not cases in which the assured has fully stated the condition of his title at the time the policies issued, and an inadequate or incorrect description of that interest has been made, through some fault or neglect of the agent of the insurance companies. When the policy of the Syndicate Company was issued, in 1888, one of the Bohns informed the agent of the company that they were the owners of the building, and directed him to issue the policies in their names. The policies were so issued and delivered to them. The Syndicate policy then issued contained the same provisions found in that now in suit, and the Bohns must be conclusively presumed to have read and to have assented to the contracts these provisions contained. The order that they gave in 1889 to renew their policies, and to procure a new policy from the New Hampshire Company, without giving any notice of the conveyance of the property they had made, or of any change in their interest or title, was an order to procure the new policy, and to issue the renewals on the faith of the original representation they had made, and on the same terms upon which the original policies were issued. The subsequent order for renewals in 1890 was of like character. These orders were in effect reiterations in 1889 and 1890 of the original statement that they were the owners of the property, and as they gave no notice of their conveyance of it, or of any change in their interest, the agent and the companies were clearly entitled to rely upon that statement.

These contracts are neither novel nor peculiar. Contracts practically identical in legal effect are, and have been for many years, common to nearly all policies upon buildings. Their terms are so familiar to insurers and insured that a policy upon a building, that did not contain some of them would be nearly as unique as a decree of an English court in Norman French in this decade. Nor are they unjust, unreasonable, or unfair contracts. They rest upon a sound policy of the business of insurance,—a policy founded in reason, and in accord with an enlightened public policy; the policy of reducing the moral hazard to which the underwriter is exposed. "Moral hazard," in insurance, is but another name for a pecuniary interest in the insured to permit the property to burn. Statistics, experience, and observation all teach that the moral hazard is least when the pecuniary interest of the insured in the protection of the property against fire is greatest, and that the moral hazard is greatest when the insured may gain most by the burning of the property. Take the case at bar. The property described in these policies that was destroyed by fire was worth \$34,000. It was insured for \$25,000, payable to a mortgagee whose interest was but \$21,000. If the Bohns had been the owners of this property, and had recovered the entire \$25,000 insurance, they would have lost \$9,000 by the fire. But suppose that the corporation that owned the property was insolvent, as the plaintiffs in error offered to prove, and that the stock of the Bohns was worthless. In that event, if they could recover on all of these policies, they would make a clear profit of \$4,000 by the burning of this building, after their mortgage debt was paid. It goes without saying that the moral hazard—the danger that the property would burn—was vastly greater in the latter than in the

former case, and the fact that the Bohns were not the owners of the property insured, but were mere stockholders of a corporation that did own it, was very material to this risk. If there could be any doubt of this fact, the evidence in this record is full and undisputed that the risk was greater, and the rate of insurance higher, for the insurance of stockholders against the destruction of corporate property than it was for the insurance of the owners of that property.

It is contended that the contracts in these policies, which exclude the Bohns from insurance under them upon any interest but that of unconditional ownership, are without binding force, because no inquiry respecting their title was made by the companies, and no statement concerning it was made by the Bohns, when these policies were issued. But neither inquiry nor statement before the issue of the policies was requisite to the validity of these contracts. The policies themselves, containing, as they did, the contracts that they should be void if the interest of the assured had not been truly stated to the company, or if it was not truly stated in the policy, or if it was not the sole and unconditional ownership, and a description of it was not indorsed on the policy, were pointed inquiries of the assured whether their interest was the sole and unconditional ownership of the property described, and their silence and acceptance of the policies was the answer. The policies themselves were notice to the Bohns that the companies deemed their interest that of unconditional ownership, that they insured them against loss to that interest only, and that they expressly excluded every other interest from the insurance unless the Bohns immediately notified them that they held a different interest, and caused a true description of it to be written into or indorsed upon the policies. The silent acceptance of the policies by the Bohns closed these contracts, and bound them to the agreement tendered by the policies, that every interest of theirs but that of unconditional ownership was excluded from the promised indemnity. *Insurance Co. v. Lawrence*, 2 Pet. 25, 49; *Waller v. Assurance Co.*, 10 Fed. 232; *Collins v. Insurance Co.*, 44 Minn. 440, 46 N. W. 906; *Lasher v. Insurance Co.*, 86 N. Y. 423, 427; *Weed v. Insurance Co.*, 116 N. Y. 106, 113, 22 N. E. 229; *Diffenbaugh v. Insurance Co.*, 150 Pa. St. 270, 24 Atl. 745; *Fuller v. Insurance Co.*, 61 Iowa, 350, 16 N. W. 273; *Waller v. Assurance Co.*, 64 Iowa, 101, 19 N. W. 865; *Mers v. Insurance Co.*, 68 Mo. 127, 132; *McFetridge v. Insurance Co. (Wis.)* 54 N. W. 326; *Henning v. Assurance Co. (Iowa)* 42 N. W. 308; *Insurance Co. v. Boulden (Ala.)* 11 South. 771; *Insurance Co. v. Smith*, 92 Ala. 428, 9 South. 327.

Finally it is said that the plaintiffs in error are estopped from enforcing, and have waived, these provisions of the policies, because, after they had heard a rumor that the Bohns had conveyed the property, and after the latter had furnished proofs of loss under the policies, the insurance companies demanded that they should submit to an examination under oath, as provided by the policies, and that they should produce papers, vouchers, and plans and specifications for the building destroyed, and pursuant to these demands the Bohns incurred the expense of employing an attorney to attend such an examination, that was never had. This position is untenable,

for two reasons: First, because there is no evidence in this record that would warrant a finding by a jury that when the companies made these demands they knew that the Bohns were not the unconditional owners of the property at the time of the fire, and no estoppel or waiver could arise from any action of theirs in ignorance of that fact; and, second, because in proofs of loss, which were required by the terms of the policies to be verified by the oath of the assured, and which were sworn to April 8, 1891, and were furnished to the companies under the provisions of the policies, the Bohns falsely stated "that the property insured was owned in fee simple by the said William G. Bohn and Conrad Bohn." After such a statement under oath, it does not lie in the mouths of these men to say that the companies are estopped from enforcing these contracts, or that they waived them, because they hesitated for a time to believe that this oath was false, or were induced by it to proceed for a time as though it was true. There was no estoppel or waiver here.

The contracts contained in the provisions of these policies we have been considering were, then, such as it was customary to make in cases like those before us. The Bohns themselves had made such contracts twice, before the policy in suit was issued, with one of the plaintiffs in error, and once with the other. The object of these contracts was one fit to be attained. It was the reduction of the moral hazard in fire insurance, and the consequent reduction of the unnecessary destruction of property. The contracts were fair, plain, and unequivocal. By their very terms, they excluded the Bohns from all insurance under these policies unless they were the sole and unconditional owners of the property they described. They were not the owners of it at all. They had neither the legal title, nor any equitable title that they could convert into a legal title. It is not the province of the court to abrogate, to modify, or to refine away these contracts, nor to make new contracts for the parties; and these contracts, as they stand, form an impregnable defense to the actions against these insurance companies brought by the Bohns. The court should so have instructed the jury.

Our conclusion is that provisions in policies of insurance to the effect that the policies shall be void if the interest of the insured is not the sole and unconditional ownership of the property described in the policies, or if that interest is not truly stated to the companies, or in the policies, or in the indorsements thereon, constitute a complete defense to actions by the sole stockholders of a corporation upon policies issued to themselves, as owners, upon property owned by the corporation.

Let us now turn to the judgments in favor of the mortgagee. Are these provisions of the policies alike fatal to any recovery in its behalf? The plaintiffs in error insist that they are. They say that the only interest insured here is that of the mortgagors; that the mortgage clause simply makes the proceeds of that insurance payable to the mortgagee to the extent of the mortgage debt; that the facts that the balance of the proceeds belong to, and all of these proceeds, if the debt is paid by the mortgagors, revert to, the mortgagors, and the very terms of the first sentence of the mortgage clause, viz. "It is

agreed that any loss or damage that may be ascertained and proved to be due under this policy to the assured shall be held payable for the account of the assured to the National Life Insurance Company, mortgagee, or beneficiaries, or its assigns, subject to the following stipulations," limit the mortgagee's right to recover to such amounts as became due or payable to the assured, the Bohns, for damage to their interest in the property; and that inasmuch as they had no interest insured, and no amount ever became due or payable to them, nothing ever became due to the mortgagee. It is not difficult to dispose of this argument. It proves too much. If it were sound, the mortgagee could not recover if, after a valid policy, with the mortgage clause attached, had been delivered to the mortgagee, the mortgagors had conveyed or burned the property or violated any of the material provisions of the policy as to the occupancy or use of the premises. But one of the "following stipulations," to which the first sentence of this mortgage clause is "subject," is that this insurance, as to the interest of the mortgagee only, "shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured"; and it is too clear and too well settled to admit of discussion that no act or neglect of the mortgagors, done or permitted after the policies and mortgage clauses were delivered to the mortgagee, although fatal to the mortgagor's recovery, could deprive the uninformed mortgagee of its indemnity. *City Five Cents Sav. Bank v. Pennsylvania Ins. Co.*, 122 Mass. 165; *Insurance Co. v. Floyd*, 19 Hun, 287; *Insurance Co. v. Olcott*, 97 Ill. 439, 455. But the plaintiffs in error say that, although the indemnity of the blameless mortgagee is protected by this contract against any act or neglect of the mortgagors subsequent to the issue of the mortgage clause, yet any prior act or neglect of theirs, which excludes their interest from insurance under the policies, precludes the mortgagee from obtaining any indemnity under this mortgage clause. Before we assent to a construction of this contract so narrow and subtle, it will not be un instructive to notice the history and purpose of this clause, and the situation of these parties when they made it their contract. We all know that 20 years ago a contract between a mortgagee and an insurance company, like that before us, was novel and rare. At that time the customary method of indemnifying the mortgagee against loss by fire was to indorse upon the policy the words, "Loss, if any, payable to ———, mortgagee, as his interest may appear," or words of similar import. To-day such an indorsement is rare, and a contract similar to the mortgage clause before us is in general use. Why this change? The reason is not far to seek. The old indorsement made the mortgagee a simple appointee of the mortgagor, and put his indemnity at the risk of every act or neglect of the mortgagor that would avoid the original policy in his hands. *Baldwin v. Insurance Co.*, 60 N. H. 164; *Martin v. Insurance Co.*, 38 N. J. Law, 140; *Insurance Co. v. Maackens*, Id. 564. Indemnity so precarious, so liable to be destroyed by the ignorance, carelessness, or fraud of the mortgagors, was not satisfactory to the mortgagees; and they proceeded to make contracts with the insurance companies similar to that before us, for the purpose of securing indemnity to



their interests that should not be affected by any act or negligence of the mortgagors.

In 1878 one of these contracts came before the court of appeals of the state of New York in *Hastings v. Insurance Co.*, 73 N. Y. 141, 150, 154, for judicial interpretation. It was a mortgage clause attached to an original policy running to the mortgagor, and, so far as the question we are now considering is concerned, the terms of that clause were identical with those contained in the contract before us. It provided that "this insurance, as to the interest of the mortgagee only, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured." The original policy contained a contribution clause to the effect that, if there was any other insurance on the property, whether prior or subsequent to the issue of the policy, the assured should be entitled to no greater proportion of the loss sustained than the sum thereby insured bore to the whole amount of insurance on the property. The mortgage clause contained no such provision. Before either the policy or the mortgage clause was issued, the mortgagor had procured \$4,000 insurance on the same property in another company, but neither the insurance company nor the mortgagee was aware of this fact until after the loss. The question presented was whether or not the mortgagee's insurance was reduced, under the contribution clause of the original policy, by the prior insurance obtained by the mortgagor. The court held that it was not; that the mortgage clause constituted a new and independent contract between the mortgagee and the insurance company, and effected a separate insurance of his interest, unaffected by any act or neglect of the mortgagor, of which he was ignorant, whether that act or neglect was prior or subsequent to the issue of the mortgage clause. In 1882, in *Meriden Sav. Bank v. Home Ins. Co.*, 50 Conn. 396, the question arose whether or not a mortgagee, who had made a collateral agreement with the insurance company, similar in terms to the mortgage clause before us, as to all the insurance policies of that company which the mortgagee held, could maintain an action on that agreement, and a policy referred to therein, without joining the mortgagor; and the supreme court of Connecticut held that it could, cited *Hastings v. Insurance Co.*, supra, with approval, and declared that, while they would not then hold that the collateral agreement was a distinct and independent contract of insurance, it was "an agreement relating to an existing policy, by which certain conditions are dispensed with, and certain privileges are secured to the insurers which they would not otherwise have, and the plaintiffs are made a party to the contract of insurance." In 1883, in *Davis v. Insurance Co.*, 135 Mass. 251, a case arose in which a mortgagor, whose policies provided that they should become void if the property was sold or transferred, had sold and conveyed the property insured during the term of his policies, and the mortgagees had subsequently entered and taken possession of it for default in the payment of the mortgage debt. The mortgagees knew that the mortgagor had conveyed away the property, and without stating this fact to the

insurance company, and upon a statement of their entry for default and possession only, and without paying any additional premiums, they procured indorsements on the policies substantially identical with the mortgage clause in question, with this exception, viz. these indorsements commence with this recital: "Davis, Taylor, and Demmon, the parties to whom this policy is payable in case of loss, being mortgagees, have entered for breach of the conditions of their said mortgage." The supreme judicial court of Massachusetts held that this recital indicated that it was not the intention of the parties to these indorsements to insure the interest of the mortgagees, as such, but to insure to the mortgagees, as owners, the interest the mortgagor originally had, on the supposition that the entry and possession had transferred that interest to the mortgagees in the same way that a sale of the premises by the mortgagor while he owned them, and the assignment of the policies, would have done, and that inasmuch as the mortgagor had no interest in the property, and no insurance upon it, at the time the mortgagees entered and took the possession, the mortgagees obtained none. That court further held that, if the indorsements could be construed as an insurance of the interest of the mortgagees, they were without consideration, and did not bind the insurance company.

We have reviewed the two cases last adverted to at some length, because they are the only cases which treat of this mortgage clause that have been called to our attention by the counsel for the insurance companies in support of his contention, or that are claimed by him to be in conflict with the decision of the New York court of appeals in *Hastings v. Insurance Co.* As we have seen, these two cases are not in conflict with that decision. The courts that rendered these decisions neither considered nor decided the question presented in the New York case. On the other hand, the decision in that case has been uniformly cited with approval in every case in which any question concerning the construction of this mortgage clause has arisen, from 1878 to the present time. *City Five Cents Sav. Bank v. Pennsylvania Ins. Co.*, 122 Mass. 165; *Insurance Co. v. Floyd*, 19 Hun, 287; *Insurance Co. v. Olcott*, 97 Ill. 439, 455. And it has lately been followed upon the precise question here at issue by the supreme court of South Dakota in *Ormsby v. Insurance Co.*, 58 N. W. 301, 302. What, now, was the situation and relation of the parties to this contract in the case at hand when this mortgage clause was issued? During the 10 years which followed the announcement of the decision in *Hastings v. Insurance Co.*, supra, the old form of indorsement, "Loss, if any, payable to ———, mortgagee, as his interest may appear," gradually disappeared from the face of insurance policies, and this mortgage clause, or a similar contract, took its place. That decision had settled that in New York, at least, such a clause protected the mortgagee against any act or neglect of the mortgagor, whether prior or subsequent to its issue. That decision had been repeatedly approved by courts of high rank, and never disapproved. Under these circumstances, the Bohns, in 1888, mort-

gaged the building insured, and the lot on which it stood, to the defendant in error the National Life Insurance Company, for \$25,000, and, in part consideration for the loan thus procured, covenanted to keep the building insured, for the benefit of the mortgagee, in such companies, and by such a mortgage indemnity clause, as the mortgagee should select. Pursuant to that covenant, the mortgagors did procure and deliver to the mortgagee in October, 1888, policies of insurance, in their own names, to the amount of \$25,000, with this union mortgage clause attached, for the benefit of the mortgagee. One of these policies, together with this mortgage clause, was issued by the plaintiff in error the Syndicate Fire Insurance Company. This insurance was valid in its inception. It ceased, however, to insure the mortgagors in May, 1889, because they then conveyed the property insured to the corporation; but, as to the mortgagee, it remained in force until the fall of 1889, when these contracts of indemnity expired by limitation. The mortgagors then procured a renewal policy from the Syndicate Company, and a new policy from the plaintiff in error the New Hampshire Fire Insurance Company, for the term of one year, with this mortgage clause attached to each, and delivered them to the mortgagee, and at the end of that year they procured and delivered to the mortgagee the policies and mortgage clauses here in suit. It is true that the Bohns paid the premiums for this insurance, but a promise to pay or indemnify is no less binding when the consideration is paid by a third party than when it comes directly from the payee or the insured. *Insurance Co. v. Olcott*, 97 Ill. 439, 454, and cases there cited. The agreement evidenced by this mortgage clause was therefore a valid contract between the mortgagee and the insurance companies, made upon sufficient consideration, for the evident purpose of protecting the indemnity guarantied to the mortgagee by these companies against destruction by any act or neglect of the mortgagors. Was it that contract that the indemnity of the mortgagee should not be protected against any prior act or negligence of the mortgagors? There is no such restriction in the contract. It provides that the mortgagee's interest shall not be invalidated by any act or neglect of the mortgagors, by any occupancy or vacancy, or by any change of title or possession of the premises, provided that the mortgagee shall notify the insurance company of any change of ownership or increase of hazard that may come to its knowledge, shall have permission therefor indorsed on the policy, and shall pay for it. It provides that when the insurance company pays to the mortgagee any loss under the policy, for which it claims that no liability to the mortgagors existed, it shall be legally subrogated to all the rights of the mortgagee, in subordination to the mortgagee's claim for the balance of its debt, or that it may, at its option, pay the entire debt of the mortgagee, and take an assignment to itself of all the securities. And it finally provides that, if the mortgagee assigns the mortgage, the agreement contained in the mortgage clause shall be binding between the insurance company and the assigns, without no-

tice to the insurance company of the assignment. What after terms could be chosen to effect a separate insurance on the interest of the mortgagee, to free that insurance from any possible influence of any act or neglect of the mortgagors, and to make it dependent solely on the course of action of the mortgagee and the insurance company? None occur to us. And these terms are found in a contract between the mortgagee and the insurance company. They secure to the insurance company certain rights in the contemplated contingency that the mortgagee's contract of insurance may be valid when that of the mortgagors is void, and they expressly provide that this contract shall run with the mortgage. When this mortgage clause was attached to the policies in suit, it had been introduced and generally adopted by insurance companies and mortgagees to secure indemnity to the latter. The purpose of its introduction and adoption had been to protect that indemnity against every act and neglect of the mortgagors, whether prior or subsequent to the issue of the mortgage indemnity clause. Ten years before, the highest judicial tribunal of the state of New York had declared that a mortgage clause which contained these provisions accomplished that purpose, and every court whose attention had been called to the question had approved that decision. Under these circumstances, the mortgagee and the insurance companies in these cases selected a mortgage clause that contained these identical provisions, and made it their contract. The inference is irresistible that they intended to, and that they did thereby, agree that no act or neglect of the mortgagors, unknown to the mortgagee, whether prior or subsequent to the date of this contract, should avoid it. Moreover, these insurance companies cannot now be heard to say that these contracts were void in their inception, as to the interest of the mortgagee. They tendered to this mortgagee their own policies running to third parties, and their contracts with the mortgagee that these policies should not be invalidated by any act or neglect of those parties. The policies had been issued by themselves, and any third party had the right to rely upon their statement as to the validity of their own policies. The policies certainly could not be invalidated unless they were then valid, and the tender of them to this mortgagee as contracts of insurance of its interest as mortgagee, with promises that they should not be invalidated, was a clear representation to the latter that those policies were then valid. The mortgagee undoubtedly relied upon this representation, and on the faith of it accepted the policies and the mortgage clauses as binding agreements of indemnity. If the insurance companies had notified this mortgagee at any time before the loss that the original policies were or might have been invalid at the inception of the contracts between them, the latter would undoubtedly have surrendered the contracts, and sought insurance elsewhere. They waited until the loss had occurred, and it is now too late for them to retract their representa-

tions. They are estopped to deny the truth of their statement, to the manifest injury of the mortgagee.

Our conclusion is that the effect of the union mortgage clause, when attached to a policy of insurance running to the mortgagor, is to make a new and separate contract between the mortgagee and the insurance company, and to effect a separate insurance of the interest of the mortgagee, dependent for its validity solely upon the course of action of the insurance company and the mortgagee, and unaffected by any act or neglect of the mortgagor, of which the mortgagee is ignorant, whether such act or neglect was done or permitted prior or subsequent to the issue of the mortgage clause.

In view of this conclusion, a careful examination of the records discloses no prejudicial error in the trial of the cases between the mortgagee and the insurance companies, and the judgments in those cases must be affirmed. The two judgments in favor of William G. Bohn and Conrad Bohn against the plaintiffs in error, respectively, must be reversed, and the cases remanded, with directions to award a new trial, and it is so ordered.

---

TRAVELERS' INS. CO. OF HARTFORD v. MELICK.<sup>1</sup>

(Circuit Court of Appeals, Eighth Circuit. December 3, 1894.)

No. 482.

1. ACCIDENT INSURANCE—PROXIMATE CAUSE OF DEATH.

The T. Ins. Co. insured R. against death resulting from bodily injury through accidental means alone, independently of all other causes, the policy providing that it should not cover suicide, sane or insane, or intentional injury. R. accidentally shot himself in the foot. The wound resulted in tetanus or lockjaw, and, on the eighteenth day after the accident, R. was found dead, with his throat cut, and a scalpel in his hand, having also evidently been in the embrace of tetanic spasms, causing intense agony, at the time of his death. Upon trial of an action against the insurance company brought by R.'s administrator, these facts appeared, and there was evidence that either the tetanic spasms or the cut would have sufficed to cause R.'s death, while expert witnesses differed in their opinions as to which did cause it. *Held* that, in this state of the evidence, the question of the proximate cause of death was for the jury, and it was not error for the court to refuse to direct a verdict for the defendant.

2. SAME.

The court charged the jury that, if they found that the shot wound caused tetanus, great pain, and delirium, and that, while in that state, the insured cut his own throat, being impelled thereto by the intense agony caused by the wound, which he was unable to resist, then the shot wound might be considered a proximate cause of that injury, and if, in a state of uncontrollable frenzy, caused by the lockjaw, resulting from the shot wound, he cut his own throat, from the direct effects of which he died, they might find that the shot wound was the proximate cause of death. *Held*, that this instruction was not erroneous, either as connecting the original accident with an event too remote in time, or as disregarding a new and sufficient cause intervening after the accident.

3. SAME—SPECIAL VERDICT.

The court submitted to the jury three forms of special verdict,—one finding that the shot-wound was the proximate cause of death; another,

<sup>1</sup> Rehearing pending.

that R., in a state of frenzy, induced by the agonies of tetanus, cut his throat, and the two causes combined caused his death; and the third, that the cut caused death. The jury returned the first finding. *Held*, that this fully justified a judgment for plaintiff.

4. SAME—APPLICATION OF DOCTRINE OF PROXIMATE CAUSE.

There is a difference in the application of the doctrine of proximate cause to actions for negligence and actions on contracts to indemnify for the results of a given cause. In the former, the liability is measured by the natural and probable consequence of the negligent act. In the latter, the liability is measured by the contract itself, as in this case, to indemnify against death that should result within ninety days from accidental bodily injuries alone, and the doctrine of proximate cause is applicable only to aid in determining whether or not the fatal result was caused solely by the act or accident against which the indemnity was given.

5. INSURANCE—EFFECT OF STATEMENTS IN PROOFS OF LOSS.

Statements as to the cause of death, in proofs of loss under a life insurance policy, are conclusive upon the party who makes them, by pleading or otherwise, only until he gives the insurance company reasonable notice that he was mistaken, after which they have the effect of solemn admissions, under oath, against interest, but are not conclusive.

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action by Samuel M. Melick, as administrator of the estate of Leonard H. Robbins, deceased, against the Travelers' Insurance Company, of Hartford, upon a policy of insurance. Upon the trial in the circuit court, a verdict was rendered for the plaintiff. Defendant brings error.

Charles Offutt, for plaintiff in error.

Allen W. Field and Edward P. Holmes, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The first question in this case is whether or not the court below should have instructed the jury to return a verdict in favor of the plaintiff in error. The Travelers' Insurance Company of Hartford, Conn., the plaintiff in error, insured, by its written policy, Dr. Leonard H. Robbins, a physician of Lincoln, Neb., for a term of one year, against death that should result from "bodily injuries effected during the term of this insurance, through external, violent, and accidental means alone, \* \* \* independently of all other causes." The policy provided that:

"This insurance does not cover disappearances; nor suicide, sane or insane; \* \* \* nor accident, nor death, \* \* \* resulting wholly or partly \* \* \* from \* \* \* disease or bodily infirmity, hernia, fits, vertigo, sleepwalking, \* \* \* intentional injuries (inflicted by the insured or any other person)."

Samuel M. Melick, the defendant in error, as administrator of the doctor's estate, brought this action on the policy, and recovered a judgment in the court below. In his petition the administrator alleged that the doctor died June 18, 1890, and that his death was caused by an accidental shot wound in his foot, which he inflicted upon himself June 1, 1890. The answer denied this allegation, and alleged that his death was caused by his cutting his own throat with a scalpel, and that it resulted from intentional self-inflicted injury. The reply denied these allegations of the answer.

There was evidence that the doctor accidentally sent a bullet through the fleshy portion of his foot, June 1, 1890; that the wound thus caused became very painful, confined him to his bed, caused a fever, and gradually reduced his strength, until he died, June 18, 1890; that this gunshot wound was just such an injury as would naturally produce tetanus or lockjaw; that the doctor and his physicians feared that disease from the first, and that they used chloral and chloroform to relieve the pain and ward off this disease; that in the early morning of June 18, 1890, while the deceased was alone in his room, he was seized with tetanus; that this disease causes the most excruciating pains that human beings ever suffer; that it is fatal in a vast majority of cases; that it produces spasms or convulsions, and sometimes causes death by a spasm of the larynx, which prevents the passage of air through the trachea to or from the lungs; that the doctor was found dead in his bed, June 18, 1890, with a scalpel in his right hand, and his trachea and both his jugular veins cut; that the tetanus was sufficient to produce the death, and the throat-cutting was sufficient to produce it. The administrator, who was not a physician, stated in his proofs of loss that the insured "took a knife and cut his throat; all evidence shows that the conditions of his mind and his physical condition that prompted the suicide was caused by the shot wound"; and he testified that he thought the loss of blood from the cut produced the death, but he could not say positively. On the other hand, Dr. Shoemaker, who was the attending physician, testified that tetanus was the only cause that he should attribute the death to in this case; and Dr. Hatch, another physician, in answer to an inquiry for his opinion, said:

"Well, there was conclusive evidence that the man was in the embrace of tetanic spasms. It is impossible for mortal to tell, and no one but the recording angel will be able to tell. He was in the embrace of tetanic spasms. I think both. I think tetanic spasms and the cut,—the two were present when breath left the body."

Under this state of the evidence, it is assigned as error that the court below refused to instruct the jury to return a verdict for the insurance company; and it is contended that the question whether the shot wound which caused the tetanus, or the throat cutting, was the proximate cause of the death, was a question of law for the court.

In *Railway Co. v. Kellogg*, 94 U. S. 469, 474, 476, Mr. Justice Strong, who delivered the opinion of the court, said:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. \* \* \* In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

This opinion of the supreme court is a complete answer to the contention of the plaintiff in error here. *Railway Co. v. Callaghan*, 6 C. C. A. 205, 208, 56 Fed. 988.

It is urged that this question was for the court, and that the court was bound to declare that the cutting was the proximate efficient

cause of the death in this case, because the evidence was uncontradicted that the cutting was later in time than the shot wound, and was sufficient to cause the death. This position might be maintained if the cutting was not itself produced by the shot wound, and if the evidence was uncontradicted that the death would not have occurred as soon from the tetanus in the absence of the cutting. But the argument begs the primary question in the case,—whether the cutting was a cause of the death at all. If it neither caused nor hastened the death of the insured, then it was in no sense a cause of it; and, however new or sufficient it may have been to have caused it, it could not relieve the insurance company from a death whose sole cause was the accidental injury. This question was peculiarly one of fact. The insurance company had agreed to pay the promised indemnity for any death that resulted from the accidental shot wound alone. The question was, what did in fact cause the death,—the shot wound, the cutting, or both? Nor would this case be withdrawn from the effect of this rule if the evidence upon this question was undisputed, for the question is always for the jury where a given state of facts is such that reasonable men may fairly differ upon it. It is only when all reasonable men, fairly exercising their judgments, must draw the same conclusion from an admitted state of facts, that it becomes the duty of the court to withdraw a question of fact from the jury. *Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679; *Railway Co. v. Jarvi*, 10 U. S. App. 439, 450, 451, 3 C. C. A. 433, 437, 438, and 53 Fed. 65; *Fuel Co. v. Danielson*, 12 U. S. App. 688, 6 C. C. A. 636, and 57 Fed. 915; *Railroad Co. v. Kelley's Adm'rs*, 10 U. S. App. 537, 544, 3 C. C. A. 589, 593, and 53 Fed. 459; *Railway Co. v. Ellis*, 10 U. S. App. 640, 644, 4 C. C. A. 454, 456, and 54 Fed. 481. But the evidence in this case was not undisputed. One witness testified that he thought the cutting was the cause of the death, another that tetanus was, and a third that it was both. It was at least doubtful what answer ought to be given to the question upon the evidence. It was by no means clear that no reasonable man could fairly draw the conclusion that the shot wound, and not the cutting, was the cause of the death; and the request to withdraw the case from the jury was properly denied.

A special verdict was rendered by the jury, and it is assigned as error that the court below rendered judgment thereon for the defendant in error. Before entering upon the discussion of this assignment, let us consider what findings were necessary to sustain the claims of the respective parties to this litigation. The administrator had alleged that the shot wound was the cause of the death, and the burden of proof was upon him to establish that fact. The insurance company had denied this averment, and had alleged that the death was caused by the suicidal throat cutting; and the administrator had denied this allegation. That the death was caused by suicide, or self-inflicted injuries, or resulted from any of the excepted causes named in the policy, was matter of defense, and the burden of proof was upon the insurance company to establish it. Again, where it is doubtful from the facts of a case whether a death was caused by accidental injuries or by the suicidal act of the deceased, a presumption of



law arises that the accident, and not the suicidal act, was the cause. *Mallory v. Insurance Co.*, 47 N. Y. 52; *Cronkhite v. Insurance Co. (Wis.)* 43 N. W. 731, 732; *Insurance Co. v. McConkey*, 127 U. S. 661, 667, 8 Sup. Ct. 1360.

The only finding, then, requisite to sustain the administrator's case here was that the shot wound caused the death. It was not incumbent upon him to obtain a finding that the cut pleaded by the insurance company did not cause it; that was the necessary legal effect of a finding that the shot wound did cause it, in the absence of any further finding as to the cause of the death. On the other hand, it was necessary to the defenses of the insurance company that it should either prevent a finding that the shot wound was the cause of the death, or procure an affirmative finding that it was caused wholly or partly by a suicidal act or intentional self-inflicted injury. In this state of the case, the court submitted to the jury three findings upon this question, and instructed them to return those which stated the facts as they found them. The three proposed findings were:

"(10) We find that the pistol-shot wound received by the said Leonard H. Robbins, on the 1st day of June, 1890, was an accident, and one insured against in said policy of insurance; and that said pistol-shot wound was the proximate cause of the said Leonard H. Robbins' death, on or about the 18th day of June, 1890."

"(8) We find that on or about the 18th day of June, 1890, after being confined to his bed, from the effects of said wound, tetanus or lockjaw had set in, superinduced and caused by said pistol-shot wound; and that the said Leonard H. Robbins, while in a state of frenzy and delirium, and in the agonies of tetanic convulsions, caused by said wound, seized a scalpel, and cut his throat; and that death followed from the two causes combined; but whether or not the said Leonard H. Robbins died from loss of blood resulting from said cut in the throat, or from tetanic convulsions or lockjaw, we, the jury, are unable to determine."

"(18) We find that the wound inflicted by the said deceased with a scalpel was a mortal wound, and that the same caused the death of said Robbins."

It will be seen that the tenth finding was that the shot wound was the cause of the death, the eighth was that the shot wound and the throat cutting together caused the death, and the eighteenth was that the throat cutting alone caused it. The jury returned the tenth finding, and rejected the eighth and eighteenth. In effect they thus found that the pistol-shot wound caused the death, and that the cutting neither caused nor assisted to cause it. This was certainly as conclusive of this question as a general verdict for the administrator, and fully authorized the judgment in his favor.

The jury also made the following findings with reference to the cutting of the throat:

"(8) We find that the wound inflicted on the throat of the insured was sufficient to produce death, independent of any and all other causes; and we further find that tetanus, suffered by the insured, superinduced by the pistol-shot wound, was sufficient to produce death, independent of all and any other causes."

"(9) We find that the insured, Leonard H. Robbins, cut his own throat with a scalpel, to end great and excruciating pains which he, the said Robbins, was then suffering from the effects of the pistol-shot wound in his foot."

"(11) We find that the cutting of his throat by Leonard H. Robbins was an act caused by physical pain and suffering, which he was unable to resist or

control, resulting from the wound in the foot; whether voluntary or involuntary, we, the jury, are unable to decide."

It is said that the ninth finding—that the insured cut his own throat with a scalpel, to end great and excruciating pains—is a finding of intentional self-destruction, and is a bar to any judgment for the administrator under the clause of the policy which excepts death by suicide. It is a conclusive answer to this proposition that the jury refused to find that the cutting either caused or contributed to the death, and did find that the shot wound caused it; hence whether the cutting was intentional or unintentional becomes immaterial, since it had no part, according to this verdict, in producing the death.

The exception to the action of the court in rendering judgment upon the findings of the jury cannot be sustained.

The objection that the findings of the jury are contrary to the weight of the evidence cannot be considered by this court. In an action at law, this is a court for the correction of the errors of law of the court below only. There was, as we have already held, sufficient evidence to warrant the submission of the question of proximate cause to the jury in this case. The court below committed no error in weighing this evidence; that duty was performed by the jury, and not by the court; and hence there is no ruling of the court in that regard for us to review, and it is not our province to review and correct the findings of the jury on questions of fact properly submitted to them. *Railway Co. v. Ellis*, 4 C. C. A. 454, 456, 54 Fed. 481; *City of Lincoln v. Sun Vapor Street-Light Co.*, 8 C. C. A. 253, 257, 258, 59 Fed. 756.

The conclusions we have thus reached upon the evidence and the findings of the jury render it unnecessary to consider in this case the vexed question, exhaustively discussed in the briefs of counsel, whether the throat cutting was suicidal or accidental, with the intent of self-destruction or with the intent to cure or mitigate a mortal malady.

It is assigned as error that the court charged the jury, in effect, that if they found that the pistol-shot wound was an accident, that the wound caused tetanus, great bodily pain, and delirium or fever, and that, while in that state of fever and delirium, the insured cut his own throat, being impelled thereto by the intense agony caused by said wound, which the deceased was unable to resist or overcome, then the shot wound might be considered a proximate cause of this injury; and that if, in a period of delirium or a state of frenzy, uncontrollable because of the great pain and bodily suffering caused by the lockjaw that was produced by the shot wound, he cut his own throat with a scalpel, from the direct effects of which he died, they might, notwithstanding, find that the proximate cause of the death was the pistol-shot wound accidentally received in the foot. If this charge was erroneous, it is difficult to see how the plaintiff in error could have been prejudiced by it, in view of the refusal of the jury to sustain by their findings its defense that the cutting either caused or contributed to cause the death. As, however, the claim is strenuously urged that it must have influenced the jury, we pro-

ceed to consider it. The criticism made of this charge was that the pistol-shot wound was too remote from the cutting and the death to be considered as the moving cause of either, and that the court should have told the jury that it must appear from the evidence that the cutting of the deceased's throat was the natural and probable consequence of the shot in the foot, and ought to have been foreseen in the light of attending circumstances, and that it must appear that the death naturally followed from the shot wound, without the intervention of some act of the deceased not reasonably to be expected, before they could find that the shot wound was the proximate cause of the death. The question whether or not the court ought to have given to the jury the general rules of law on the subject of proximate cause embodied in this criticism is not before this court, because the plaintiff in error did not request the court below to give them; they were merely urged *arguendo* in the exceptions to the charge. The only question here is whether, in the state of the case set forth in this instruction, the pistol-shot wound was so remote from the injury inflicted by the cutting and the death that it could not be found to be their efficient or moving cause. The proximate cause has been so lately defined and the rules for its discovery so fully stated by this court that it is only necessary to refer to *Railway Co. v. Elliott*, 5 C. C. A. 347, 55 Fed. 949; *Railway Co. v. Callaghan*, 6 C. C. A. 205, 56 Fed. 988; and *Railway Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 921, for our views of the law upon this subject. In the last case we said that:

"The proximate cause is not always, nor generally, the act or omission nearest in time or place to the effect it produces. In the sequence of events, there are often many remote or incidental causes nearer in point of time and place to the effect than the efficient moving cause, and yet subordinate to it, and often themselves influenced, if not produced by it." Page 925, 57 Fed., and page 641, 6 C. C. A.

And in *Railway Co. v. Elliott*, *supra*, we said:

"Obviously, the relations of causes to their effects differ so widely, and are so various, that no fixed line can be drawn that will in each case divide the proximate from the remote cause. The best that can be done is to carefully apply the rule of law to the circumstances of each case, as it arises." Page 952, 55 Fed., and page 347, 5 C. C. A.

The question presented by this instruction is, like most questions involving this doctrine of proximate cause, perplexing and difficult; but after as careful a consideration as we are able to give to the supposed case stated in this instruction, in the light of the authorities and the exhaustive arguments presented by counsel, we are unwilling to say that the wound in the foot might not have been the efficient cause of the death under the facts and circumstances there set forth. It must be borne in mind that the doctrine of proximate cause has a different relation to an action for negligence from that which it bears to a contract to indemnify for the result of a given cause. In the former it measures the liability, while in the latter the contract fixes the extent of the liability. In an action for negligence the liability extends only to the natural and probable consequences of the negligent act. In the case in hand the contract is to indemnify the insured against death that shall result within 90 days from accidental

bodily injuries alone. The company was undoubtedly liable under this contract for the death of the insured if that death did in fact result from the accidental shot wound alone. The crucial question was whether or not it did in fact so result, and the doctrine of proximate cause was applicable to this case only to aid in finding a just answer to this question, and not to measure the liability which the contract had fixed.

The authority chiefly relied on to sustain the exception to this instruction is *Scheffer v. Railroad Co.*, 105 U. S. 249. That was an action for negligence. The plaintiff was injured in a railroad wreck. The complaint alleged that the injury caused phantasms, illusions, and forebodings, which eventually prostrated the reasoning powers of the assured, and caused him to take his own life eight months after the injury. The supreme court declared that the original injury was too remote to be deemed the proximate cause of the death, and that the act of self-destruction was a new intervening cause which must be held responsible for it. But it is far from following from this decision that if the railroad company had contracted to indemnify Mr. Scheffer against a death that resulted from that wreck, and the injury there received had confined him to his bed, had worn and exhausted him with pain, and then caused an agony of delirium and fever that irresistibly impelled him to take his own life only 18 days after the injury, that court or any court would have declared the injury too remote to be deemed the efficient cause of the death. So, in *Streeter v. Society*, 65 Mich. 199, 31 N. W. 779, cited by counsel, where the insured received an injury at the base of his brain from a fall on the sidewalk, complained of pains in his head, changed his demeanor, and after six weeks shot himself at a time when some of the witnesses testified that he was unable to control his physical actions, the court held that the fall was too remote and unconnected with the act of self-destruction to stand as its moving cause. But it is unprofitable to review the cases. In these and other cases cited for plaintiff in error the original negligence or accident is so much further removed, so much more disconnected, from the fatal effect than the shot wound in this case is from the cutting, that they form no criterion for its determination.

In the case in hand the original cause is near in time,—only eighteen days from the fatal effect; while in the *Scheffer* Case it was eight months, and in the *Streeter* case six weeks, from it. In this case the sequence of events is neither unnatural nor improbable, and the chain of causation seems to us unbroken. It was not unnatural nor improbable that the shot wound in the foot should produce great pain and fever. It was not unnatural nor improbable that it should produce tetanus, and that tetanus should produce uncontrollable pain, fever, and delirium. It was neither unnatural nor improbable that a man in the torture of uncontrollable agony and in a delirium or fever should be irresistibly impelled to do himself an injury in an attempt to abate his suffering, or that, if he was a physician, and familiar with the use of a scalpel, near at hand, he should seize and use that to relieve his pain. The universal practice of providing such sufferers with constant attendants, in order to prevent just such

accidents, is convincing proof that this was neither an unnatural nor an improbable consequence of the excruciating torture of the lockjaw that the shot wound produced. We are forced to the conclusion that, if the jury found the facts as stated in this instruction, they might well find that the shot wound was the efficient cause which set in motion the train of events that in their natural sequence produced the cutting and the death,—the *causa causans* without which neither would have been. But it is said that this view is erroneous, because the cutting was a new and sufficient cause of the death, which intervened between the shot wound and the fatal result, and thus became itself its proximate cause. This position is untenable, because in the state of facts set forth in this instruction the cutting was not a new cause, nor a cause independent of the original efficient cause,—the shot wound. It was only an effect of that cause,—an incidental means produced and used by the original moving cause to produce its fatal effect. In the absence of the shot wound the cutting would never have been. That was dependent entirely for its existence and for its effect upon the original accident, and was a mere link in the chain of causation between that and the death. The intervening cause that will prevent a recovery for a death which results from an accidental bodily injury indemnified against by contract must be a new and independent cause, which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original accidental injury, and produces a different result, that could not reasonably be anticipated. It may not be a mere effect of that injury, produced by it, and dependent upon it for both its existence and its effect. *Railway Co. v. Callaghan*, 6 C. C. A. 205, 56 Fed. 988, 994; *Railway Co. v. Kellogg*, 94 U. S. 469, 475. If the jury found that the facts were as they were stated in this instruction, the cutting was neither a new cause nor a cause independent of the shot wound, but a mere effect of it. Therefore, it could not have been the proximate or moving cause of the death.

For the reasons already given in the affirmance of the instruction we have been considering, there was no error in the refusal of the court to give the counter instruction requested by counsel for the plaintiff in error, to the effect that the jury could not find that the wound inflicted by the scalpel was caused by the shot wound, and that, if they found the wound inflicted with the scalpel was a mortal wound, they could not find that the shot wound was a cause of the death.

Complaint is made that the court below refused to give four elaborate instructions upon the burden of proof, requested by counsel for plaintiff in error. But in its charge the court told the jury that, to entitle the plaintiff to recover, it was necessary for them to find from the evidence that the death of the assured was proximately caused by such an accident as was covered by the terms of the policy; that it was the duty of the defendant in error to establish, by a preponderance of proof, the truth of every affirmative proposition which it was necessary for him to show, in order to justify a recovery; and that they could not base any of their findings upon conjecture. In view of the fact that the court submitted the crucial questions in the case—

whether or not the shot wound was the proximate cause of the death, and whether or not the cutting of the throat either caused or contributed to the death—to the jury by special proposed findings on these questions, in accordance with the respective claims of the parties in their pleadings, we are persuaded that there was no error in the refusal of the court to charge more at length upon the burden of proof. The rule of law was fairly stated, and, where this is done in the general charge, there is no error in a refusal to give instructions upon the same subject requested by counsel. *Railway Co. v. Jarvi*, 10 U. S. App. 439, 453, 3 C. C. A. 433, 439, and 53 Fed. 65; *Railroad Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. 347.

It is assigned as error that the court instructed the jury with reference to the statements in the proof of loss that "the deceased, Leonard H. Robbins, took a knife, and cut his throat. All evidence shows that the condition of his mind and his physical condition, that prompted the suicide, was caused by the shot wound,"—that they were at liberty, in determining the cause of death, to consider this statement of the defendant in error, but that it was not in any manner conclusive upon him; that they should only give to it such weight as they thought it might be entitled to receive; that, whatever cause of death might have been alleged in the proof of death, he was at liberty, on the trial, to show that the death resulted from some other or different cause; and that, in determining the cause of death, they should be governed by all the evidence that had been introduced upon that question. The better rule upon this subject is that statements of this nature in proofs of loss are binding and conclusive upon the party who makes them until, by pleading or otherwise, he gives the insurance company reasonable notice that he was mistaken in his statement, and that he will endeavor to show that the death was the result of a different cause from that stated in his proofs. After the insurance company has received due notice of this fact, the proofs have the probative force of solemn admissions under oath against interest, but they are not conclusive. *Insurance Co. v. Newton*, 22 Wall. 32; *Keels v. Association*, 29 Fed. 198, 201; *McMaster v. Insurance Co.*, 55 N. Y. 222, 228, 233; *Parmelee v. Insurance Co.*, 54 N. Y. 193. There was nothing in the charge of the court in conflict with this rule. Ample notice of the claim of the defendant in error that the death was not caused by suicide was given in the pleadings, and the proof itself disclosed the claim that the cutting was an effect of the accidental shot wound. The court, it is true, declared that this statement was not in any manner conclusive; but, if it was conclusive, it was conclusive in every manner. The court told the jury that they should only give it such weight as they thought it was entitled to receive; but there was no error in this, for the presumption is that they thought it was entitled to receive its lawful probative force. The fact is that there is no positive error in the charge the court gave here. The real complaint of counsel is that the court did not also charge the jury that the weight which they should give to the statement was that of a solemn admission under oath against interest. Undoubtedly, the court would have so charged if its attention had been called to it, and it had been requested so to do. It was not. The

question was not presented to it, and was not ruled upon, and cannot now be successfully urged upon our consideration.

Finally, it is insisted that the court erred in directing the jury to find the special verdict. Upon an examination of the record, however, we discover that no objection to this course of proceeding was made at the trial. On the other hand, counsel for the plaintiff in error requested the court to submit four special questions to the jury, and his only exceptions relative to this subject were to the refusal of the court to submit his questions, and to the statement of facts in certain of the proposed findings it did submit. The court below, therefore, was not called upon to rule upon this question, and there is no ruling here for us to review.

The judgment below must be affirmed, with costs; and it is so ordered.

---

### MADDEN v. LANCASTER COUNTY.

(Circuit Court of Appeals, Eighth Circuit. December 3. 1894.)

No. 476.

#### 1. COUNTIES—LIABILITY FOR CARE OF HIGHWAYS—STATUTES AND CONSTITUTION OF NEBRASKA.

The Nebraska statute of 1889, giving a right of action against counties for failure to keep highways and bridges in repair, if brought within 30 days after the injury, does not violate the constitution of that state, either by granting to counties a special immunity, or by amending the general statute of limitations without containing or repealing the section amended, since, before the passage of said act, counties were not liable to suit, and the act imposed a new liability, which might be limited in any way the legislature saw fit.

#### 2. LIMITATION OF ACTIONS—REASONABLENESS.

Where the same statute creates a new right of action, and imposes a limitation of time within which such action must be brought, the objection that the time is unreasonably short cannot be entertained.

#### 3. SAME—FROM WHAT TIME LIMITATION RUNS.

Where a statute provides that an action for damages may be brought "within 30 days of the time of said injury or damage occurring," suit must be brought within 30 days from the occurrence giving rise to the right, and not from the time when the whole consequent damage was suffered.

#### 4. NEBRASKA CODE—JUDGMENT NON OBSTANTE VEREDICTO.

Under the Nebraska Code of Civil Procedure, a defendant does not waive his right to judgment on the pleadings by answering over after a demurrer interposed by him has been overruled.

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action by Michael H. Madden against the county of Lancaster, Neb., for personal injuries. After a verdict for the plaintiff in the circuit court, that court rendered judgment for the defendant on the pleadings. Plaintiff brings error.

G. M. Lambertson, for plaintiff in error.

Charles O. Whedon and W. H. Woodward, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

**SANBORN, Circuit Judge.** In 1889 the legislature of the state of Nebraska passed an act entitled "An act relating to highways and bridges and liabilities of counties for not keeping same in repair," by which, for the first time in the history of that state, they expressly gave a right of action against a county for damage resulting from its neglect to maintain and keep in suitable repair the highways and bridges in its charge, on the express condition that the action so authorized should be commenced within 30 days of the time when the injury or damage occurred. Section 4 of that act, which gives this right of action, reads as follows:

"If special damage happens to any person, his team, carriage, or other property by means of insufficiency, or want of repairs of a highway or bridge, which the county or counties are liable to keep in repair, the person sustaining the damage may recover in a case against the county, and if damages accrue in consequence of the insufficiency or want of repair of a road or bridge, erected and maintained by two or more counties, the action can be brought against all of the counties liable for the repairs of the same, and damages and costs shall be paid by the counties in proportion as they are liable for the repairs; provided, however, that such action is commenced within thirty (30) days of the time of said injury or damage occurring." Sess. Laws, Neb. 1889, p. 77; Consol. St. Neb. 1891, § 1934.

The plaintiff in error brought an action against the defendant in error, the county of Lancaster, for damages caused by a defective bridge, more than 30 days after his injury occurred. The defendant in error demurred to the plaintiff's petition, which disclosed this fact, on the ground that it did not state facts sufficient to constitute a cause of action, and its demurrer was overruled. The defendant then answered, among other things, that the action ought not to be maintained because it was not brought within 30 days of the time when the injury or damage occurred. The case was tried to a jury, and a verdict rendered for the plaintiff.

Section 440 of the Code of Nebraska provides that "where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." Consol. St. Neb. 1891, § 4965.

After the verdict, and upon the motion of the defendant, the court rendered a judgment in its favor upon the statements in the pleadings, and this is the error complained of.

The constitution of the state of Nebraska declares that no special law shall be passed by the legislature of that state, "laying out, opening, altering and working roads or highways \* \* \* regulating the practice of courts of justice \* \* \* granting to any corporation, association, or individual any special or exclusive privileges, immunity or franchise whatever," and provides that "in all other cases where a general law can be made applicable no special law shall be enacted." Const. Neb. art. 3, § 15. That constitution also provides that "all corporations may sue and be sued in like cases as natural persons" (Id. art. 13, § 3), and that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amend-



ed shall be repealed" (Id. art. 3, § 11). When the act of 1889, in question, was passed, the time in which actions for negligence could be commenced was limited to four years by the General Statutes of the state. Consol. St. Neb. 1891, §§ 4541, 4548, 4552.

The chief contention of counsel for plaintiff in error in this case is that the proviso of the act of 1889 limiting the time within which actions for negligence may be brought thereunder is in violation of these provisions of the constitution. He maintains that the condition of the grant of the cause of action by the act of 1889, that it must be commenced within 30 days after the injury, is unconstitutional, because it grants special immunity to counties, from actions for negligence, during all but 30 days of the 4 years within which they may be brought against others, and because it is in effect an amendment of the general statute of limitations on this subject, and does not contain or repeal the section amended. Stated in syllogistic form, the argument is: Counties in Nebraska are corporations, and, in the absence of the act of 1889, they were liable to actions for injuries caused by their negligence in the care of highways and bridges for the same term (4 years) that other corporations and individuals were liable to such actions under the general statute of limitations of that state. The act of 1889 relieved them from such liability during all but 30 days of the 4 years, while it left all other parties liable to actions for negligence for the entire 4 years. Therefore, the act of 1889 granted special immunity from these actions to counties, and amended the general statute of limitations without containing or repealing the section it amended. It is obvious that, unless the first proposition or the major premise of this syllogism is sound, the conclusion will not follow, and cannot be maintained. If that proposition is unsound; if, in the absence of the act of 1889, counties in Nebraska were not liable to actions for injuries caused by their negligence in the care of highways and bridges,—then the act of 1889 granted no immunity to them, but, on the contrary, fastened a liability and imposed a burden upon them. It made them liable to actions for damages for 30 days after injuries are caused, that they were not liable for before; and it did not amend the general statute of limitations by shortening the period within which any actions could be brought, but it granted rights of action for periods of 30 days, that, in its absence, would never have existed. Moreover, if this act was not a limitation of actions that might be maintained without it, and if it created rights of action for periods of 30 days that did not exist at all before, then it was a grant, instead of a limitation; and, even if it were unconstitutional, it would not be the limitation, but the grant, that would fall, and the effect would be, not that the action permitted could be brought after the 30 days, but that it could not be maintained at all. Counsel for the plaintiff in error fully appreciates how essential it is to his contention to establish the major premise of his argument, as we have stated it, and he meets the issue squarely. He presents an exhaustive and persuasive argument in support of the proposition that, under the common law and the statutes of Nebraska, counties are corporations, and are liable for negligence in the care of highways and bridges, regardless of the act

of 1889. In support of this proposition, he cites the decisions of the supreme courts of Indiana, Iowa, Pennsylvania, and Maryland (*House v. Board*, 60 Ind. 580; *Wilson v. Jefferson Co.*, 13 Iowa, 181; *Commissioners v. Duckett*, 20 Md. 468; *Rigony v. Schuylkill Co.*, 103 Pa. St. 382), and asks this court to investigate and determine the question thus presented as an original proposition, upon the right and reason of the matter, regardless of the precedents established, and the decisions already rendered upon it. The question is an interesting one, and it would be a grateful task to make such an original investigation and decision of it; but fixed rules of decision, which ought to and must govern the deliberations and action of this court, preclude us from entering upon it.

In the first place, the authorities cited from Indiana, Iowa, Pennsylvania, and Maryland are in conflict with the great weight of authority. The general rule of law in this country and in England is, and has been for more than a century, that while cities and municipal bodies, that voluntarily accept charters from the state to govern themselves, and to manage their own local affairs, are municipal corporations proper, and are liable for negligence in the care of streets and bridges, and in the discharge of like public duties (2 Dill. Mun. Corp., 3d. Ed., §§ 1017, 1018; *Barnes v. District of Columbia*, 91 U. S. 540, 550, 551, and cases cited), counties, townships, school districts, and road districts are not municipal corporations proper, and are not liable for such negligence. The latter, even when invested with corporate capacity and the power of taxation, are but quasi corporations, with limited powers and liabilities. They exist only for the purpose of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are intrusted are the powers of the state, and the duties imposed upon them are the duties of the state; and inasmuch as the sovereign power is not amenable to individuals for neglect in the discharge of public duty, and cannot be sued for such neglect without express permission from the state itself, so these quasi corporations, its agents, are not liable for such negligence, and no action for damages arising therefrom can be maintained against any of them, in the absence of an express statute imposing the liability and permitting the action. 1 Dill. Mun. Corp. (3d. Ed.) §§ 23, 26; 2 Dill. Mun. Corp. (3d. Ed.) §§ 961-963; *Russell v. Men of Devon*, 2 Term R. 667; *Barnes v. District of Columbia*, 91 U. S. 540, 552; *Travelers' Ins. Co. v. Township of Oswego*, 7 C. C. A. 669, 675, 59 Fed. 58; *Mower v. Leicester*, 9 Mass. 247; *Hill v. Boston*, 122 Mass. 344; *Askew v. Hale Co.*, 54 Ala. 639; *Haygood v. The Justices*, 20 Ga. 845; *Hollenbeck v. Winnebago Co.*, 95 Ill. 148; *White v. Commissioners*, 90 N. C. 437; *Brabham v. Board*, 54 Miss. 363; *Reardon v. St. Louis Co.*, 36 Mo. 555; *Commissioners of Marion Co. v. Riggs*, 24 Kan. 255; *Cooley v. Freeholders of Essex*, 27 N. J. Law, 415; *Barnett v. Contra Costa Co.*, 67 Cal. 77, 7 Pac. 177; *Eastman v. Meredith*, 36 N. H. 284; *Detroit v. Blackeby*, 21 Mich. 84; *Granger v. Pulaski Co.*, 26 Ark. 37; *Templeton v. Linn Co. (Or.)* 29 Pac. 795.

In *Barnes v. District of Columbia*, *supra*, the supreme court declared that whether this distinction between the liability of municipal corporations proper and such quasi corporations as counties and townships, for neglect in the discharge of public duties, was based upon sound principle or otherwise, it was so well settled that it could not be disturbed. A rule that is too well settled for the supreme court to disturb is too firmly established for this court to undertake to overturn.

There is, however, another and a conclusive reason why we cannot, in this case, enter upon the consideration of this rule as an original question. It is that this question arose in the state of Nebraska, and before this cause of action accrued this question had been settled by a line of uniform decisions of the supreme court of that state. The answer to this question is not to be found in the general or commercial law, but it depends upon the construction of the constitution and statutes of the state of Nebraska. The extent of the powers and of the liabilities of the counties formed by or under the constitution and laws of a state must necessarily be determined by an examination and construction of the constitution and statutes which grant those powers and impose those liabilities. The national courts uniformly follow the construction of the constitution and statutes of a state, given by its highest judicial tribunal, in all cases that involve no question of general or commercial law, and no question of right under the constitution and laws of the nation. *Dempsey v. Township of Oswego*, 4 U. S. App. 416, 435, 2 C. C. A. 110, and 51 Fed. 97; *Rugan v. Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, and 53 Fed. 415, 420; *Travelers' Ins. Co. v. Oswego Tp.*, 7 C. C. A. 669, 674, 59 Fed. 58; *Claiborne Co. v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489; *Bolles v. Brimfield*, 120 U. S. 759, 763, 7 Sup. Ct. 736; *Detroit v. Osborne*, 135 U. S. 492, 499, 10 Sup. Ct. 1012. The tenacity with which the national courts adhere to this practice is well illustrated by *Detroit v. Osborne*, *supra*. It is, as we have stated, the generally accepted rule of law that a city is liable for negligence in the construction or care of its streets and sidewalks. The supreme court had itself declared that the law must be deemed to be settled in accordance with this rule. *Barnes v. District of Columbia*, *supra*. The supreme court of the state of Michigan, however, had repeatedly held that a city in that state was not liable for negligence in the care of its streets. In this state of the decisions, *Osborne*, a citizen of the state of Ohio, sued the city of Detroit, in the United States circuit court in Michigan, for an injury caused by the negligence of the city which resulted in a defective sidewalk; and the supreme court held itself bound by the decisions of the Michigan court, and refused to permit him to recover. Mr. Justice Brewer, in delivering the opinion in that case, said:

"This question is not a new one in this court. In the case of *Claiborne Co. v. Brooks*, 111 U. S. 400, 410, 4 Sup. Ct. 489, it was held that, 'When the settled decisions of the highest court of a state have determined the extent and character of the powers which its political and municipal organizations

may possess, the decisions are authoritative upon the courts of the United States'; and in the opinion it was observed: 'It is undoubtedly a question of local policy with each state, what shall be the extent and character of the powers which its various political and municipal organizations shall possess; and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the state.' What was there decided in reference to the powers is equally true as to the liabilities of a municipal corporation"

The reason for and the necessity of this rule are apparent. The circuit court below had concurrent jurisdiction with the courts of Nebraska of actions by citizens of other states against the municipal corporations and political organizations of that state. If the federal courts sustain actions against counties and other quasi corporations for negligence in the discharge of their public duties, in the absence of an express statute authorizing them, while the supreme court of that state refuses to do so, the result will be inequality before the law, rights of action for the citizens of other states that the citizens of Nebraska do not and cannot enjoy, and confusion and uncertainty in the administration of justice. Stability and certainty in the rights and remedies of citizens, and uniformity of decision and harmony of action between the national and state systems of jurisprudence, demand a strict adherence to the rule to which we have adverted. What, then, has the supreme court of Nebraska held as to the liability of counties to actions for negligence, in the absence of any legislative enactment expressly permitting them? In *Wehn v. Commissioners*, 5 Neb. 494, 497 (which was decided in 1877), an action was brought against a county for damages caused by the erection of a jail, and such negligence in its management that it became a nuisance; and that court refused to permit a recovery, held that no liability therefor existed, unless created by statute, and declared that there was "nothing in the legislation of this state, either directly or by reasonable implication, recognizing the liability of counties to private actions for the neglect of their officers in the performance of public duties." In *Woods v. Colfax Co.*, 10 Neb. 552, 556, 7 N. W. 269 (decided in 1880), an action had been brought against the county for damages caused by the breaking down of a public bridge in that county. The supreme court of Nebraska reviewed some of the authorities upon the question before us, refused to allow a recovery, and closed its opinion with these words:

"The legislature undoubtedly possesses the power to make counties liable in cases of this kind, and some of the states have passed laws imposing such liability; but, without such legislation, we must adhere to the rule laid down in *Wehn v. Commissioners*, 5 Neb. 494."

In *Hollingsworth v. Saunders Co.*, 36 Neb. 141, 144, 54 N. W. 79 (decided in 1893), an action was brought against the county, under the act of 1889, for damages caused by the breaking of a public bridge; and that court cited with approval the decision in *Woods v. Colfax Co.*, declared that it was "perfectly plain that a county is not liable for the acts or negligence of its officers, un-

less made so by legislative enactment," and then sustained the action under the act of 1889.

For the reasons already stated, these decisions settle this question in the case in hand. The county of Lancaster is under no greater liability to a citizen of Iowa than to a citizen of Nebraska for a failure to keep its highways and bridges in a reasonably safe condition; and the measure of that liability must be determined by the construction given to the constitution and statutes of that state by these repeated decisions, and not by any opinion that this court might entertain in the absence of those decisions.

The result is that counties in Nebraska were not liable for negligence in the care of public highways and bridges, in the absence of the act of 1889. That act, therefore, did not grant any special privileges or immunity to such quasi corporations, nor did it shorten the term in which actions already authorized could be brought, nor amend the general statute of limitations; but, on the other hand, it imposed a new liability upon, and gave a new right of action against, them, for 30 days after any injury caused by such negligence; and the argument against the constitutionality of this act, which we have been considering, cannot prevail.

Another contention of counsel for plaintiff in error is that the limitation of 30 days on the rights of action by the act of 1889 was unreasonably short. If this was a limitation upon rights of action in existence at the time of the passage of this act, the objection might be worthy of consideration. But the proviso in the act that suits shall be brought upon the rights of action it creates within 30 days from the occurring of the injuries, respectively, is a condition qualifying the rights of action, and not a mere limitation of the remedy. *Theroux v. Railroad Co.* (decided by this court at the present term) 64 Fed: 84; *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140; *Railroad Co. v. Hine*, 25 Ohio St. 629. It was within the discretion of the legislature of Nebraska to create the rights of action given by this act, or to refuse to create them at all; and a fortiori it was entirely within the discretion of that legislature to fix the duration of their existence, if it gave them being. The whole is greater than any of its parts. Where the time within which a right of action may be enforced is limited by the legislative enactment which creates the right, the legislature is the exclusive judge of the reasonableness of the limitation, and it is not the province of the courts to inquire concerning it. *De Moss v. Newton*, 31 Ind. 219.

Again it is said that the condition that the action must be brought "within thirty days of the time of said injury or damage occurring," does not extend to this case, because the plaintiff was confined to his bed and suffered intense pain, in consequence of his injury, for two months after it occurred, and was unable to consult his attorney; that he then presented his claim to the county commissioners, who rejected it, that he has necessarily incurred liability for medical services up to the time he commenced his action; and that his is a continuing damage, which was not all sustained until the day when he brought his action, more than six months after he sustained the

injury. But it was the province of the legislature, and not that of the courts, to fix the conditions on which the rights of action it created might be enforced, and to name the exceptions to these conditions, if any. The legislature has made no exception, on account of any of the matters to which we have referred, to the express condition that it imposed upon every right of action it created by this act. The conclusive presumption from this fact is that it intended to make none, and it would be judicial legislation for this court to do so. *Morgan v. City of Des Moines*, 60 Fed. 208; <sup>1</sup> *McIver v. Ragan*, 2 Wheat. 25, 29; *Bank v. Dalton*, 9 How. 522, 528; *Vance v. Vance*, 108 U. S. 514, 521, 2 Sup. Ct. 854. "The time of said injury or damage occurring," within the meaning of this statute, was clearly the time when the accident happened which caused the injury or damage, and not the time when all injury and damage resulting therefrom had ceased; and no action, in our opinion, can be maintained here, unless brought within 30 days from that time.

Finally, it is insisted that the defendant waived the defense that the action was not commenced in time, because it did not stand upon its demurrer, and that a judgment non obstante veredicto can never be lawfully rendered in favor of a defendant. It is a conclusive answer to both of these objections that, whatever the rule may be in the absence of a statute establishing it, section 440 of the Code of Civil Procedure of Nebraska (Consol. St. Neb. 1891, § 4965) expressly requires that where, upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party. This section is not, in our opinion, in any way limited or qualified by any other portion of the Code to which our attention has been called. It appeared both from the statements in the petition and from those in the answer that this action was not brought within the 30 days after the injury occurred, prescribed by the statute which gave it, and the court below could not have refused judgment for the defendant without disregarding this statute. Moreover, the defendant did not waive this defense by its failure to stand upon its demurrer, or by filing its answer. Under the Code and the settled practice in Nebraska, if the facts stated in the petition do not constitute a cause of action, not because of some defect in the form of pleading, but on account of a substantial defect that is fatal to a recovery, the defendant does not waive such defect by filing his answer, but may take advantage of it at any time. Consol. St. Neb. § 4636; *Farrar v. Triplett*, 7 Neb. 237, 240; *O'Donohue v. Hendrix*, 13 Neb. 255, 13 N. W. 215; *Thompson v. Stetson*, 15 Neb. 112, 17 N. W. 368; *Railroad Co. v. Crockett*, 17 Neb. 570, 572, 24 N. W. 219; *Renfrew v. Willis*, 33 Neb. 98, 106, 49 N. W. 1095; *Plow Co. v. Webb*, 141 U. S. 616, 623, 12 Sup. Ct. 100; *Bennett v. Butterworth*, 11 How. 669, 675. The defendant was guilty of no waiver here. It insisted upon this defense at every stage of the proceeding below. It raised it by demurrer, it raised it by answer, and it raised it by motion after verdict.

The result is that it is a complete defense to an action against a county in Nebraska for neglect in the discharge of its public duty to maintain reasonably safe highways and bridges, that such action was not brought within the 30 days after the occurring of the injury prescribed by the proviso to the act of 1889, and the judgment below must be affirmed. It is so ordered.

---

TERRE HAUTE & I. R. CO. v. MANSBERGER.

(Circuit Court of Appeals, Seventh Circuit. January 14, 1895.)

No. 178.

1. REVIEW ON APPEAL—NEGLIGENCE—OBJECTION NOT RAISED BELOW.

Where, in an action for personal injury, the trial court is not asked to instruct the jury to find for the defendant, the question of negligence, being thus submitted to the jury as one of fact, is not reviewable on appeal.

2. MASTER AND SERVANT—FELLOW SERVANTS—CAR INSPECTOR AND BRAKEMAN.

A car inspector is not the fellow servant of a brakeman. Railroad Co. v. Myers, 63 Fed. 793, followed.

3. SAME—CONTRIBUTORY NEGLIGENCE.

Where a brakeman is injured by the breaking of a defective coupling pin, the fact that he was at the time on top of the car, instead of on the ground beside the car, as the rules of the railroad company required, does not constitute contributory negligence, since his improper position was not the proximate cause of the injury. Phillips v. Railway Co., 25 N. W. 544, 64 Wis. 475, followed.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Action on the case by William M. Mansberger against the Terre Haute & Indianapolis Railroad Company. Plaintiff obtained judgment. Defendant brings error.

Greene & Golden, for plaintiff in error.

Craig & Hamlin, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge. It is contended that the court erred in submitting to the jury the question whether the plaintiff in error was chargeable with negligence in using the defective coupling pin, the breaking of which permitted the cars to separate, and thus caused the defendant in error, in attempting to pass from one car to another, to fall between them, and sustain the injuries of which he complains. The plaintiff in error did not ask the court to give to the jury a binding instruction to return a verdict in its favor, for the reason that there was not sufficient evidence to authorize them to find and return a verdict for the defendant in error. The case was submitted to the jury on the evidence produced, without any objection specifically asking the court to rule as matter of law that there was such failure of proof as would preclude a verdict for the plaintiff below. The question of the negligence of the plaintiff in error in

using the defective coupling pin having been submitted to the jury as a question of fact, without objection, their finding on that question is conclusive on this court. *Elevator Co. v. Lippert*, 63 Fed. 942. We have no authority to review any questions except rulings of the trial court involving matters of law, properly saved by exception and assigned for error. And if the question of the sufficiency of the evidence to prove actionable negligence in the use of the defective coupling pin were open to review here, we could not examine it, because the bill of exceptions does not profess to embody all the evidence given on the trial of the cause. *Railroad Co. v. Myers*, 63 Fed. 793.

We have carefully read the evidence in the record, and are satisfied that it was sufficient to carry the question of negligence to the jury. The defendant in error was a brakeman on an east-bound through freight train of the plaintiff in error, which had been made up in its yards at East St. Louis, in the state of Illinois. Near Pine Bluff City, in that state, the train parted. The forward part of the train, consisting of the engine and tender and 13 freight cars, became separated from its rear part, consisting of a caboose and 7 freight cars. The crew with the forward part of the train consisted of the engineer, fireman, and one brakeman, the defendant in error. He was on the top of the cars, while the engineer was backing the forward part of the train down a steep grade, to couple onto the detached portion. The defective coupling pin in question was in use as a part of a foreign car which had been delivered to the plaintiff in error for transportation over its line, and had been put into the train at East St. Louis. This coupling pin was broken while the forward part of the train was moving back, and the thirteenth car, on which the defendant in error was riding, became separated from the twelfth car, and in attempting to pass from one to the other he fell between them, and was seriously injured. The night was dark, and it had been snowing somewhat. His purpose in attempting to pass from the thirteenth car to the twelfth was to enable him to reach and set the brake on the eleventh car, with a view to control the movement of the forward section of the train. The evidence shows that the coupling pin had a break in it extending from one-fourth to one-third of the way through it; that the break was rusty, and looked as though the pin had been cut into with a knife, and had then been exposed to the weather. The only witness who spoke on the subject said he could not say whether or not the fracture could have been seen before the pin was broken.

It is insisted that the jury was not warranted, on this state of the proof, in finding negligence in the use of a defective pin. It is claimed that the plaintiff in error had a car inspector at East St. Louis, and that, while there is no evidence to prove that he actually inspected the car having the defective coupling pin, the presumption, in the absence of proof, is that he performed his duty, and inspected the car, and discovered no defect. And it is further claimed that, if the inspector neglected to inspect the car, or if he made an insufficient inspection, the defendant in error can have no recovery for such negligence, because the car inspector is to be deemed the fellow servant of the injured brakeman. We have held in the recent case



of *Railroad Co. v. Myers*, 63 Fed. 793, that it is the duty of a railroad company receiving foreign cars for transportation over its line to inspect them, to see if they are in a reasonably safe condition of repair; that, if they are found to be out of repair, the company must refuse to receive them, or, having received them, it must put them in a reasonably safe condition of repair; that the inspection required to be made is not merely a formal one, but it must be made with such care as the exigency of traffic will permit, having regard to the hazard of the service; and that the failure to make such inspection, or, if such inspection is made, the failure to give notice of defects to those who may be required to work upon or about such defective cars, would be evidence of actionable negligence. And we there further held that the car inspector was not the fellow servant of the brakeman, but that he represented the master, who was responsible for his negligence. The neglect of the car inspector, therefore, to make any inspection, or his neglect to make it with reasonable care, having regard to the hazard of the service, is the negligence of the company. If we should agree with counsel for the plaintiff in error that, in the absence of proof, the presumption is that the car inspector at East St. Louis inspected the foreign car having the defective pin, it would not aid their contention, because the jury had a right, from the facts before them, to reach the conclusion that, if an inspection was made, it was not made with such care and prudence as would relieve the plaintiff in error from the charge of negligence. We could not, therefore, say, if we were authorized to review the finding of the jury,—and we are not,—that their verdict is unsupported by the evidence.

It is further contended that a rule of the plaintiff in error made it the duty of the defendant in error to have been on the ground, walking, at the rear of the forward section of the train, acting as a flagman; and that, if he had been on the ground, he would not have been injured. This part of the train was backing down a heavy grade, so that, in the judgment of the brakeman, it became necessary to set some of the brakes, to control the movement of the cars. It was his intention, when he had set enough brakes to accomplish this purpose, to get down, and act as a flagman. The engineer moved the cars so rapidly that the brakeman did not deem it safe to attempt to get down. It is said that the negligence of the engineer in running too rapidly upon a down grade contributed to the accident, and that, as the engineer and brakeman were fellow servants, there can be no recovery. If it were conceded that the accident and consequent injury arose from the concurring negligence of the car inspector and engineer, it would not relieve the plaintiff in error from responsibility. It would still be liable for the consequences of the negligence of its car inspector, even though the negligence of the engineer may have contributed to produce the injury. It is held in *Cayzer v. Taylor*, 10 Gray, 274, that the master is liable to his servant for injuries resulting from his defective machinery, although the negligence of a fellow servant contributed to the accident. The same doctrine is affirmed in *Boyce v. Fitzpatrick*, 80 Ind. 526. Indeed, upon principle, it must be held that a master cannot escape

responsibility for injuries resulting from his negligence because the negligence of a fellow servant may have contributed to produce it. Here the car inspector stands for the master, and his negligence was the master's negligence. The proximate cause of the accident and injury was the breaking of the defective coupling pin; and the negligence of the engineer, if his running too rapidly can be called negligence, was at most too remote and contingent to have any influence on the case. The following is the rule referred to above:

"Should any portion be uncoupled while running, the brakeman must stop the rear section as quick as possible, the engineman being careful to keep the forward section out of the way. The engineman and fireman must look back frequently to see that all is right; and, in case the train is broken apart, great care must be taken to keep the forward part out of the way of the detached part, and every precaution used to prevent a collision. The engineman must in all cases go back, under the protection of the flagman, after the detached portion. He must be absolutely sure it has stopped. Trains going up behind will wait indefinitely unless otherwise ordered by the train dispatcher."

It is insisted that this rule made it the duty of the defendant in error to be upon the ground, acting as a flagman, to insure the slow and careful backing of the forward section of the train, and that his disregard of this duty in going on top of the cars to set the brakes was the proximate cause of his injury. To this it is answered that the object of the rule was to keep the forward section of the train from colliding with the detached portion, and that to accomplish this purpose it was necessary to set the brakes. This rule did not, in terms, require the brakeman to act as a flagman, and be upon the ground. It must receive a reasonable construction in view of the exigencies of the situation. We do not think the court would have been justified in directing the jury to find for the plaintiff in error, even if they believed the defendant in error was on the top of the cars, setting the brakes, in violation of the rule. The rule does not require us to hold that the company was absolved from its duty of exercising reasonable care for the safety of the injured brakeman because he was engaged in setting brakes on the moving cars. He was still in his master's service, performing a duty important to the safety of the train.

But if we felt constrained to hold that the defendant in error was setting the brakes in violation of the rule, still we could not disturb the verdict. The proximate cause of the injury was the breaking of the defective coupling pin, and the consequent parting of the cars. The negligence of the injured brakeman, in being in an improper place, if it can be called negligence, was a mere condition of the injury. The breaking of the defective pin was the proximate cause of the injury. His being on the cars was not the immediate cause of it in a juridical sense. It may have been the remote cause, sometimes called "remote negligence," but it is too remote and contingent to be influential on the right of the defendant in error to recover. In the case of *Phillips v. Railway Co.*, 64 Wis. 475, 25 N. W. 544, this exact question was considered, and it was there said, if the brakeman had been at his post on top of the cars, as required by a rule of the company, he might not have been injured; yet it was held that his

improper position was not the proximate cause of his injury. See, also, *Pease v. Railway Co.*, 61 Wis. 163, 167, 20 N. W. 908.

We have carefully examined the entire charge of the court, and especially those parts of it to which exceptions were reserved, and, in our opinion, it contains a full and fair statement of the law applicable to the facts of the case. It is in harmony with the views herein expressed, and no good purpose would be subserved by setting out the instructions in this opinion. Finding no available error in the record, the judgment of the court below will be affirmed, at the cost of the plaintiff in error.

---

HAGER v. McDONALD et al.

(Circuit Court, W. D. Missouri, W. D. January 7, 1895.)

No. 1,782.

1. JOINT DEBTORS—RELEASE OF PART—KANSAS STATUTE.

Under paragraph 1102, Gen. St. Kan. 1889, providing that "any person jointly \* \* \* liable with others for the payment of any debt \* \* \* may be released \* \* \* by the creditor and such release shall not discharge the other debtors beyond the proper proportion of the debt for which the person released was liable," a release of one or more out of several joint judgment debtors, by a compromise agreement, operates as a proportional satisfaction of the judgment, which can thereafter only be enforced against the remaining judgment debtors to the extent of their fractional proportion of the judgment.

2. SAME.

And although the instrument of release refers also to another statute under which it is made, which statute, separately considered, makes the release operate as a satisfaction pro tanto of the joint judgment, yet this release should not be so restricted, not only because it also refers to the other statute, first above named, but especially because of the fact that the instrument declares on its face that it shall operate as a satisfaction "to the extent of the proportionate share of such judgment."

This was an action by Walter J. Hager, as administrator of Rosa Hager, against Rufus L. McDonald and others, to recover the balance due upon a judgment. Defendants pleaded a release, claimed to operate as a partial satisfaction of the judgment. Plaintiff demurs to the answer.

In the year 1889 plaintiff's intestate recovered judgment in the state district court of Ellis county, Kan., against 16 defendants, sued as joint trespassers, for the sum of \$10,734.40 and costs. Afterwards, on the 7th day of February, 1891, said Rosa Hager entered into a compromise agreement with, and executed to, 14 of said judgment defendants, a written release from said judgment, in consideration of the sum of \$4,175 then paid to her by the said 14 defendants; which said written release was duly acknowledged by said Rosa Hager, and filed with the clerk of said court. Said release recites, inter alia, that said defendants, being desirous of compromising their part and portion of said judgment, and "paying unto said Rosa Hager their proportionate share of said judgment and costs thereon, and being released therefrom, now, therefore, in pursuance of chapter 75, Gen. St. Kan. 1889, entitled, 'An act to authorize compromises by partners and joint debtors,' and of paragraph 1102, Gen. St. Kan. 1889," the plaintiff released and discharged said 14 defendants from liability to her on said judgment, without prejudice to her right to proceed against the other attaching creditors of said Hager Bros., and other persons jointly liable with them. The written instrument further provided that

it was not intended to be a satisfaction of said judgment, nor to discharge any parties who might be liable under said judgment, and for the conversion of the property, from the effect thereof, except the parties to the compromise. The release then concludes with this provision:

"And it is further understood that the amount hereinbefore acknowledged as received by me is not received by me in satisfaction of said judgment, except to the extent of the proportionate share of said judgment, for which last-named parties are liable."

The act referred to as chapter 75 was enacted in 1866, and makes detailed provisions for composition or compromise by any partner for copartnership debt, to operate as an effectual discharge from any further liability to the partnership creditor, without, however, impairing the right of such creditor to proceed against any other individual member of the firm. The act provides that such release shall be evidenced by a note or memorandum in writing, and making the same evidence by such debtor or debtors; and, where such joint liability shall be evidenced by the record of any court, such release, duly acknowledged, may be filed with the clerk of such court, who shall thereupon discharge said judgment of record, so far as the compromising debtor or debtors are concerned. By section 4 of said act, paragraph 4001 of the General Statutes, it is provided that such compromise "shall in nowise affect the right of the other copartners to call on the individual making such compromise for his ratable portion of such copartnership debts the same as if this law had not been passed." Section 5 of the original act, now paragraph 4002, extends the provisions aforesaid to the case of joint debtors. The provision of paragraph 1102, referred to in the instrument of release, is quoted in the opinion of the court. Since the transaction above stated, said Rosa Hager died intestate in the state of Colorado, and the plaintiff prosecutes this action as administrator. The present action is against a number of other persons than those named in the judgment aforesaid, and seeks to recover against them, as aiders and abettors of the trespass in question, the whole amount of said judgment, after crediting the same with the sum of \$4,175 received under said composition and release. These defendants make answer, denying their joint liability in the first count, and by the second count, after pleading the release aforesaid, allege and claim that the same operated as a complete acquittance and discharge of these defendants from any liability. And by the third count it is claimed that said release operated as a satisfaction of said judgment pro rata as to 14 of the 16 judgment defendants, consequently leaving but two-sixteenths, or one-eighth, of said judgment unsatisfied. And as the one-eighth part thereof would be for a sum not exceeding \$1,300 or \$1,400 in controversy, this court would have no jurisdiction of the subject-matter. To this answer the plaintiff demurs generally as to the second and third counts, on the ground that the facts stated do not constitute any defense.

E. H. Stiles and A. J. Bryant, for plaintiff.

Karnes, Holmes & Kranthoff and Dowe, Johnson & Rusk for defendants.

PHILIPS, District Judge (after stating the facts). As to the issue presented under the second count of the answer, it is not insisted by defendants' counsel that said release operated as a satisfaction of the judgment. The single and decisive question presented by the demurrer to the third count of the answer is whether the composition release operated as a satisfaction of the judgment pro tanto or pro rata. There having been 16 defendants against whom judgment went, and a compromise thereof by 14 of the defendants, if this operated as a pro rata payment, it left only one-eighth part thereof unsatisfied; and, as this fractional part is admitted to be less than the sum necessary to give this court jurisdiction, it would result that the plaintiff's action be dismissed. The party injured by

an act of trespass committed by several persons has a right to proceed against the tortfeasors jointly or severally, and he may recover judgments against them all, or any part of them, jointly and severally; but he can have but one satisfaction of either judgment. This is the recognized rule in the state of Kansas. *Westbrook v. Mize*, 35 Kan. 299-302, 10 Pac. 881. It would logically follow that a satisfaction pro rata of the judgment would operate to discharge all the other cotrespanders to the extent of the proportion released. It may be conceded to plaintiff that under the provisions of chapter 75, Gen. St. Kan., enacted in 1866, the release operated only as a discharge of the other cotrespanders pro tanto. This is clearly enough expressed in said paragraph 4001 of the act. It is insisted, however, in reply to this, that under paragraph 1102, referred to in the composition release, the compromise operates as a satisfaction pro rata of the judgment. This section was first enacted in 1868, and occurs in the General Statutes of 1889, under chapter 21, entitled "An act relating to contracts and promises," and is as follows:

"Any person jointly or severally liable with others for the payment of any debt or demand may be released from such liability by the creditor and such release shall not discharge the other debtors or obligors beyond the proper proportion of the debt or demand for which the person released was liable."

If this latter statute is applicable to this case, it is difficult to escape the conclusion that only one-eighth of said judgment remains unsatisfied; for it, in effect, declares that such release shall discharge the other debtors to the extent, but not "beyond, the proper proportion of the debt or demand for which the person released was liable." The term "proportion" is synonymous with "pro rata." *Black, Law Dict. tit. "Pro rata,"* p. 944. Plaintiff's counsel interposes, as a first objection to this latter statute, that the subject-matter of said paragraph 1102 is not sufficiently expressed in the title of the act, which is, "An act regulating contracts and promises." And the court is asked to hold that the term "contracts and promises" is not comprehensive enough to include judgment debts. In the accepted text books, contracts are divided into three classes: (1) Contracts of record, such as judgments, recognizances, and statutes staple; (2) specialties which are under seal, such as deeds and bonds; (3) simple contracts, or contracts by parol. Judge Brewer, in *Meixell v. Kirkpatrick*, 29 Kan. 679, expressly held that after judgment against cotrespanders they became "debtors of the plaintiff,—judgment debtors." It is quite inconceivable, upon the idea of equivalents, in character and right, why the legislature should have had in contemplation any distinction in favor of the two classes of contracts—by specialty and by parol—over the one first in order by record, a judgment, in extending the privilege of compromise. Joint debtors by the act of 1866 were put upon the same plane of right with partners, whose obligations unquestionably spring from and are included within contracts. Paragraph 1102 in the latter act being evidently in the spirit of a measure of relief to obligors, it is the duty of courts to so apply it as to effectuate the legislative intent. As the act of 1866 already extended to joint debtors, and as the obligation of a debtor springs from contract and promise, it is not reasonable to say that the

purpose of paragraph 1102 was merely to extend the right of compromise to a class of debtors not already provided for.

The second contention of plaintiff's counsel in this connection is that the supreme court of Kansas has construed this statute to mean that the sum paid by one tortfeasor under a judgment in trespass operates in favor of the others only as a satisfaction pro tanto. The case of *Meixell v. Kirkpatrick*, 29 Kan. 685, is relied on to support this contention. In that case there were separate actions and separate judgments in favor of the plaintiff against two trespassers. It is quite obvious, from the character of the questions raised, that the mind of the learned judge who wrote the opinion was chiefly occupied with the consideration of the fact that the lower court entirely ignored the effect of the compromise made by the defendant under the first judgment, and his thought was directed rather to the proposition that the fact of the settlement made with the other debtor should have been taken into computation in assessing the damages against the remaining trespasser than as to the extent of such satisfaction. It is furthermore apparent that the attention of the learned judge was directed alone to the provisions of chapter 75, or the act of 1866; and it was as to the effect of the release under that chapter that it was said it operated "as satisfaction pro tanto of the claim against the other." There does not appear to have been any adjudication by the supreme court of the state as to the effect of said paragraph 1102 in its relation to this case. It is apparent, however, that in the opinion of the learned counsel, resident in that state, who formulated for the respective parties the compromise agreement, paragraph 1102 applied to and affected the operation of the instrument; for it expressly declares that "in pursuance of chapter 75, Gen. St. Kan. 1889, \* \* \* and of paragraph 1102, Gen. St. Kan. 1889," the said compromise was made and the release executed. And as if to give emphasis to the fact that said paragraph 1102 applied with force and as if expressive of the parties' understanding as to the extent of the satisfaction of the judgment thereby accomplished, the concluding paragraph of the release declares that:

"It is further understood that the amount hereinbefore acknowledged as received by me is not received by me in satisfaction of said judgment except to the extent of the proportionate share of said judgment for which last-named parties are liable."

It would be a strained perversion of the language employed in so carefully framed an instrument, by competent practitioners in law, to hold that "the proportionate share of said judgment" was inadvertently employed, or that they should not be held to have employed it in the sense of its legal acceptance, and with direct reference to said paragraph 1102 named in the agreement, which declares that the release shall operate to discharge "the proper proportion of the debt," which was fourteen-sixteenths of the judgment. It does seem to me that both reason and justice demand that the plaintiff should be held to the operation of said paragraph 1102, and the explicit language of the instrument of release. By incorporating in effect the provisions of said paragraph 1102 into the composition release,

and by the express language of the closing paragraph thereof, the plaintiff agreed and declared that, in consideration of the receipt from the 14 defendants of \$4,175, the judgment should be satisfied "to the extent of the proportionate share" for which said debtors were liable. So that, as between the parties to the compromise, the plaintiff received \$4,175, not only upon the promise not further to vex the 14 defendants, but on the assurance, in effect, that it should be a pro rata—"proportionate"—satisfaction of the judgment, so that they could not be called upon for further contribution by the other cotrespanders in the event of a recovery against them. The reference to chapter 75 made in the instrument of release was necessary because of the fact that it made the detailed provisions respecting the formula to be gone through as to the execution of the instrument, its acknowledgment, and where it should be filed, and directed the duty of the clerk in entering the formal discharge of record. I am of opinion that the plaintiff should be held in this action to the letter of the law. It therefore results that the demurrer to the third count of the answer is overruled, and the action will be dismissed for want of jurisdiction over the subject-matter, unless plaintiff makes issue on the facts pleaded in the answer.

---

UNITED STATES v. MORTON, Clerk of Court.

(Circuit Court of Appeals, Seventh Circuit. January 11, 1895.)

No. 182.

CLERK OF COURT—COMPENSATION.

Act March 3, 1891, creating the circuit courts of appeals, provides (section 2) that the salary of the clerk of the court shall be \$3,000, and (section 9) "that the marshals, criers, clerks, bailiffs and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts"; while Rev. St. § 823, provides that a clerk of the circuit court may retain out of the fees of his office, over and above office expenses, a sum not exceeding \$3,500. *Held*, that a clerk of a circuit court of appeals, the fees of whose office for a year and a half amounted, over office expenses, to the sum of \$371 only, was entitled to retain that amount for his own use, in addition to his salary.

Appeal from the District Court of the United States for the District of Indiana.

Suit by Oliver T. Morton, clerk of the United States court of appeals for the Seventh district, against the United States, for fees and compensation. Plaintiff obtained judgment. Defendant appeals.

This was a suit by the appellee, Morton, against the United States, brought under the act of March 3, 1887 (24 Stat. 506), conferring upon the district courts jurisdiction of such cases. The district court, as required by the statute, made a special finding of the facts, and stated its conclusion of law substantially as follows: (1) On the 16th day of June, 1891, the petitioner, Oliver T. Morton, was duly appointed clerk of the United States circuit court of appeals for the Seventh circuit, and on the same day accepted, and has ever since held, the office. (2) From the beginning of his term of office, as aforesaid, down to January 1, 1893, he received, by way of costs and fees as such clerk, over and above necessary clerk hire and incidental office expenses, which were paid out of the costs and fees earned and received dur-

ing said period, the sum of \$371.20, and no more. (3) On January 28, 1893, he made his return, as required by law, to the secretary of the treasury of the United States, of all costs and fees collected by him prior to January 1, 1893, in which return he represented to the secretary of the treasury that the amount of costs and fees received by him during said period over and above necessary disbursements for clerk hire and incidental office expenses was in the amount of \$371.20; and in said return he further represented and insisted that said amount of \$371.20 was his own property, and not the property of the United States of America. (4) On April 3, 1893, A. C. Matthews, first comptroller of the treasury department of the United States, gave to said Morton a peremptory notice that said amount of \$371.20 was due from him to the United States, and at the same time peremptorily demanded that he at once pay the same into the treasury of the United States. (5) On April 11, 1893, said Morton, solely on account of said peremptory notice and demand, paid said sum of \$371.20 to the treasurer of the United States, but under protest to the treasurer of the United States that the said sum of money was his own, and not the property of the United States. Judge Baker's opinion is reported in 59 Fed. 349.

The second and ninth sections of the act of March 3, 1891 (26 Stat. 826), whereby the circuit courts of appeals were established, contained the following provisions:

"Sec. 2. \* \* \* The court shall appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the supreme court of the United States, so far as the same may be applicable. \* \* \* The salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the supreme court now provided for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid over to the treasury department of the United States in the same manner as is provided in respect to the costs and fees in the supreme court."

"Sec. 9. \* \* \* That the marshals, criers, clerks, bailiffs and messengers shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit courts."

In respect to fees, section 823 of the Revised Statutes provides that "the following and no other compensation shall be taxed and allowed" to officers named, including clerks of the circuit and district courts. Section 828 prescribes the fees of clerks. And section 839 provides as follows: "No clerk of a district court, or clerk of a circuit court, shall be allowed by the attorney-general \* \* \* to retain of the fees and emoluments of his office, or, in case both of said clerkships are held by the same person, of the fees and emoluments of said offices, respectively, for his personal compensation, over and above his necessary office expenses, including necessary clerk hire, \* \* \* a sum exceeding thirty-five hundred dollars a year for any such district clerk or for any such circuit clerk," etc. By section 840 the clerks of the several circuit and district courts of California, Oregon, and Nevada are declared entitled to charge and receive double the fees and to retain double the amount allowed to other clerks.

The fees to be charged by the clerk of the supreme court are prescribed by the seventh subdivision of rule 24 of the rules of the supreme court. 3 Sup. Ct. xiii. This was done by authority of an act passed March 3, 1883, which contains also the following provision: "The clerk of the supreme court of the United States shall not hereafter retain of the fees and emoluments of his office for his personal compensation, over and above his necessary clerk hire, and the incidental expenses of his office certified to by the court, \* \* \* and audited and allowed by the proper accounting officers of the treasury, a sum exceeding six thousand dollars per year, or exceeding that rate, for any time less than a year; and the surplus of such fees and emoluments shall be paid into the treasury as provided by law in cases of clerks of the circuit and district courts of the United States." 22 Stat. 631. And in the act of 1884 it is further provided: "The clerk of the supreme court of the United States shall, on the first day of January next, or within thirty days thereafter, and annually thereafter, make to the secretary of the



treasury a return of all costs collected by him in cases disposed of at the preceding term or terms of said supreme court; and after deducting his compensation as provided by law, and the incidental expenses of his office, including clerk hire, said expenses to be certified by the chief justice or a justice of said court, shall pay any surplus that may remain, into the treasury of the United States, at the time of making said return." 23 Stat. 224.

Frank B. Burke, U. S. Dist. Atty., and Edwin Corr, Asst. U. S. Dist. Atty.

Addison C. Harris and Linton A. Cox, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge (after making the foregoing statement). By the second section of the act establishing the circuit courts of appeals the clerks of those courts are given a salary of \$3,000 a year each, and by the ninth section it is provided that they shall be allowed "the same compensation for their respective services as is allowed for similar services in the existing circuit courts"; and the question presented is of the proper construction of the latter provision. In the opinion of the district judge it is said:

"Counsel for the petitioner contends with great earnestness that the clerk is entitled to the salary provided for in section 2, and, in addition thereto, to retain out of the fees and emoluments of his office the same amount which clerks of existing circuit courts are allowed to retain. The district attorney, on the other hand, insists that he is only entitled to his salary of \$3,000 a year; and that the last paragraph of section 9 only relates to such incidental expenses of the court and its officers as the marshal is authorized to pay, and has no relation to the compensation of the clerk for his services. Sections 2 and 9 ought to be so construed as to give full effect to the language of each. They ought not, however, to be construed, unless incapable of other construction, in such a manner as to give the clerk of the circuit court of appeals the salary provided for in section 2, and also the right to retain, in addition thereto, the same amount out of the fees and emoluments of his office as is allowed in the case of the clerks of the circuit courts. Such a construction would result in double compensation. It would make his compensation larger than that received by the clerk of the supreme court of the United States, and nearly twice as large as that received by the clerks of the circuit courts. It cannot well be doubted that no such result was contemplated by the framers of the statute. Still, if the language employed necessarily forbids any other construction than one leading to such a result, it would be the duty of the court to adopt and enforce that construction. I think the apparent conflict may be reconciled by regarding section 9 as fixing the full measure of compensation which such clerk is entitled to receive. This section enacts that the clerk of the circuit court of appeals shall be allowed the same compensation for his services as is allowed for similar services in the existing circuit courts. It may be suggested that this provision was intended to fix the fees which may be lawfully taxed and collected as between the clerks and the litigants, and not as providing for the disposition of the fees when collected. This construction would make the compensation of the clerk the amount of his salary, and no more. I am not, however, disposed to adopt this construction, because the statute declares that he shall be allowed the same compensation for his services as is allowed for similar services in the existing circuit courts. This, in my opinion, was intended to fix the limit of his compensation. He is to be allowed for his services the same compensation as is allowed to the clerks of existing circuit courts for similar services. The clerks of existing circuit courts are entitled to receive, for all services rendered by them, \$3,500 a year. If the clerks of the circuit courts of appeals are to receive the same compensation as clerks of existing circuit courts for similar services, then they cannot receive a larger sum for

all services rendered by them than \$3,500 a year. The clerks of the circuit courts receive their compensation out of the fees and emoluments of their offices, which they are allowed to retain without covering the same into the treasury. The method in which their compensation is paid is not material. The fees are collected under authority of law, and they belong to the United States as much as though they had been covered into the treasury. In my opinion, the clerk of the circuit court of appeals is entitled to the same compensation as the clerks of the existing circuit courts; that is to say, \$3,500 a year, and no more."

It is plain that it was not intended by section 9 "to fix the fees which may be lawfully taxed and collected as between the clerks and the litigants," because it is declared in section 2 that the costs and fees in the supreme court shall be the costs and fees in the circuit courts of appeals. It is, therefore, from costs and fees taxed and collected in accordance with the rule of the supreme court, that the fund in the hands of a clerk of the circuit court of appeals must be derived. That fund, it is provided in section 2, shall be expended, accounted for, and paid over to the treasury department in the same manner as is provided in respect to the costs and fees in the supreme court. Out of the costs and fees in the supreme court the clerk of that court is authorized to deduct his compensation, not exceeding \$6,000 a year, and the incidental expenses of his office, including clerk hire, and is required to pay any surplus that may remain into the treasury of the United States. In harmony with this are the provisions of the 9th section of this act, and of the 839th section of the Revised Statutes, whereby the clerks of the circuit courts of appeals are allowed the same compensation for their services as are allowed to clerks of the circuit courts for similar services, and the latter are authorized to retain of the fees and emoluments of their offices (derived from fees taxed and collected under section 828), for compensation over and above necessary office expenses, including clerk hire, a sum not exceeding \$3,500 a year.

A comparison of the fees and costs in the supreme court, as fixed by the rule of the court, and the fees of the clerk of the circuit court, as fixed by section 828 of the Revised Statutes, will show that they are in many respects essentially different, and consequently that the aggregate of the fees and costs collected by the clerk of a circuit court of appeals will probably be different from the aggregate of compensation for services allowed by section 9, when taxed in accordance with section 828. We agree with the judge below that sections 2 and 9 should be so construed as to give full effect to the language of each; but we do not think that it should be assumed that a construction which would give a clerk the salary provided in section 2, and also the right to retain the same amount out of the fees and costs collected as is allowed in the case of the clerks of the circuit courts would result in double compensation. A new system of courts of high dignity was being established,—higher than the circuit courts, and inferior only to the supreme court,—which were to be held in the largest cities of the land; and it seems to us that the plain intention was that the chief officers of these courts, without regard to the amount of business done in them, should receive the salaries granted by section 2, and in addition, and in proportion to the work

done, like criers, bailiffs, and messengers, should each receive the same compensation for services performed as is allowed to clerks of the circuit courts for similar services. The words "respective services" are used to distinguish between the different classes of officers named, while the words "similar services" and the fact that criers, bailiffs, and messengers are included show that this provision has reference not to annual compensation, but to compensation for distinct acts of service, for which a charge should be made in accordance with section 828 against the fund derived from the fees and costs collected in accordance with the rule of the supreme court. We perceive no "apparent conflict" between the sections which needs to be reconciled by regarding section 9 as fixing the full measure of the compensation which a clerk of the circuit court of appeals is entitled to receive. If it had been intended to allow, in addition to salary, a compensation for services not exceeding the sum of \$500, it is to be presumed that plain words to that effect would have been used. Sections 2 and 9 are clearly and distinctly expressed; one giving a salary, which is to be paid out of the national treasury; and the other giving compensation for services done, to be paid out of the fund derived from costs and fees collected, and to be applied, first, to the expenses of the office; and then, if there be a surplus, to personal use.

By section 841 of the Revised Statutes, marshals are allowed to retain for personal compensation as much as \$6,000 a year; and the same construction which gives to a clerk of the circuit court of appeals \$500 in addition to his salary of \$3,000 would give the marshal of that court \$3,500 in addition to his salary of \$2,500. The marshal, it is true, if the office had been continued, would have few writs to serve and no sales to make, and therefore could earn but little beyond the per diem of \$5 for attending the court. So, too, according to the showing of this record, the compensation of the clerk under section 9 is likely to be much less than \$3,500; but the question for the court is not what will be the practical result, but what is the proper interpretation of the statute. Congress, doubtless, in view of the fact that the marshal would have little to do except to attend the sessions of the court, made his salary less than that of the clerk; and it can hardly be a proper construction of section 9 which will make his entire compensation possibly greater than that of the clerk. A provision on the subject in the legislative appropriation bill passed July 31, 1894 (St. 53d Cong. 2d Sess. p. 203), has perhaps made the question unimportant for the future. What significance should be given to that enactment as a legislative interpretation of the act in question need not be considered. It would seem to be an amendment rather than an interpretation. The rights of the appellee should not be affected by an act (which is the act of his adversary in the suit) passed since the suit was commenced.

While we are not ready to commit ourselves to the opinion of the court below that under section 9 the appellee could receive no more than \$500, and decide nothing on that point, the amount in controversy being less than that sum, we are clear that the judgment should be affirmed.

Section 15 of the act under which the suit was authorized to be brought in the district court provides that, if the United States puts in issue the right of the claimant to recover, the court may, in its discretion, allow costs to the prevailing party.

The judgment is therefore affirmed, at the costs of the appellant.

JENKINS, Circuit Judge. I assent to affirm the judgment below. I am, however, constrained to withhold concurrence in the construction apparently placed upon section 9 in the opinion of the court. It is manifest, as stated by the court, that that section does not refer to the fees to be collected by the clerk, because by section 2 such fees are gauged by a different standard. But I cannot concur that the words "similar services" prevent reference of this provision to annual compensation, and require it to be applied to distinct acts or services. The provision is "that the marshal, criers, clerks, bailiffs, messengers, shall be allowed the same compensation for their respective services as are allowed for similar services in the existing circuit court." The reference is to five distinct classes of officers, and the thought was, as I conceive, to measure the extent of compensation of each class by the compensation of such class in the circuit courts; and that the term "similar services" refers to the nature of service rendered by the respective officers named. In other words, I concur with the court below in the opinion that the intent of the statute was that the clerk should receive an annual salary of \$3,000, and, in the contingency that the fees and emoluments of his office should warrant it, then he should be permitted to retain from the amount of fees received an amount as additional salary or compensation not exceeding \$500; placing him, as to compensation, in that respect upon the same footing with the clerk of the circuit court.

By the appropriation act of 1894, referred to in the opinion of the court (chapter 174, p. 203), compensation is provided "for nine clerks, at \$3,000 each: \* \* \* provided, that said clerks shall make annually, within thirty days after the 30th day of June, to the secretary of the treasury, a return of all costs collected by them in cases disposed of during the preceding year by said court, and after deducting the incidental expenses of their respective offices, including clerk hire and their compensation as provided by section 9 of the act of March 3, eighteen hundred and eighty-one, establishing the circuit courts of appeals, not exceeding five hundred dollars, said expenses to be certified by the senior circuit judge of the proper circuit, shall pay any surplus of such costs with him remaining, into the treasury of the United States at the time of making said return." This legislative construction of the act, under a familiar principle, is entitled to great, if not controlling, weight with the courts in the determination of the legislative intent. *City of Superior v. Norton*, 63 Fed. 357-363. All statutes, says Lord Mansfield, which are in *pari materia*, are to be taken together as if they were one law. *Per Chancellor Kent, Rogers v. Bradshaw*, 20 Johns. 744. It does not matter about their date when the object of the court is to get at any provision, because a consistent, harmonious, single spirit and policy are presumed to govern statutes relating to one subject-matter.

1 Kent, Comm. 463; Potter's Dwar. St. 189, and authorities cited in note 9, and page 145, rule 17; Smith, Com. § 639 et seq.

In *Alexander v. Mayor, etc.*, 5 Cranch, 1, Chief Justice Marshall observed:

"If, in a subsequent clause of the same act, provisions are introduced which show the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law."

Within these principles, if the statute in question be of doubtful construction, I am of opinion that we should adopt that rendering of its language which has been sanctioned by the subsequent act of congress.

---

UNITED STATES v. DEBS et al.

(District Court, N. D. Illinois. January 8, 1895.)

1. OBSTRUCTING THE MAILS—INDICTMENT—FELONY.

An indictment for obstructing the mails need not allege that the act was done feloniously, since obstructing the mails was not a felony at common law. *U. S. v. Staats*, 8 How. 41, followed.

2. SAME.

But it must allege that it was done knowingly, willfully, or unlawfully.

3. SAME.

Such indictment, which charges the defendants with certain overt acts of retarding mail trains, in pursuance of a conspiracy to retard the mails, need not charge them with having known at the time that the trains carried the mails.

4. SAME.

Where such indictment alleges that defendants retarded the trains by turning switches and overturning cars upon the track, it need not allege that these acts were not done in the exercise of any lawful right, since they are presumably illegal.

5. SAME—CONSPIRACY—DUPLICITY.

Where the indictment charges a conspiracy to obstruct the mails, and overt acts in pursuance thereof, it is not restricted to a single overt act, since the gist of the offense is the conspiracy, which is a single offense.

At Law. On motion to quash. Indictment of Eugene V. Debs and others for obstructing the mails.

T. E. Milchrist, Moritz Rosenthal, Asst. U. S. Dist. Atty., and Edwin Walker, for the United States.

John S. Geeting, Col. Harper, and S. S. Gregory, for defendants.

GROSSCUP, District Judge (orally). The indictment charges the defendants with having on the 29th of June, 1894, in this division and district, unlawfully, corruptly, and wickedly conspired and agreed together, and with other persons to the grand jury unknown, to commit an offense against the United States, to wit, knowingly, unlawfully, and willfully to obstruct and retard the mails of the United States, and that, to effectuate the object of such conspiracy, certain of the defendants, on different days subsequent to June 29th, and within

this division and district, unlawfully, knowingly, and willfully did in fact obstruct and retard the mails of the United States. The means whereby such obstruction was brought about are set out in detail. The indictment thus charges a conspiracy, and the overt acts in pursuance of the conspiracy. The defendants now move to quash.

Their first objection to the indictment is that it nowhere charges that the acts done were done "feloniously." This word is one of those legal adjectives that have grown out of the common law criminal procedure. The word itself seems to have no special, inherent meaning. It was held necessary in those indictments which, under the old common law, fell within the classification of felonies. The fact that a crime is not denominated a "felony" does not make the felonious intent indispensable, unless it was one of those felonies that have come over from the common law. No case or statute has been called to my attention which shows that the obstruction of the mails was, under the old procedure, known as a felony. I am of the opinion that it was not, and that, therefore, on the authority of *U. S. v. Staats*, 8 How. 41, irrespective of whether it is a felony now or not, the felonious intent is not indispensable.

The second objection is that the defendants charged with the overt acts of retarding the mail trains are not charged with having known at the time that the trains carried the mails of the United States. It is said that no intent against the mails can be inferred unless the perpetrators had knowledge that the mails were on board the trains obstructed. I do not concur in this view. The defendants are properly chargeable with an intent to do all the acts that are the reasonable and natural consequence of the acts done. The laws make all the railways post routes of the United States, and it is within every one's knowledge that a large proportion of the passenger trains on these roads carry the mails. There is no stretching, therefore, either of law or of common sense, to presume that a person obstructing one of these trains contemplates, among other intents, the obstruction of the mails. This view, I think, is supported by the decision of the supreme court in *Coy's Case*, 127 U. S. 731, 8 Sup. Ct. 1263. There a conspiracy to affect the election of a member of congress was charged. The indictment, however, did not charge an intent to affect the election of a member of congress, but only an intent to affect the election generally, which embraced state and county officers as well. The court held that a conspiracy with an intent to unlawfully affect elections was itself unlawful, and would therefore be carried over as an intent to do the natural and usual consequence of such an act.

It is next urged that the means of carrying out the conspiracy are not set out, and that, for all the court knows, the obstruction of the mails may have been the result of a lawful exercise of defendants' rights. It is indisputable that, if the obstruction or retarding of the mails was the result of defendants' lawful right to quit the service of the roads, it would not constitute a criminal overt act. But the indictment sets out particularly what the overt acts were, such as the turning of switches, the overturning of railway cars upon

the track, etc. These are so presumably unlawful that the nonexistence of any circumstances that might make them possibly lawful is not an essential averment of the indictment. If such circumstances exist, it will be within the power of the defendants to bring them to the attention of the court on the trial.

Lastly, it is objected that the indictment is not restricted to a single overt act. The gist of the offense is the alleged conspiracy of June 29th to obstruct the mails. That offense is single and distinct. It is not a conspiracy to obstruct the mails upon any given date, or upon any particular road, or by any designated means, but simply a conspiracy to obstruct the mails. Any overt act in effectuation of such conspiracy can be shown. The conspiracy alone is not a crime. An overt act in pursuance is essential, but any overt act that is born of the conspiracy is a sufficient supplement to the conspiracy, and the government has the right to rely upon any or all of such.

For these reasons the motion to quash will be overruled as to all the counts of the indictment, except the third. That count nowhere charges that the overt act was done knowingly, willfully, or unlawfully, and, from all that appears, it might have been the result of an unintentional casualty. To that count the motion will be sustained.

## EDISON ELECTRIC LIGHT CO. et al. v. BLOOMINGDALE et al.

(Circuit Court, S. D. New York. November 10, 1894.)

### 1. FEDERAL COURTS—COMITY BETWEEN CIRCUITS—FOLLOWING CIRCUIT COURTS OF APPEALS.

It is the duty of a circuit court, notwithstanding the rule of comity, to follow a decision of the circuit court of appeals for its own circuit, rather than a contrary decision of a circuit court in a different circuit.

### 2. PATENTS—DURATION OF RIGHT—ESTOPPEL.

The action of the patentee and assignee of the Edison incandescent carbon filament vacuum lamp patent (No. 223,898), in procuring a "correction" of the patent, making it expire with foreign patent, which correction was beyond the jurisdiction of the patent office, did not operate to estop them from claiming that the patent was in force for the full term of its life, as originally fixed. *Edison Electric Light Co. v. United States Electric Lighting Co.*, 3 C. C. A. 83, 52 Fed. 300, followed.

### 3. SAME — STIPULATION PERMITTING SALE OF INFRINGEMENT ARTICLE — USE BY PURCHASERS.

In a suit for infringement of the Edison incandescent electric light patent (No. 223,898), a stipulation was made providing for an injunction, but containing a provision that the defendants should not be charged with contempt thereunder "for selling or otherwise distributing to the trade" a certain lamp known as the "Buckeye." *Held* that, as purchasers from such defendants could not be charged with notice of restrictions upon resale, Buckeye lamps sold by them were removed from the monopoly of the patent, and third persons using them could not be enjoined.

### 4. SAME—PRELIMINARY INJUNCTION.

And, further, the use of Buckeye lamps, not purchased from such dealers, should not, in the first instance, be prevented by preliminary injunction, since they could be replaced by lamps of the same kind bought from such dealers; and to require this would be to impose a hardship upon defendant without any advantage to the complainant.

This was a bill by the Edison Electric Light Company and the Edison Electric Illuminating Company of New York against Lyman G. Bloomington and another for infringement of the Edison incandescent electric light patent.

Eaton & Lewis, for complainants.

Cravath & Houston, for defendants.

LACOMBE, Circuit Judge. This is an application for a preliminary injunction to restrain infringement of patent 223,898, issued to Thomas A. Edison, January 27, 1880, for the well-known incandescent carbon filament vacuum lamp, which has been repeatedly sustained in this circuit. The defendants are using on their premises, at the corner of Fifth-Ninth street and Third avenue, in this city, incandescent lamps of three kinds, known, respectively, as the "Khotinsky," the "Novak," and the "Buckeye." The first two of these are conceded infringements, and no opposition is made to the granting of a preliminary injunction restraining their further use. As to them complainants may take an order.

Defendants, however, insist upon their right to use the Buckeye lamps, relying mainly upon a decision of Judge Ricks, rendered in the circuit court for the Northern district of Ohio in January of this year. 59 Fed. 691. That court refused to continue a preliminary injunction on the suit of the Edison Electric Light Company and the Edison General Electric Company against the manufacturers of the Buckeye lamps; and it is insisted that comity requires this court, in the Southern district of New York, to follow Judge Rick's opinion, and refuse an injunction to restrain their use here. This would, no doubt, be so were the question one of infringement only, where the court in Ohio had been the first to examine into and determine questions as to the structure of some particular lamp not heretofore judicially examined into and determined in this circuit. But the situation here presented is a peculiar one. That the lamps made by the Buckeye Company are infringements of the Edison patent, as construed by the courts, is not disputed here, nor does it seem to have been disputed in Ohio. Judge Ricks himself held that the Buckeye structure infringed. He refused relief to the complainants in the Ohio suit on the following grounds: After the patent to Edison had been regularly issued, the patentee and his assignee petitioned the commissioner of patents to "correct" the letters patent as to the statement of the term for which they were to run. And, accordingly, on December 8, 1883, the commissioner, in compliance with such petition, issued a so-called "certificate," stating that the said patent "is hereby limited so as to expire at the same time with the patent of the following named having the shortest time to run." Then follows an enumeration, including a British patent, which expired November 10, 1893. That the attempted "correction" by the commissioner of patents was without jurisdiction, and wholly void, as held in Edison Electric Light Co. v. United States Electric Lighting Co., 3 C. C. A. 83, 52 Fed. 300, is not disputed. But the circuit court in Ohio reached the conclusion that the action of the patentee and as-



signee in petitioning for the correction, and accepting the same when made, operated as a public and solemn limitation of the duration of their own patent, and as a record of their intention to abandon it to the public from and after November 10, 1893, the expiration of their British patent; and that, having thus limited its duration, and made public their intention to abandon, and defendant having in good faith acted on said public declaration, complainants are estopped from coming into court, and asserting that such conduct was a mistake as to the law, and therefore not binding upon them. This precise point, however, was argued before the circuit court of appeals in the Second circuit in *Edison Electric Light Co. v. United States Electric Lighting Co.*, supra. The printed brief of counsel in that case epitomizes their argument in the statement on page 18:

"The Edison Company, by its solemn statement to the commissioner of patents, duly verified by Mr. Edison, is estopped from saying that the term of the British patent has not become the measure of the duration of the American patent."

That court, however, upon full argument and careful consideration, held that the point taken was unsound, and sustained the decree of injunction and accounting.

It is, of course, the duty of the several circuit courts in the second circuit, comity to the contrary notwithstanding, to follow the decisions of the court of appeals of that circuit rather than those of a circuit court in some other circuit. Were there nothing in the way of complainants' application except the decision of the Ohio court in a case where the parties are not identical, they would in this circuit be entitled to relief against the user of a lamp which concededly infringes, even though the Ohio court has refused a preliminary injunction against the maker.

It appears, however, that the Edison Electric Light Company and the Edison General Electric Company, which last-named company is the manufacturing licensee under this patent, heretofore brought three suits in the Northern district of this state to restrain infringement by certain dealers in electric supplies. In those suits a stipulation was made between all the parties, providing for an injunction pendente lite, with the express understanding and agreement "that the complainants shall not charge the defendants, or either of them, or assert that the defendants, or either of them, shall be in contempt of court under said preliminary injunction order, for selling or otherwise distributing lamps known to the trade as the 'Buckeye lamps.'" Buckeye lamps, therefore, sold by those defendants in Buffalo, although infringements, are, with the authorization of the manufacturing licensee and of the owner of the patent, removed from the monopoly of the patent. It was held by this court in *Electric Light Co. v. Golet*, 65 Fed. 613, that "the purchaser of lamps once sold by the patentee, or the person whom he authorizes to make and sell them, cannot, under the decisions of the supreme court (*Adams v. Burke*, 17 Wall. 453, and *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879), be charged with knowledge of restrictions upon resale." An injunction order would not, therefore, operate

to prevent the use of Buckeye lamps by the defendants. It might compel them to remove those actually now in use, which appear to have been purchased direct from the Buckeye Company; but they could be at once replaced by lamps of the same kind bought from those dealers in Buffalo, whom the owners of the patent have authorized to sell. A preliminary injunction should not be granted where the effect is solely to impose hardship and expense upon respondents, without substantial benefit to the complainants. The complainants are, however, entitled to insist that the only infringing lamps used hereafter shall be those sold out of the monopoly, and this motion will be denied only upon defendants stipulating to file sworn monthly statements of all Buckeye lamps hereafter bought in the lifetime of the patent and during the pendency of this suit (or until further order), to replace those now in use or to increase their lighting plant, showing from whom such lamps were purchased, so that complainants may, if so advised, move to restrain the use of any of them which have not been sold out of the monopoly.

## ELGIN WIND POWER &amp; PUMP CO. v. NICHOLS et al.

(Circuit Court of Appeals, Seventh Circuit. January 11, 1895.)

No. 166.

## 1. PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—JURISDICTION.

The jurisdiction of a federal court, invoked by filing a bill for infringement of letters patent, is not defeated by a plea of license, which admits the use and validity of the patent. *White v. Rankin*, 12 Sup. Ct. 768, 144 U. S. 628, followed.

## 2. SAME—LICENSE—JUDICIAL SALE—PARTNERSHIP.

Where one of the assets of a firm is a license to use during the life of the partnership a patent belonging to one of the copartners, the purchaser of the firm assets at a judicial sale takes no right to use such patent, even though the tools and patterns used for making the patented articles are included in the sale.

## 3. EQUITY PRACTICE—PLEA—EQUITY RULE 33.

Under equity rule 33, which provides that "if upon an issue the facts stated in a plea are determined for the defendant they shall avail him as far as in law and equity they ought to avail him," the decision of the cause does not depend wholly upon the truth of the allegations of the plea, but the complainant may avoid it by proof of other facts.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Suit by William D. Nichols against the Elgin Wind-Power & Pump Company for injunction and accounting. Complainant died pending suit, and his administrators, Margaret A. Nichols and B. D. Nichols, were substituted as parties complainant. Complainants obtained a decree. Defendant appeals.

This suit was brought April 18, 1891, by William D. Nichols, a citizen of Illinois, against the Elgin Wind Power & Pump Company, a corporation of Illinois, for an accounting, and to enjoin infringement of letters patent for improvements in wind mills issued to the complainant on the 13th day of February, 1877, the 16th day of August, 1881, and the 9th day of October,

1888, and numbered, respectively, 187,297, 240,607, and 390,698. The complainant having died intestate, the suit was revived in the name of the appellees, as administrators; and the defendant, with leave of court, filed four pleas, in substance as follows: (1) The first, addressed to the entire bill, alleges that on the 14th day of December, 1883, William D. Nichols and John M. Murphy entered into a contract of partnership, in writing, for the manufacture and sale of wind mills, for the period of 10 years; that Nichols then agreed to put into the firm, for its full, free, and exclusive use, during said period, his entire right, title, and interest in and to any and all patents on wind mills which he then had and might thereafter have, together with any and all improvements which he might afterwards make thereon, etc.; that, in pursuance of the agreement, Nichols did put into the firm a full, free, and exclusive license to use the inventions and improvements described and claimed, and all letters patent relating to wind mills which he then had or might thereafter have, including all the patents mentioned in the bill of complaint, for and during the period of 10 years, and the same became a part of the assets of said firm, and that afterwards, on the 27th of September, 1884, Nichols & Murphy entered into a contract in writing with Geister, in and by which the parties agreed to form a new copartnership, under the style of Nichols, Murphy & Geister, for the purpose of carrying on said business, until the 1st day of January, 1886, which was afterwards extended until the 1st day of January, 1887, and that Nichols & Murphy, under the agreement of partnership, contributed to its capital stock all the assets and resources of the firm of Nichols & Murphy, which, defendant avers, put said full and exclusive license into the capital stock of said copartnership, and it became part of the assets thereof, and that in May, 1887, Nichols filed his bill in chancery in the circuit court of Kane county, Ill., against the said Murphy and Geister, praying, among other things, for the appointment of a receiver to take charge of the assets and business of said firm of Nichols, Murphy & Geister; that one Hoagland was appointed receiver, and, having taken possession, made, by order of the court, a sale of the business, property, and assets of the firm to the appellant, whereby, it is alleged, the appellant became possessed of the business and assets, including a "full, free, and exclusive license under said letters patent," and has been since the sole and exclusive owner thereof. (2) After setting out the partnership agreements of Nichols & Murphy, and of Nichols, Murphy & Geister, as in the first plea, with an averment of the further stipulation that the partners agreed to give their personal attention and services to the business of the copartnership, the second plea alleges that, during the existence and in prosecution of the business of the firm, Nichols made the inventions and improvements described and claimed in letters patent No. 390,698, "if the same were made by him at all," so that, it is alleged, they became the joint property of all of the partners, and a part of the assets of the firm; that afterwards, in 1887, Nichols brought a suit in chancery in the circuit court of Kane county, Ill., against Murphy and Geister, seeking to be decreed to be the absolute owner of letters patent dated, respectively, April 15, 1873, February 13, 1877, and April 26, 1881, free from all claims of the copartnership, praying for the appointment of a receiver, etc., but not claiming any right, title, or interest in and to the inventions covered by letters No. 390,698; that Hoagland was appointed receiver, and, under order of the court, sold to the appellant the business and assets of the firm, including the entire right, title, and interest in and to the last-named letters patent, for the sum of \$43,000; that the sale was duly confirmed without objection from Nichols, and that by reason of his failure to give notice of any claim on his part to the said inventions, either in his bill of complaint or subsequent proceedings, the appellant was induced to invest, and did invest, in the business, a large sum of money, in the distribution of which Nichols participated, the appellant believing that the patents and inventions relating to wind mills, not specified in said bill, or otherwise claimed by Nichols, were included; wherefore, it is alleged, Nichols became and is estopped to assert title or interest therein. (3) The third plea, like the second, is addressed to letters patent No. 390,698, sets up the same partnership agreements, and alleges that the inventions or improvements described were made by Nichols, if made by him at all, during the existence of the

firm, and that his experiments in relation thereto were made with the machinery and tools and at the expense of the firm. The appointment of the receiver, and the sale of the business and property to the appellant, are alleged, whereby it is claimed the appellant became possessed of a sole and exclusive license to use the patent. (4) The fourth plea is to the entire bill, and sets forth the contracts of partnership of Nichols & Murphy and of Nichols, Murphy & Geister, alleging that Nichols agreed to put into the firm, and thereafter did put into the firm, as a part of its assets, all machines, patterns, wind-mill stock, and tools owned by him; that, at the suit of Nichols, a receiver of the business, property, and assets of Nichols, Murphy & Geister was appointed, who afterwards, in pursuance of an order of the court, sold and transferred to the appellant, for the consideration of \$43,000, the property and assets of said firm, including machinery, tools, and patterns; that it was well known to Nichols, who, as complainant in the suit, was a party to the receiver's sale, that the appellant was purchasing the tools and patterns for the purpose of manufacturing wind mills of the kind alleged in the bill to be covered by the letters patent in suit, and for no other purpose; that Nichols consented to the sale, and personally received a large part (\$7,400) of the proceeds, besides being released from partnership liabilities to the amount of \$16,000; that the appellant thereby became entitled to use the tools and patterns so purchased in manufacturing the wind mills, for which alone they were capable of being used, and that all the mills which he has made or sold were made by and with the patterns so purchased: Wherefore, etc. Replication in the usual form. The cause was heard on the pleadings and proofs and, upon a finding that the pleas were not true, a decree was entered in favor of the complainants, and a reference ordered to a master, who should ascertain and report an account of gains and profits.

Banning & Banning (D. B. Sherwood, of counsel), for appellant.  
Charles Wheaton, for appellees.

Before HARLAN, Circuit Justice, WOODS, Circuit Judge, and BUNN, District Judge.

WOODS, Circuit Judge (after making the foregoing statement). The objection was raised at the hearing, by counsel for the appellant, that under the ruling in *Hartell v. Tilghman*, 99 U. S. 547, the case is one of which a federal court cannot take jurisdiction—the parties being of the same state, and the pleas being to the effect that the appellant had a license to use the inventions covered by the plaintiff's letters patent, the validity of which is not denied. The bill in this case is in the customary form for infringement of letters patent, and the proposition contended for necessarily implies that the jurisdiction invoked by the filing of such a bill—of which, it is to be observed, no court except a federal court can take cognizance—may be defeated by a plea of license which admits the use and validity of the patent sued on. If the decision in *Hartell v. Tilghman* ever meant that much, it has been explained and limited by later decisions, which leave no doubt of the federal jurisdiction in cases like the present. *White v. Rankin*, 144 U. S. 628, 12 Sup. Ct. 768; *Manufacturing Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756; *Marsh v. Nichols, Shepard & Co.*, 140 U. S. 344, 11 Sup. Ct. 798.

In respect to the merits of the appeal, much stress has been laid upon the rule that a replication to a plea admits its validity, and that, if the particular facts stated in the plea be proved to be true, the bill must be dismissed, without reference to the equity arising from any other facts stated in the bill. *Farley v. Kittson*, 120 U. S. 303, 314,

7 Sup. Ct. 534; *U. S. v. California & O. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458. A necessary corollary is that strict proof must be made of "the particular facts stated in the plea," and it will not be enough to prove less than, or something different from, what is averred. In the federal practice, however, the rule itself has been modified by equity rule 33, which provides that "if upon an issue the facts stated in a plea are determined for the defendant, they shall avail him as far as in law and equity they ought to avail him." In respect to that rule, the supreme court, in *Pearce v. Rice*, 142 U. S. 28, 42, 12 Sup. Ct. 130, said:

"It clearly takes from the establishment of the plea the effect it had under the old law. When, by filing a replication, issue is taken upon a plea, the facts, if proven, will now avail the defendant only so far as, in law and equity, they ought to avail him. Under the existing rule, the court may, upon final hearing, do at least what, under the old rule, might have been done when the benefit of a plea was saved to the hearing. 'When,' says Cooper, 'the benefit of the plea is saved to the hearing, the decision of the cause does not rest upon the truth of the matter of the plea, but the plaintiff may avoid it by other matter, which he is at liberty to adduce.'"

However, of the pleas in question there are substantial averments which are not proved. It is alleged in the first three of the pleas, for instance, that Nichols gave to Nichols & Murphy an exclusive license to use his patents for the period of 10 years, the term of the partnership; while the proof shows that the agreement was that the license should continue "during the life of the partnership," and that any invention made by either party, in the "prosecution of the company's business," should be "the joint property of both parties." Again, it is true that Nichols & Murphy contributed to the copartnership of Nichols, Murphy & Geister "the assets and resources of the late firm of Nichols & Murphy," mentioned in the inventory and schedule attached to the contract; but it is not true, as averred and contended, that the new firm thereby became possessed of a license to use the inventions, or any of them, for the remainder of the term of 10 years, for which the partnership of Nichols & Murphy had been designed to continue. The utmost that can justly be asserted is that the new firm acquired an exclusive license for the term of its own existence, during which it was stipulated that no right, title, interest, permit, or license should be granted to any other person or corporation to use, manufacture, or sell under the patents mentioned in the schedule attached to the contract. In the schedule referred to, particular patents were not specified, but simply, "Patents and business, \$6,000," followed by this statement:

"The above patents include all patents and improvements on the wind mill, feed mill, and all other machinery and implements used in connection with said manufacture, and on articles manufactured in the said business."

While this language shows that patent interests were treated as a part of the assets and resources of Nichols & Murphy, it does not, in terms or by fair implication, include inventions or improvements not then in existence, and which, when brought into being, were to be, according to the agreement, not partnership property, but "the joint property of the parties," which is a very different thing.

If the firm of Nichols & Murphy ceased to exist when that of Nichols, Murphy & Geister was organized, ipso facto the license to the first firm to use the patents ceased, and, strictly speaking, constituted no part of its transferable assets or resources. The manifest intention, however, was that the new firm, during its life, should have the same license which the other firm had had; and whether it be considered that the original license was transferred, or that the legal effect of the second contract of partnership was a grant by Nichols, with the consent of Murphy, of a new license to the new firm, it is not important to determine. The new firm acquired no right which could run beyond its term of life and be sold as a part of its assets. So the supreme court of Illinois seems to have held in the case of Nichols v. Murphy, 136 Ill. 380, 26 N. E. 509. Being between the same parties, the judgment in that case, if it had been pleaded, would perhaps be a strict estoppel; but whether, being in proof without objection, it should be given that effect, we need not inquire, as our conclusion upon the evidence, outside of the judgment, would be the same.

It has been suggested that the copartnership of Nichols & Murphy was not merged in the new firm and was never otherwise dissolved, and that if the right in the patents acquired by Nichols, Murphy & Geister ended in 1887, the license for the remainder of the original term of 10 years still belonged to Nichols & Murphy, and that the use of the inventions by the appellant, having been with the consent and authority of Murphy, was rightful and affords no ground for a suit for infringement. If conceded to be true, the proposition is not available, because no such right is set up in any of the pleas. No right or license under the patents is asserted, except as derived from the firm of Nichols, Murphy & Geister, through the receiver's sale of the partnership assets.

The fourth plea differs from the others, in that it counts not on an express but upon an implied license, arising out of the sale by the receiver, and purchase by the appellant, of the tools and patterns used in manufacturing wind mills of the kind covered by the patents. The averments of this plea are not all proved as laid. No reference is made to the agreement between Nichols and Murphy, or to the fact of their partnership; but it is alleged that by the partnership contract of Nichols, Murphy & Geister, Nichols agreed to put into the firm, and afterwards did put into the firm, as a part of its assets, all machines, patterns, wind-mill stock, and tools owned by him. The proof, on the contrary, shows no individual contract by Nichols in respect to individual property, but a contract by which Nichols & Murphy, as partners under their previous contract, entered into a contract of copartnership with Geister, wherein it is recited that "the said Nichols & Murphy have contributed jointly to the capital stock of said copartnership the assets and resources of the late firm of Nichols & Murphy," and that "the said Nichols & Murphy will be the owners of two-thirds interest, jointly, and the said Geister the owner of a one-third interest, in said copartnership." The plea, therefore, fails for want of proof; but, if the averments were all true, it ought not

to prevail. The tools and patterns belonged to Nichols, Murphy & Geister, and were necessarily included in the order for the sale by the receiver of the assets of that firm; but a sale of tools and patterns which are used solely for the manufacture of a patented device, even if the sale be made by the owner of the patent, does not necessarily imply a license to the purchaser to manufacture and sell the device. That depends on the intention of the parties, and is a question of fact. In *Anderson v. Eiler*, 1 C. C. A. 659, 50 Fed. 775, where the owner of a new design for mantels sold one of the mantels to a manufacturer, who avowed his purpose to use it as a pattern, the court says:

"The inference is therefore, we think, irresistible, that he consented to this use. Whether he actually consented or not, however, the circumstances estop his denial. His silence at the time closes his mouth."

That is, his silence proved his consent. The appellee in this case was not silent. His assertion of individual ownership of the patents, and denial of any right of Murphy and Geister to the use of them, was distinctly made in the suit which he brought against them, and otherwise; and the proof is clear that the parties composing the appellant company, for whom the purchase was made, were not ignorant of the fact and extent of his assertion of right. The receiver, Hoagland, as one of the organizers of the appellant company, was himself interested in the purchase. His testimony is in the record, and in answer to the question whether Nichols did not claim the ownership of the patents, and that the purchaser at the receiver's sale would not acquire any interest in them by the purchase, he said: "I think Mr. Nichols never let up on that. He always claimed that." It is shown, moreover, that the parties concerned in organizing the appellant company negotiated with Nichols, before the purchase, with a view to the acquiring of his rights in the patents, and the circuit judge was clearly justified in concluding that "they were purchasers with notice of his rights." It is not shown what estimate was put upon the patterns by the appellant when the purchase was made, and, if any considerable sum, it must be presumed to have been with the purpose of acquiring the patents, or a license to use them. The decree of the circuit court is affirmed.

---

L. SCHREIBER & SONS CO. v. GRIM et al.

(Circuit Court, S. D. Ohio, W. D. January 12, 1895.)

No. 4,618.

PATENTS—INVENTION—SUPPORTS FOR CASKS.

The Schreiber patent, No. 396,372, for a support for casks and barrels, consisting of saddles with concave upper surfaces, and convex lower surfaces resting in concave shoes, so as to rock them both longitudinally and transversely, and thus accommodate themselves to the cask at the point of support, held void as to claim 6, for want of invention, and as being a mere application of the old ball and socket joint.

This was a bill by the L. Schreiber & Sons Company against Ignaz Grim and Philip Selbert for infringement of a patent for supports for casks and barrels.

Wood & Boyd, for complainant.  
James Moore, for defendants.

SAGE, District Judge. The suit is for infringement of patent No. 396,372, granted complainant January 15, 1889, for a barrel stand, designated in the specification as an improvement in cask supports. The object of the invention is stated to be to provide a strong and durable support for heavy casks and barrels, one readily adjusted to any sized cask, and so constructed as to automatically adjust itself to the curve of the cask. It is designed principally for use in breweries for the support of large casks. There are six claims. It is conceded that there is no infringement of any of the first five claims. The sixth alone is relied upon. The drawings show, and the specification describes, a cask supported by means of four saddles, two placed near each end, and upon opposite sides of the cask. The upper faces of the saddles are concave, and shaped generally to receive the bulge of the cask. They are made self-adjustable to the cask and to each other. The support and seat for the saddles necessary to accomplish this result is called the "shoe," which rests upon a broad, firm base. The union between the shoe and the saddle is what is known as the "ball and socket," the lower surface of the saddle being convex and answering to the ball, and the upper surface of the shoe being concave, answering to the socket, and allowing the saddle to rock longitudinally and transversely, so as to fit the upper surface of the saddle to the conformation of the cask at the place of support. To anchor these shoes in position, or, in other words, to hold them in place, the patentee, in the drawings and specification, shows the shoe in ways on which rest tie rods. At first the construction was according to the description. Afterwards the shoes were made with broad bases, which rested directly on a concrete floor, and were held to their places by a tie rod. The sixth claim is as follows:

"In a cask support, the shoe, 3, provided with a concave seat, in combination with the self-adjusting saddles, 10, supported in said seat, substantially as described."

The first five claims are in various forms for the combination of the saddles, the shoes, and the ways provided for adjusting them to and from each other, and the locking device for securing them in their adjusted position. These claims being, by the concession of counsel, out of the case, the only question remaining is whether the claim for the shoe, provided with the concave seat in combination with the self-adjusting saddle, is valid. No testimony was taken for the defense, sole reliance being placed upon the fact that the ball and socket joint is as old as the creation of man, and universally known and adopted whenever required in the arts from the earliest periods, and that, therefore, there is no invention displayed in the complainant's device. I can see no escape for the complainant from this conclusion. He concedes that there is no infringement of any of the first five claims for the combination of the saddles, the shoes, and the locking device for holding them in position. It is impossible, in my view of the case, to sustain the claim to invention for that



portion of the combination, which is nothing more than the application of the old ball and socket joint to a saddle, which in itself is shaped so as to fit the surface to which it is to be applied. The joint, as has already been said, is old, and the shaping requires nothing more than mechanical skill of ordinary degree. The bill will be dismissed.

---

RITCHIE v. OBDYKE et al.

(Circuit Court, E. D. Pennsylvania. May 15, 1894.)

No. 16.

1. PATENTABLE INVENTION—SHEET-METAL ELBOWS.

The making of sheet-metal elbows longitudinally corrugated, and having only longitudinal seams, *held* to involve no invention, it appearing that corrugated elbows having transverse seams, and plain metal elbows having only longitudinal seams, were both old, and that all that was done was to make the corrugated elbows without the transverse seams. Affirmed in 65 Fed. 224.

2. SAME.

The Ritchie patent, No. 342,465, for a "sheet-metal expansible elbow," *held* void for want of invention. Affirmed in 65 Fed. 224.

This was a suit in equity by David A. Ritchie against Benjamin P. Obdyke and W. Austin Obdyke for infringement of a patent for a "sheet-metal expansible elbow."

Fish, Richardson & Storrow, for complainant.

Philip I. Dodge, for respondents.

DALLAS, Circuit Judge. This suit is brought on letters patent No. 342,465, granted May 25, 1886, to the complainant. The claim is as follows:

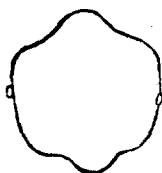
"As an improved article of manufacture, a sheet-metal elbow composed of curved and longitudinally corrugated pieces of metal having only longitudinal seams, whereby the said elbow is free to expand uniformly to avoid bursting, substantially as described."

Corrugated elbows were old, but they were made from the ordinary corrugated pipe, the required curvature being effected by "removing small gores" thereof, and bringing together and uniting by soldering the edges thus produced. Elbows so made necessarily contained transverse seams, and the "improved article" of the patentee, "having only longitudinal seams," is undoubtedly a preferable one, and it has been adopted by the trade to the exclusion of all pre-existing constructions. The gist of the invention claimed, if there was invention, is the exclusively longitudinal seams feature of the complainant's elbow, and the important question in the case is whether the inventive faculty was exercised in its attainment. The elbows previously in use for the precise purpose for which this elbow is intended were made in a manner which did not suggest the absence of transverse seams, but, on the contrary, necessarily involved their presence. The method, as well as the product, of the patentee is different. In his specification he says:

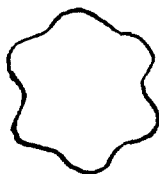
"In the manufacture of my improved expansible elbow I take blanks, concave at one edge and convex at the other, and subject them to the action of corrugating dies, which corrugate the said blanks, and at the same time give them a general semicircular outline, and in such condition the flanges of the corrugated blanks can be joined together by folding the flanges to form a locking joint."

In other words, he takes properly shaped blanks, and subjects them to the action of a die, by which they are corrugated and given a semicircular outline. Each blank, after having been thus treated, constitutes one longitudinal half of an elbow, and joining two of these parts by folding or locking together the flanges with which each is provided completes the operation, and the final product is thus represented in cross section by Fig. 5 of the patent:

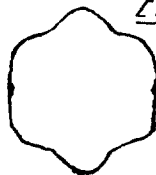
Sheet-metal elbows having the material characteristics of that of the complainant—being formed of two stamped halves, and without any seams except those which united the halves longitudinally—were well known before his patent was applied for. It is true that no such corrugated elbow appears to have been made, and I cannot agree that the hexagonal form shown in Fig. 9 of the Savoral patent is equivalent to corrugation; but the use of corrugated metal in making elbows was not new, and longitudinally corrugating and outlining curved blanks by subjecting them to the action of dies so as to form two halves, and then uniting those halves by longitudinal seams, to make spouts for coffee pots and tea pots, had been quite extensively practiced. What difficulty then was there left for Mr. Ritchie to overcome? It is said, and I think correctly, that by reason of the size and configuration of the corrugations essential to these elbows their halves could not be stamped as those of coffee-pot spouts had been, except by omitting from the elbow two of the indentations which are present in the pipe with which it is commonly used, and, accordingly, two of the pipe corrugations were relinquished in making the elbow. This was not desirable, though not materially harmful. The important fact is that, when it was found that all of the desired indentations could not be formed by a die, the necessity for acceptance of the lesser and practicable number was plainly obvious. In patent No. 78,564, dated June 2, 1868, granted to William Austin for pipe made of corrugated sheets of metal, it had been stated that the corrugations may be of any desired number, and of this the present patentee was compelled to take advantage, in order that he might make use of a die as it had been theretofore used for analogous purposes. Consequently he made an elbow somewhat varied in cross section from the straight pipe, as is shown by these representations:



Pipe.



Elbow.



The evidence is that this difference between the pipe and the elbow gives rise to no substantial difficulty in fitting them together; but on the subject of connecting the one with the other the patent is silent, and it is unimportant.

The learned counsel for the complainant contends that, though "he has not claimed the method of making his elbow," Mr. Ritchie "is entitled to the credit of the idea of such an elbow, and to the credit of finding out what no one knew before; that is, how to make it." This well states the case of the complainant, but the answer to it seems to me to be apparent and conclusive. It is: What has not been claimed is not patented. An "idea," however creditable, is not patentable; and that which any skilled mechanic would naturally have done, if possessed of knowledge of what had previously been accomplished, cannot be credited, as an inventive act, to any one; not even to him who first suggests and actually does it. The bill is dismissed, with costs.

---

RITCHIE v. OBDYKE et al.

(Circuit Court of Appeals, Third Circuit. December 21, 1894.)

No. 27.

1. PATENTABLE INVENTION—SHEET-METAL ELBOWS.

The making of elbows of longitudinally corrugated sheet metal, having only longitudinal seams, *held* to involve no invention, it appearing that conductors of corrugated metal and elbows of plain metal were both previously made with only longitudinal seams, and that corrugated elbows having transverse seams were also old. 65 Fed. 222 affirmed.

2. SAME.

The Ritchie patent, No. 342,465, for a "sheet-metal expansible elbow," *held* void for want of invention. 65 Fed. 222, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a bill by David A. Ritchie against Benjamin P. Obodyke and Austin W. Obodyke for infringement of a patent. The circuit court held the patent void for want of invention (see 65 Fed. 222), and complainant appealed.

Frederick P. Fish, for appellant.

Philip T. Dodge, for appellees.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

BUTLER, District Judge. The bill is for infringement of letters patent No. 342,465, issued May 25, 1886, to the plaintiff, for a "sheet-metal expansible elbow."

The claim is as follows:

"As an improved article of manufacture, a sheet-metal elbow, composed of curved and longitudinally corrugated pieces of metal having only longitudinal seams, whereby the said elbow is free to expand uniformly to avoid twisting, substantially as described."

The circuit court dismissed the bill; and this is the error assigned.

Does the elbow show patentable novelty? No other question need be considered. The substance of the claim is for an elbow formed of "curved and longitudinally corrugated pieces of metal, having only longitudinal seams." Conductors (such as these elbows are intended for) formed of "corrugated metal, having only longitudinal seams," were old. Such conductors, formed of plain metal with elbows having only longitudinal seams, were old; corrugated elbows formed by uniting short sections of such conductor pipe, with transverse seams, were also old. The plaintiff applied the longitudinal seams of the old corrugated conductor, and of the plain conductor and elbow, to the corrugated elbow. In this we cannot see invention. It improved the elbow, or cheapened its manufacture, possibly both.—In determining the question of invention utility plays an important part. It is not, however, conclusive. Combined with the presumption arising from the grant of letters it is sufficient to sustain a patent in the absence of evidence disproving invention. Here, however, in our judgment, such evidence is present. All the plaintiff did, substantially, was old. He simply bent and curved two longitudinal sections of corrugated metal, as such sections of plain metal had previously been bent and curved, and united them, as such sections had previously been united in forming pipes, and as had always been practiced in forming elbows of plain metal; or to state it differently, united the metal forming corrugated elbows precisely as it was previously united in corrugated conductors, and as it was always united in plain metal elbows.

Furthermore, every material thought involved in the patent is plainly expressed in Savoral's letters of 1864, for the "manufacture of tubing."

His specification says:

"Tubes made out of sheet metal generally, have many cross seams, which form as many obstructions to the free passage of fluids or gases conducted by such tubes. Curved tubes of sheet metal, made in the common way of several straight tubes of more or less length, according to the size of the sheets and the curvature, have not only many cross joints or seams, but offer far more resistance to the passage of fluids or gases by being polygons instead of real curves. \* \* \* They are not so durable, are more difficult to repair and are more likely to leak. To avoid these obstructions, especially in the manufacture of curved tubes in bents and elbows, I form my tubes of two or more parts, according to the inside diameter required and to the width of the material to be used, which parts are to be punched out of sheet metal and shaped at once by this punching operation, or by the hammer or otherwise, and which parts are connected by single or double overlapping, by rivets or by soldering, as the case may require. These seams are always parallel to the longitudinal axis of the tube to be formed."

"The advantages of my invention are: \* \* \* Secondly, all bents, elbows or curved tubes, such as spiral tubes for heating or cooling fluids or gases, may be made of the exact curvature desired, the inside perfectly smooth, and therefore offering less resistance to the passage of fluids or gases through them, etc. \* \* \* Thirdly, such curved tubes may be made with less or wasted material and with great saving of labor," etc.

If this patent does not belong to the same art as the plaintiff's the two are very close akin.

The judgment is therefore affirmed.

## THE SIRIUS.

## WILLIAMS v. THE SIRIUS.

(District Court, N. D. California. January 2, 1895.)

No. 11,101.

## ADMIRALTY—MARITIME SERVICE—WATCHMAN.

The service rendered by a watchman, employed to care for and clean the machinery and maintain a general care and supervision of a vessel lying at her home port, out of commission, and with no voyage in contemplation, is not maritime.

Libel in rem for balance of wages as ship keeper of a vessel in her home port, and not engaged in navigation, present or prospective. Libel dismissed, the service rendered not being maritime.

Walter G. Holmes, for libelant.

Andros & Frank, for claimant.

MORROW, District Judge. The libel in this case was brought to recover the sum of \$176.25, claimed to be a balance due the libelant for services rendered in taking care of the engine and boilers of the steam vessel Sirius. The testimony established that the libelant was employed from May 23, 1893, to September 4, 1894, by claimant, at \$40 per month. His earnings for this period aggregated \$616, of which he acknowledges having received \$439.75, and he now seeks to enforce a lien on the vessel, under the state statute, for the remainder. It is averred in the libel that the Sirius is a British vessel. This is denied by the answer, and it is therein alleged that the vessel is now, and was at all the times in the libel mentioned, wholly owned by the claimant, who was then, and still is, a resident and citizen of the city and county of San Francisco, state of California, and that said last-named place is her home port. On the hearing it was developed that the Sirius had formerly carried the British flag; that she was sold at this port to the claimant under a venditioni exponas issued out of this court; that her register as a British vessel has been canceled; that she is now, and was during all the time Williams was employed on her, out of commission; and that up to the time of filing the answer she had not been enrolled as an American vessel. The facts of the case show further that Williams had been acting as engineer of the vessel for some 11 months previous to the time of the sale; that when the claimant bought the vessel he engaged the libelant to look after and care for her engine and boilers, and to exercise a general supervision over her. In connection with this employment, he also acted as watchman in relieving the deck watchman. But it would seem that this latter service was rather incidental to his chief occupation of looking after the machinery of the vessel. The deck watchman testified that he watched the deck, while Williams watched the engine. The Sirius was not then engaged in navigation, nor, so far as the evidence discloses, were there any immediate pros-

pects of her doing so. She was without a register, and when Williams was employed, and during the continuance of his employment, she was lying idle in the Straits of Carquinez, being floated twice a day by the tide. The evidence does not show that the libelant rendered any maritime service connected with the navigation of the vessel, either present or prospective. His duties consisted and were confined to taking care of the engine and boilers, and looking after the vessel in general. He was by occupation an engineer, but there is nothing to show that he rendered any services as such, other than in the taking care of the machinery so as to prevent the accumulation of rust and unnecessary decay and deterioration. In fact, it does not appear that the vessel was even once moved from her anchorage during the entire time of libelant's employment. The mere fact that he was an engineer by occupation does not alter the real character of his services in the present case, which is ordinarily known as that of "ship keeper." The claimant contends that the libelant was, to all intents and purposes, a watchman, but I deem it immaterial to the decision whether he be called a ship keeper or a watchman. The principles of admiralty law applicable to both of these services, so far as this case is concerned at least, are substantially the same. It is conceded by claimant that the libelant was employed to take care of the engine and boilers, and to look after the vessel generally, at \$40 a month for the period above stated; but it is claimed that the services rendered were not of such a maritime character as would justify this court to take cognizance of a libel to recover wages for the same. The answer also sets up that the libelant performed his work so carelessly and negligently that the engine and boilers became rusted and "pitted," to claimant's damage in the sum of \$176.25, an amount equal to that claimed by libelant as his balance of wages. The testimony of the deck watchman and of other witnesses would seem to indicate that the libelant was delinquent in his attention to the duties of his employment, and that through his carelessness and negligence the engine and boilers became rusted and "pitted." It was testified that the damage done would amount fully to \$200. On the whole, the testimony against the libelant on this matter is of such a character that, if the case were to be disposed of on the merits, I should feel inclined to allow the claim for damages as an offset to the balance of wages claimed by libelant. But, the question of jurisdiction having been raised, that feature of the case must be considered and determined.

The claimant contends that the service which libelant rendered, whether it be called that of a watchman or ship keeper, was not of a maritime nature, and that, therefore, this court, as a court of admiralty, has no jurisdiction over the cause of action for balance of wages arising from such employment. The libelant, on his part, claims that he rendered a maritime service, for which he claims to be entitled to a lien by virtue of the state statute. Section 813 of the Code of Civil Procedure provides that "all

steamers, vessels, and boats are liable: (1) For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees." The question, therefore, to be considered is, was the service which libellant rendered a maritime service? We begin with the elementary proposition that the test of admiralty jurisdiction over causes of action arising from contracts is not the locality of the performance of the contract, but its subject-matter. It is a cardinal principle of admiralty jurisprudence that, to give a court of admiralty jurisdiction over contracts, the subject-matter thereof must be maritime. It is not enough that the service which sprang from the contractual relation be performed on water, or even that it be done on board, and for the benefit, of a vessel which is afloat. These are not the exclusive tests. The service arising from the contract must be of a maritime character, and I might add not nominally, but substantially, so. The expression "maritime character" or "nature" is held to mean any act which contributes to the navigation of the vessel, presently or prospectively. This is rather a broad and indefinite statement, but the needs of vessels in navigation are so complex and diverse that it is difficult to give an exhaustive, and at the same time accurate and intelligible, definition. However, Judge Betts, in *Cox v. Murray*, Abb. Adm. 340, Fed. Cas. No. 3,304, gives one an excellent idea of the scope of the expression as applied to contracts. He says:

"The subject-matter of the contract—the substantial object and end—must pertain to navigation, or be connected with transactions performed by vessels on the sea, to become maritime in its nature, and be clothed with the privilege of a remedy in admiralty courts; and it appears to me that an agreement acquires this maritime quality only when the matters performed or entered upon under it pertain to the fitment of a vessel for navigation, aid and relief supplied her in preparing for and conducting a voyage, or the freighting or employment of her as an instrument of a voyage. Collateral contracts with or assistance by services or advances to an owner or master, incidentally benefiting a voyage, acquire no special property thereby which renders them maritime."

In *Gurney v. Crockett*, Abb. Adm. 490, Fed. Cas. No. 5,874, the same learned judge said:

"The line of discrimination between cases which are maritime in their nature and those not so is exceedingly dim and vague, and in the contested state of admiralty jurisdiction in respect to these border subjects it is most desirable to keep within the limits of the clear powers of the court. Manifestly not every contract in relation to maritime matters falls within the cognizance of maritime courts, and, without attempting to define with strictness the terms within which the jurisdiction of admiralty courts is circumscribed, it may be safely asserted that, to impart a maritime character to a subject relating to personal services in vessels, it must be connected with the reparation or betterment of the vessel, or be rendered in aid of her navigation, directly by labor on the vessel, or in sustenance and relief of those conducting her operations at sea."

The libellant, we have seen, rendered the service of a ship keeper in the home port of the vessel. He was hired particularly to take care of the engine and boilers, and also to look after the vessel in general. In this he was assisted by a deck watchman. How his duties, assuming them to have been efficiently rendered, con-

tributed to the navigation of the *Sirius*, it is difficult to see. The vessel was not then engaged in navigation. She could not do so, being out of commission. She was laid up, without cargo, or even master and crew. Giving the libellant's claim the most favorable consideration, it can only be said that his services tended to the preservation of the vessel, so that when she should be enrolled as an American vessel she might be fitted out for a voyage less expensively and more expeditiously. But such service did not contribute to the navigation of the vessel. Merely keeping a vessel in safe custody, protecting it from the depredations of thieves or the danger of fire, or preserving her machinery from unnecessary decay and deterioration, does not, of itself, constitute a maritime service. It must be connected with the navigation of the vessel. It is difficult to see, therefore, upon what ground it can be said that the libellant rendered a service of a maritime nature. His services did not contribute to the present navigation of the vessel, because she was then laid up; nor to her prospective navigation, because she had no voyage in contemplation. To be sure, it concerned the vessel, but it did not concern the vessel with reference to her navigation, present or prospective. Looking at the question in the light of the authorities, we find that, although there has been, and is yet, some conflict as to whether a mere ship keeper or watchman can be deemed to have rendered a maritime service, the weight of authority is against the right of individuals performing such services to a vessel in her home port to recover in a court of admiralty, for the reason that it is not regarded as a maritime service, within the signification of that term. But the cases, while establishing this general rule, have also created exceptions which, if given full latitude, may become almost as wide as the rule itself. The reason for the exceptions is that, if the ship keeper or watchman, in connection with his duty as such, render any distinctively maritime service, such as moving the vessel to a different anchorage, or preparing or fitting her out for a voyage, or in brief any service connected with the navigation or voyage of the vessel, then the court of admiralty will not only take cognizance of the maritime service rendered, but, if it be sufficiently broad and pronounced, will treat the entire service as maritime. That these adjudications tend to confuse the subject, there can be no doubt. This conflict is due to the fact that the claim of a ship keeper is on the very border line of admiralty jurisdiction, and decisions must rest to a very large extent on the peculiar facts of each case, rather than upon the application of principles. Two of the earliest cases which are cited in support of the maritime character of the services of a ship keeper are *The Harriet*, Olc. 229, Fed. Cas. No. 6,097, and *The George T. Kemp*, 2 Low. 482, Fed. Cas. No. 5,341. The case of *The Harriet* involved the claim of a watchman employed on a domestic vessel. It was conceded that the libellant was a mere laborer on shore, not a mariner, and in no way attached to the ship; that he slept on board nights, and



watched her during the day; and that she was moored at the wharf in a dismantled state. Judge Betts held that the libellant was not entitled to a lien by the maritime law for the services he rendered. He said:

"When no materials are furnished or labor bestowed in the refitment or reparation of vessels, services which are entitled to take the rank and character of maritime must be such as are performed in aid of the navigation of the vessel or the ship's company, or in furtherance of her appropriate business, and are rendered whilst she is employed afloat upon tide waters."

But the judge held that the libellant was entitled to a lien by the state law. The case of *The George T. Kemp*, supra, did not involve the claim of a ship keeper or of a watchman, but that of a stevedore. Judge Lowell gave the decision, and he criticised the case of *Gurney v. Crockett*, Abb. Adm. 490, Fed. Cas. No. 5,874, which denied the right to recover in a court of admiralty compensation for such services, as being too narrow in its discrimination between what are maritime and what are not maritime services. But his statement that the claim of a ship keeper is a maritime one is dictum, and he refers to no case excepting *The Harriet*, supra. The case of *Gurney v. Crockett*, above referred to, is in point, and is valuable in that it is a decision by Judge Betts, rendered four years after his determination of *The Harriet*, in which he considers at some length the character of the service rendered by a ship keeper, and comes to the conclusion that a mere ship keeper, who simply looks after the vessel, and renders no service of a distinctively maritime character, cannot obtain a remedy in a court of admiralty. The libel there was in personam, and thus gives additional force to the judge's decision. He makes no allusion to his ruling in *The Harriet*, where he held that although, under the maritime law, a ship keeper had no lien, still, if the local statute gave a lien, it could be enforced in a court of admiralty. But as, in *Gurney v. Crockett*, he holds that the claim of a ship keeper is not cognizable in a court of admiralty, it not being for a maritime service, this amounts to a practical repudiation of his former decision. After adverting to the uncertain condition of the admiralty jurisdiction with reference to some services rendered to vessels, he says:

"A ship keeper is ordinarily nothing more than a watchman having guard of a vessel anchored in harbor, or lying at a wharf or in a dock. In the present instance the libellant did not remain on board by night or by day. His duty was to repair occasionally to the schooner, at her anchorage, to see to her safety, open her doors and hatches for ventilation, and to try her pump. I advert to his casual resort to the vessel, not for the purpose of suggesting a distinction between this case and that of a keeper stationed on board, but to mark the description of services connected with his employment, and to ascertain whether they have the characteristics of maritime. Evidently these duties are in no respect nautical. They can be fully as well performed by shore laborers as by seamen; and the libellant in this instance, it appears, was a common stevedore. The services are distinct from the navigation of the vessel, ceasing when that commences, and have the same character and importance on board a hulk under keeping to be broken up or destroyed as upon a vessel preparing or intending for sea. Sweeping and scrubbing the decks, throwing out and securing lines for her fastening, or keeping watch on the wharf against robbery, fire, and other injuries that might reach a vessel from the

shore, are services rendered towards her preservation of like nature with those of ordinary keepers. No principle ever yet announced seems, however, to range services of that description under admiralty jurisdiction."

And in conclusion he says:

"In my view of this claim, it is for mere labor, not for the reparation or fitment of the vessel, and in no respect maritime, as being nautical in its character, or distinguishable from ordinary services rendered in going to and from the vessel, or incidental to her probable employment at sea. I shall therefore disallow the claim entirely in this action."

But he allowed the libellant a small sum for performing a maritime service while keeper, which consisted in moving the vessel from her anchorage further out into the bay by the direction of a health officer. To do this the libellant was compelled to get under way and navigate her to the designated place. This, the judge held, "was comparatively a small service, but it was in its nature maritime, and the libellant had a right to resort to this court to receive a proper compensation for it." In the case at bar there was nothing to show that the *Sirius* was even once moved from her anchorage. In *The Island City*, 1 Low. 375, Fed. Cas. No. 7,109, Judge Lowell held, in 1869,—seven years prior to his criticism of *Gurney v. Crockett*, *supra*,—that a ship keeper of a domestic vessel, which was being repaired for a new use, had no lien on her for his wages by the general maritime law. The learned judge said:

"Nor has Holden a lien. He was a ship keeper, and made himself useful in taking care of the machinery, etc. The contract with such a person has been decided not to be maritime. *The Thomas Scattergood*, Gilp. 1, Fed. Cas. No. 11,106; *The S. G. Owens*, 1 Wall. Jr. 359, Fed. Cas. No. 17,310. I do not fully agree with those judgments in their application to a foreign vessel, but in such a case as this they are sound."

The service which the libellant rendered in that case was very similar to those in the case at bar. The case of *The Thomas Scattergood*, Gilp. 1, Fed. Cas. No. 11,106, cited by Judge Lowell, is also in point. There the first officer, after the return of the vessel from her voyage and the discharge of her cargo, continued on board, and took care of the vessel. For this he claimed wages as a continuation of his duties as first officer. But Judge Hopkinson held that, as the voyage was ended, and the vessel had ceased earning freight, the admiralty had no jurisdiction over the service as a maritime one. He said:

"It is a contract neither made at sea nor for a service to be performed at sea. Both were in the port of Philadelphia, within the body of the county of Philadelphia. The ship was safely moored at the wharf. She had returned to the possession of the owners. The service had no agency in bringing her in. She had ceased to earn freight. The contract between the owners and the seamen had expired. The relation and rights created by that contract were dissolved. It is true that the same parties might make a new contract, but they could not extend the old one beyond its legal limits, nor give to the new one a character and privileges which the law denies to it. The place and subject-matter of a contract decide its maritime character, and not the will of the parties. Is there an instance in which a contract made on land, for a service to be rendered on land, having no connection with any voyage performed or to be performed, has been deemed, by the general admiralty law, a case of admiralty jurisdiction, giving a lien on the ship? The meritorious

service of the petitioner, if such it was, and the hardships of the case, have been strongly pressed in his behalf, but they must not be permitted to unsettle established principles, or to remove the landmarks of judicial jurisdiction."

The claim of the libellant was dismissed. The case of *The Champion*, Fed. Cas. No. 2,584, is also in point, and is a later decision (1877). The facts of that case are: That a seaman shipped on the vessel in the spring, served as such during the season of navigation, and then remained on board during the winter, taking care of the ship. No new contract for this service was entered into, nor was there any change of wages. The services were continuous, and small sums were paid from time to time. The contract of hiring as seaman was made in Canada, and the vessel plied between Canadian ports, touching occasionally at American ports. The libellant intervened while the vessel was in the custody of the marshal for the Eastern district of Michigan. He was an American citizen, and the court determined that, as it had the proceeds of sale in its possession, it had jurisdiction to entertain the claim, notwithstanding the contract of hiring was made in Canada, and the services as keeper rendered there. Judge Brown, in alluding to the conflict of authority on this question, said:

"Notwithstanding some conflict of authority, I think the better rule is that a ship keeper, particularly of a domestic vessel, has no lien upon her for wages by the general maritime law. It was so decided by Judge Lowell in the case of *The Island City*, following in this respect *Phillips v. The Thomas Scattergood* (Gilpin, J.); *Weaver v. The S. G. Owens*, Fed. Cas. No. 17,310. See, also, *The John T. Moore*, Fed. Cas. No. 7,430. In the case of *The Trimountain*, Fed. Cas. No. 14,175, the court allowed a watchman for his fees before she was taken into custody by the marshal, giving as a reason that that constituted one of the privileged demands of the maritime law, as administered under the ordinance of Louis XVI. [XIV.], and was so ranked in the Code de Commerce. In the case of *The Dolphin*, Fed. Cas. No. 3,973, I held that the underwriter had a claim on that vessel for his premiums, following in this respect French law. But the supreme court had already determined the contract of insurance to be a maritime contract, and it seemed to me the lien followed naturally upon this decision, and, inasmuch as the civil law conferred the lien, I considered myself at liberty to adopt it. I did not intend, however, to decide that the courts of this country would give a lien in every case where it was given by the Commercial Code of France. Indeed, many of these liens, particularly those for the wages of the master, for supplies furnished for domestic vessels, and for the expense of building and equipping, have been held by the supreme court not to exist in this country. Where the contract is maritime, I should be very reluctant to deny the lien, but where, as in this case, the services are rendered, not in aid of the navigation of the vessel, but while she is laid up for the winter, it seems to me the service is not maritime, and consequently that the party is not entitled to his lien. Nor do I think the lien is saved in this case because no new contract was made, but the party remained on board during the winter, without having been paid in the fall for his services as cook. Had his services as watchman been performed merely as an incident to the navigation of the vessel, and while she was lying up in some port, it would have been saved by the rulings in such cases as *The Gazelle*, 1 Spr. 378, Fed. Cas. No. 5,289; *Pitman v. Hooper*, 3 Sumn. 286, Fed. Cas. No. 11,186; *Brown v. Lull*, 2 Sumn. 443, Fed. Cas. No. 2,018; *The Jane and Matilda*, 1 Hagg. Adm. 187; *The Canton*, 1 Spr. 437, Fed. Cas. No. 2,388. But the contract as cook and seaman terminated with the season of navigation and with the discharges of the crew, and, if libellant remained on board while the vessel was laid up in winter quarters, he must be held to have remained, by im-

plication, under a different contract. Although no new contract was actually made, circumstances had intervened which put an end to the first contract, and he must be held to know that, if he remained on board during the winter, it was not in the capacity of a seaman or cook."

In *The E. A. Barnard*, 2 Fed. 712, Judge Butler affirmed the report of Henry P. Morton, author of the excellent work on Admiralty Jurisprudence and Practice, who, as commissioner, reported upon the claim of a watchman and ship keeper for services rendered in the home port of the vessel. The commissioner held that the services of watchman and ship keeper rendered in that case were not maritime. The views of the commissioner are not referred to, nor are the circumstances of the services stated, and the court does not enter into a discussion of the reasons for not recognizing the services as maritime. The latest reported decision which holds that for services rendered to a vessel in her home port as watchman or ship keeper there is no maritime lien is *The America*, 56 Fed. 1021. In that case Judge Green said:

"This claim is a meritorious one, and should be paid. The services for which wages are claimed by the libelant were faithfully performed, and should be compensated for. But, unfortunately for the libelant, he has mistaken his remedy for the wrong done him. The libelant was employed simply as a ship keeper or watchman of the dredge *America*, a domestic vessel, while she was lying in port. Such employment, and the consequent services rendered, are not maritime, and cannot be the basis of a maritime lien. *The E. A. Barnard*, 2 Fed. 712; *The Island City*, 1 Low. 375, Fed. Cas. No. 7,109. The libel must therefore be dismissed."

Of the cases cited by counsel for libelant in support of his position that the service rendered by Williams was maritime, not one of them holds, under facts at all analogous to those in the case at bar, that the service is of a maritime character. In every one of them the court places its decision, not upon the fact that the libelant rendered services as a mere watchman or ship keeper, but because, in the discharge of his duties as such, he rendered a distinctive and substantial maritime service, or, to put it in a more general way, his services were connected with the navigation of the vessel, present or prospective. Take the case of *The Maggie P.*, 32 Fed. 300. There a libel was instituted against a vessel lying in the port of St. Louis, which was her home port. The libelant claimed wages for the services of a watchman. The case came up for decision on exceptions to the libel on the ground that it did not state a maritime cause of action. It was averred in the libel that it was the duty of the libelant to keep the steamer in a place of safety, and to that end to move and navigate her from place to place, as circumstances demanded, and that on several occasions he did procure a tug to move her from one anchorage to another, to insure her safety. Judge Thayer held that the services of the watchman in the case before him was a maritime service, and that the entire demand grew out of a maritime contract. In *The Jos. Nixon*, 43 Fed. 926, the libelant had been the master of the towboat by that name. At the end of a trip, he was hired to take exclusive custody and care of her while she remained moored at Pittsburgh, her home port, and to put and keep her in good order, and fit her to proceed on an anticipated voyage;

all of which he did. He remained on board day and night. It was necessary to move the boat into shore and out therefrom as the river rose and fell, and the chief perils to which the boat was exposed, and from which she was to be protected by the libelant, were perils of the river. Judge Acheson held that the libelant undoubtedly had a lien by virtue of the state statute, and considered the question whether he could recover in rem in a court of admiralty for such services. Respecting the duties of the libelant, the learned judge said:

"The libelant was called a 'watchman,' but he was much more, and, indeed, his services went far beyond those of an ordinary ship keeper."

After rehearsing all the facts connected with libelant's employment, as were above briefly stated, he comes to the conclusion that the service of the libelant was essentially maritime, and he says:

"The contract related to a vessel afloat and about to proceed on a voyage, and it concerned not only her preservation from marine dangers, but her reparation, and the fitting of her for navigation. The libelant's services directly promoted all those objects. The principal dangers to which the boat was exposed, and from which she was to be protected, were perils of the river. The services in that regard here rendered were not those of a landsman. They could be performed properly by a mariner only."

The service rendered by the libelant in the case at bar cannot be deemed to rise to the same level. His duties had nothing to do with preparing or fitting the *Sirius* for a prospective voyage, or protecting her from any known perils.

The *Hattie Thomas*, 59 Fed. 297, is also cited. But in that case the services performed were not those of a mere watchman or ship keeper to a vessel laid up in her home port, but they were of a substantial maritime character. Judge Townsend, after referring to a number of cases showing the conflict existing on the subject, says:

"It will thus be seen that the later decisions give a lien to stevedores, longshoremen, watchmen, and ship keepers against foreign vessels, while the authorities are in conflict as to whether such lien exists against domestic vessels. In some cases the question seems to have been determined by the maritime or nonmaritime character of the services; in others, by ascertaining whether the services were performed on the credit of the master or of the vessel. I am unable to find any case where such lien has been denied under circumstances like those in the present case. The services for which the charge of \$30 was made included bringing the schooner into the port of Branford, laying her up, moving her about, pumping her out, and drying her sails, in the expectation, warranted by the statements of the son of the master, that the schooner might shortly again start on her trips. Other services, it is true, were merely those of landmen, but I do not think they should affect the right of the libelant to recover for such maritime services as would naturally be rendered only by a seaman. It seems to me that the principle deducible from the cases establishes that, where services are rendered in the home port of the vessel, the question whether there is an admiralty lien, irrespective of statute, depends largely upon whether the services are in the nature of repairs or supplies or other necessities for the vessel, such as are furnished by material men, or are such in kind as would be rendered by a mariner. If they are of the latter character, it seems that they are of equal rank with those of other seamen, and constitute a lien against the vessel. It is further important to inquire whether the services concern the cargo or freight or the vessel itself or her maritime duties, and, if the latter, whether they are connected with her navigation, present or prospective. Assuming these tests to be correct, and applying them to the case at bar, it will be found that the services rendered were such as to entitle the libelant to the lien of a seaman."

If we apply the tests of the learned judge to the facts of the case at bar, we find it difficult to see wherein the services of the libelant resembled those of a mariner, or concerned the cargo or freight of the vessel, or her maritime duties in connection with her navigation, present or prospective. The services which he did render—those of looking after and caring for the machinery of the vessel, and exercising a sort of general supervision over her—were entirely disconnected with her navigation. And this distinction seems to run through all the cases which hold that a watchman or ship keeper is entitled to a maritime lien. I have been unable to find any case which determines that a watchman or ship keeper is entitled to a lien in admiralty, or performs a maritime service, simply because he watches over and guards a vessel. In all the cases cited where a lien has been given, the ship keeper or watchman did something more. He actually performed maritime services, and in some instances very substantial nautical services. While the ruling in *Gurney v. Crockett*, supra, may be criticised as being narrow, in view of the somewhat liberal interpretation as to what constitutes a maritime service at the present day, still, relying upon the authorities subsequent to that decision, I am not convinced that a mere ship keeper, in charge of a vessel in her home port, out of commission, and laid up, not engaged in navigation, and having no voyage in contemplation, has a maritime lien by the general admiralty law. Nor has he a lien by the state statute, since his services are of a nonmaritime character. *The Lottawanna*, 21 Wall. 558; *The Guiding Star*, 18 Fed. 263; *The Samuel Marshall*, 49 Fed. 754; *Id.*, 4 C. C. A. 385, 54 Fed. 396; *The Alvira*, 63 Fed. 144. Where some maritime-exigency renders it necessary to employ a watchman or ship keeper, a court of admiralty will treat such services as maritime, and afford a remedy in rem, as was done in *The Erinagh*, 7 Fed. 231. Judge Choate there said:

"Whatever may be the rule upon the facts of those cases where the vessel was laid up undergoing repairs, dismantled, or not engaged in any voyage, or earning freight, I have no hesitation in holding that it is in accordance with the present view of what constitutes a maritime contract that the services of a watchman on board a vessel coming into port utterly disabled by the sickness of her crew, and having on board a cargo to deliver in order to earn her freight, is a maritime service, for which there is a maritime lien on the ship."

The case of *The Seguranca*, 58 Fed. 908, has also been cited by counsel for libelant. But the question there was not whether watchmen watching the cargo of a vessel in her home port, before its delivery, had a lien, but it was whether a contractor who furnished such watchmen to the vessel had a lien. The court held that he had not. In the course of his opinion Judge Brown further stated that, were the libelants seeking to enforce a lien for wages for their personal services as watchmen, he should feel bound to sustain their claim. He bases this statement on the ground that watchmen and stevedores, when employed by the ship's representative, on her credit, may have a lien for their wages in enabling the ship to earn her freight, even in the home port, as analogous to the wages of seamen, to pilotage, towage, or wharfage. While the views of that eminent

judge would have great weight with the court were the facts similar, yet a brief quotation from his opinion will serve to show that the facts of that case and the one at bar are entirely dissimilar. Judge Brown said:

"The petition and proofs show that in December, 1892, they [the contractors] supplied several different persons as watchmen to watch the cargo of the *Seguranca*, which was lying at Roberts' stores, in Brooklyn, until the cargo could be delivered to the consignees. Some of the cargo, as I understand, was on the dock, and some on board of the vessel."

In speaking of the character of their services, he uses this language:

"The personal services of watchmen or stevedores, on the other hand, in cases like the present, are necessary to enable the ship to discharge her maritime duty, to accomplish her voyage, and to earn her freight. They are rendered in the course of the voyage, since the voyage is not ended, as regards the goods, until they are delivered, or ready for delivery. See *The Mattie May*, 45 Fed. 899, and *The Scotia*, 35 Fed. 916. It is but right that the same lien should be allowed for the wages of the substitutes, who are employed merely for greater safety, skill, and economy."

It would be useless repetition to refer to the facts of the case at bar to show that they are not analogous to those of the *Seguranca*.

A number of cases bearing upon the maritime nature of the service rendered by a stevedore have been referred to and pressed upon the court as authority for giving the libellant in this case a remedy in rem in this court. But the cases are not analogous in principle. Whatever doubts were formerly entertained as to the maritime character of a stevedore's employment, that doubt has been effectually dispelled in his favor; but the reasons for giving a stevedore a maritime lien are much stronger than are those for a ship keeper or watchman, since the employment of the former has relation to the handling of the cargo or earning of the freight. *The Windermere*, 2 Fed. 722; *The Canada*, 7 Fed. 119; *The Circassian*, 1 Ben. 209, Fed. Cas. No. 2,722; *The George T. Kemp*, supra; *The Hattie M. Bain*, 20 Fed. 389; *The Scotia*, 35 Fed. 916; *The Gilbert Knapp*, 37 Fed. 209; *The Main*, 2 C. C. A. 569, 51 Fed. 954. I must therefore conclude, both upon principle and authority, that the particular service which libellant rendered in this case as ship keeper had no connection with the navigation of the vessel, either present or prospective; and that it was not, of itself, of such a maritime character as to bring a claim for wages based on such employment within the admiralty jurisdiction of this court. The libel will be dismissed.

---

CLARK v. FIVE HUNDRED AND FIVE THOUSAND FEET OF LUMBER et al.

(Circuit Court of Appeals, Seventh Circuit. December 14, 1894.)

No. 136.

1. ADMIRALTY PRACTICE—FILING LIBEL BEFORE MATURITY OF CLAIM—COSTS. C., on September 15th, filed a libel against the cargo of his steam barge for freight. Such cargo was not discharged or delivered to the consignee

until September 17th, at which time, only, the freight became due. On September 16th two attachments were issued from a state court in suits against C., and served upon the consignee of the cargo, as garnishee. On September 17th the consignee gave bond, and took possession of the cargo. Judgment having been subsequently entered in the state court against the consignee in the garnishment proceedings, the freight money was paid by it upon such judgment, and this fact set up by supplemental answer in the admiralty suit. The district court dismissed the libel. *Held*, that the jurisdiction of the district court for enforcement of the lien for freight was not impaired by the fact that delivery had not been perfected when the libel was brought, nor was that fact ground for a dismissal of the libel, under the practice in admiralty, but only affected the imposition of costs.

2. ADMIRALTY—FEDERAL AND STATE COURTS—JURISDICTION.

*Held*, further, that, the jurisdiction of the admiralty court over the res having attached upon the filing of the libel and seizure under the monition, the subsequent attachment and garnishee proceedings in the state court were an infringement of such jurisdiction, were vain, nugatory, and void, so far as concerned the libel in the district court, and should have been disregarded.

3. SAME—EQUITABLE DEFENSE.

*Held*, further, that as either the fact that no freight was due at the time of the levy of the attachment from the state court, or the fact that the admiralty jurisdiction had already attached, and excluded the jurisdiction of the state court, would have been a complete defense to the consignee, if properly presented in the garnishment proceedings, its payment of the freight in those proceedings raised no equity in its favor to prevent the prosecution of his libel by C.

Appeal from the District Court of the United States for the Northern District of Illinois.

This was a libel by Frank Clark, owner of the steam barge Maggie Duncan, against 505,000 feet of lumber, constituting her cargo, and H. Paepcke & Co., consignees, to enforce a lien for freight. The district court dismissed the libel. Libellant appeals.

The appellant filed a libel in rem in the district court, on September 15, 1892, against the cargo of the steam barge Maggie Duncan, for enforcement of a maritime lien for freight. The libel alleges his sole ownership of the steam barge, and agreement to carry a cargo of lumber from Ontonagon to Chicago for H. Paepcke & Co. in September, 1892; that the lumber was taken on board, arrived at Chicago, and was reported to H. Paepcke & Co., consignees; that he "offered to deliver it to them upon their paying freight to libellant therefor, whereupon they refused to accept it upon said terms"; that the sum of \$1,550 "is justly due him from said cargo" for freight. The answer of the claimants, H. Paepcke & Co., asserts that they are a corporation and owners of the cargo; that they have no knowledge who was owner of said steam barge, but admit that she took on a cargo of lumber consigned to claimant, and arrived at Chicago therewith. It further admits "that a demand for freight was made, and that payment thereof was refused because the same, at the time said demand was made, had not been delivered to the claimant, and was not then at the dock of said claimant ready for delivery," and denies that the freight was then due. It then alleges that on arrival at Chicago, September 15, 1892, "and while said vessel was not at the dock of said claimant or ready to discharge her cargo, a demand for the freight which would become due upon the delivery of said cargo" was made, and, when only a small portion had been discharged, the libel was filed, and monition issued. The answer further alleges that on September 16, 1892, two attachments were issued out of the circuit court for Cook county in favor of third parties (named) and against the libellant, and served upon the claimant, requiring it to "answer as to the estate or property of the said Frank Clark then in its possession." The record shows two (so-called) amended answers, which further set up the subsequent proceedings in the state court in the attachment



suits; that judgments were rendered against the libelant, who was there present, for amounts stated, exceeding together the amount claimed for freight; that thereupon the same court entered an order against this claimant, as garnishee, to pay the sum of \$1,465.25, and it paid said amount on March 24, 1893, to save execution, no appeal having been taken by said Clark, and the time allowed therefor having expired. The libelant filed exceptions to the amended answers, especially to the allegations of proceedings in the state court as not constituting a defense. Pending the cause, September 17, 1892, claimant gave bond, and obtained possession of the cargo, pursuant to the practice in admiralty. Upon the hearing of the cause, the only testimony was that of the libelant in his own behalf, and Herman Paepcke for the claimant, and was to the following effect: (1) The libelant states: That he talked with Paepcke the day before the steamer arrived, and "he said he would pay the freight upon arrival at the dock. He had before paid on arrival, before discharging cargo." That he called again, about 9 o'clock next morning, the boat having arrived about 11 o'clock the night before, and had the following conversation: "Asked Mr. Paepcke for freight money. He said he would not pay me any; that he had been telephoned to not to pay me freight money; that he did not know whether I owned the boat or not." The libelant says he then offered to show the boat's papers, and said they could pay the captain; but, on demand by the captain, the claimant "refused to pay him." He further testifies: "Boat had commenced to unload lumber; had landed about 50 or 70 thousand feet on dock. Paepcke had on several occasions paid me freight money before cargo was landed"; and, further: "When I found Paepcke would not pay freight, I filed a libel against the lumber for the amount due," which was for the total freight, \$1,550. (2) The testimony of Mr. Paepcke, president of claimant, differs only in the following particulars: He says the propeller was at the dock when he came down on the morning of September 15th, but "went away from there up the river," and returned "just before noon"; that libellant demanded "the freight in full for the full cargo," which was refused both to him and to the captain; that the propeller was then "alongside of the dock, but she had not unloaded," and they were "just beginning to unload her." Later, on the same day, and when "not over one-third of the cargo had been unloaded," leaving the balance in the vessel, the marshal seized the cargo upon the motion. He further says: The refusal to pay was "because the cargo had not all been delivered, or put on our dock, and it was therefore not due," and, "besides this, I had been telephoned not to pay him," by the agent of the propeller. He further testifies: "It is customary in Chicago, among lumbermen, to pay part of the freight when the vessel comes alongside of the dock, and the balance after the cargo has been delivered"; that full freight was not payable "until the cargo had all been put on the dock"; that he had never paid the libelant in full, but "only a part before the full cargo was discharged." Service of attachment out of the state court was made September 16th, and "the cargo was not unloaded until the afternoon of the 17th." In answer to a question by the court, the witness said: "If all the cargo had been unloaded, I would not have paid freight to Clark after receiving telephone not to pay." On May 20, 1893, the district court entered a decree that the cause be dismissed, at libelant's cost, and this appeal is prosecuted from that decree.

W. H. Condon, for appellant.

D. J. Schuyler and C. E. Kremer, for appellees.

Before WOODS, Circuit Judge, and BAKER and SEAMAN, District Judges.

SEAMAN, District Judge (after stating the facts). This is a proceeding in admiralty, in rem, for the enforcement of a lien for freight against the cargo of libelant's vessel. The existence of the lien is unquestioned, and it was operative in favor of the vessel

owner from the moment the cargo was taken on board. Its enforcement was a matter peculiarly within the admiralty jurisdiction of the district court. The libel was filed, and the cargo came into the custody of that court through its seizure by the marshal, on September 15, 1892. The only objections urged by the consignee (respondent here and claimant below) against the enforcement of the lien are based upon the following claims: (1) that the libel was prematurely filed; and (2) that under certain subsequent attachment proceedings in the circuit court for Cook county the consignee was held as garnishee of the libellant, and paid the amount due for freight.

1. The fact is undisputed that the cargo was not discharged until September 17th, and therefore was not placed upon the dock, and in condition for inspection and delivery, until two days after the libel was filed. In the absence of express provision otherwise in the contract of affreightment, it is the well-settled general rule that the cargo of a vessel must be unladen, and placed subject to inspection by the consignee, and in complete readiness for a delivery, before the shipowner becomes entitled to his freight, unless delivery is prevented by the act or fault of the shipper or consignee. *Brittan v. Barnaby*, 21 How. 527; *The Eddy*, 5 Wall. 481; 1,265 Vitrified Pipes, 14 Blatchf. 274, Fed. Cas. No. 10,536; 175 Tons Coal, 9 Ben. 400, Fed. Cas. No. 10,522; *The Mary Riley v. 3,000 Railroad Ties*, 38 Fed. 254; 3 Kent, Comm. 219; 1 Pars. Shipp. & Adm. § 5, c. 7; *Macl. Shipp.* (3d Ed.) 467. The vessel owner may retain his possession of the cargo until the entire freight is paid or adjusted, but cannot claim a partial payment or ratable freight "except in special cases; and those cases are exceptions to the general rule, and called for by the principles of equity." 3 Kent, Comm. 219. The consignee is entitled to delivery of the entire cargo as called for by the bill of lading, and to that end may inspect the whole before he is required to accept or pay the freight. Subject to that inspection, the vessel owner retains his possession and lien, when he so elects, either upon the dock or in the hold. Evidence appears in this record which seems designed to show a custom at the port of Chicago, or between these parties, for the advance of a portion of the freight before a delivery; but it is not in any view sufficiently definite to disturb the general rule, and is immaterial in this case for the reason that the only demand made by the libellant was for the freight money as a whole. The general rule is therefore applicable, and a right of action for the freight had not matured when the libel was filed, unless it can be held that the conduct of the consignee prevented or waived a delivery. The admission by its president that he "would not have paid freight to Clark after receiving telephone not to pay," even if the cargo had been unloaded, taken in connection with the terms of refusal to pay, indicates that complete delivery would not have procured payment, and that there was not entire absence of ground for protection of the lien; but, there being no showing of tender of delivery as a condition precedent to the payment of the freight, we are inclined to assume, for the purposes of

this opinion, that the terms in which the consignee placed his refusal should not be so construed as to dispense, at least, with an unmistakable offer by the vessel owner of inspection and delivery, and that the libel was brought prematurely. But that fact would not prevent or affect the jurisdiction of the district court, which was established over the res by the prior service and seizure. The lien of the libellant remained unaffected, and with it his right to hold the cargo until his freight was paid, or until a final adjudication of the admiralty court upon the merits. The possession which he held of right to secure that lien had been surrendered only to that court for the purpose of having the lien enforced; and the custody of the cargo was constructively in the court until the lien was satisfied. The fact that the respondent, as claimant, had been permitted, in accordance with the practice in admiralty, to give bond and take possession of the cargo, made no change in this status; the bond stands as a representative of the cargo, and the res is regarded as continued in the custody of the court. *U. S. v. Ames*, 99 U. S. 35; *Henry*, Adm. Jur. & Prac. § 123; *The Fidelity*, 16 Blatchf. 569, Fed. Cas. No. 4,758; *The Orpheus*, 3 Ware, 143, Fed. Cas. No. 8,330.

2. With reference to the attachment proceedings in the circuit court for Cook county, which appear only as set up in the answer and supplemental answers of the claimant, it is clearly shown that they were both commenced, and the claimant, as consignee, was served with the garnishee summons therein, on September 16, 1892. This was before there was an indebtedness of the consignee for the freight, and was open to the objection that it was premature equally with the libel. But it was indisputably after the service of the monition out of the district court upon the libel, and the subject-matter, then being within the jurisdiction of the admiralty court, was beyond the reach of the process or jurisdiction of the other court. The rule is firmly established, in respect to different co-ordinate courts having the same subject-matter before them, that the court which first obtains possession of the res or of the controversy by priority in the service of its process acquires exclusive jurisdiction for all the purposes of a complete adjudication; and, where the right of a party to prosecute his suit in the United States court has attached, "that right cannot be arrested or taken away by any proceeding in another court." *Wallace v. McConnell*, 13 Pet. 136; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355; *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135; *Sharon v. Terry*, 36 Fed. 337. In *Covell v. Heyman* the doctrine is expressed which must govern here:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent, and have

no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and, when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues."

This doctrine is reciprocal, making priority of service or possession the test. It is essential to prevent collisions in jurisdiction which would seriously embarrass the administration of justice, and has fortunately obtained recognition by the courts, state as well as national. Under it the subsequent attachment proceedings in the state court, so far as concerned this libel in the district court, were "vain, nugatory, and void." *Heidritter v. Oilcloth Co.*, supra. They constituted no defense, and the exceptions to the answer of the respondent in that regard were well taken, and should have been sustained. *Wallace v. McConnell*, 13 Pet. 136.

The foregoing propositions are not seriously contested in the argument upon either side in this appeal. The respondent invokes, in support of the decree, strict application of the letter of the law as contained in the first proposition,—that the premature filing of the libel justified its dismissal,—and, conceding that equitable rules must govern for such disposition, claims that all equity is with the respondent by reason of its alleged enforced payment of the amount of freight under the attachment proceedings, which are then entitled to equitable consideration, "as accomplished facts," without regard to their legal effect. The appellant rests his argument for reversal upon the second proposition,—that the district court obtained and must uphold its exclusive jurisdiction. A question of practice is involved which is of general interest, and has an importance beyond the amount here in controversy. It is well settled that courts of admiralty "proceed upon equitable principles and according to the rules of natural justice" (Ben. Adm. §§ 329, 358); that the utmost liberality will be exercised in the interest of justice to save a libel from dismissal by disregarding technicalities which would operate for its defeat according to the practice at common law (*The Adeline*, 9 Cranch, 244). Referring to the liberality indulged in the former, as distinguished from the rigid rules which prevail in the law courts, it is remarked by Mr. Justice Story, in the opinion in *The Adeline*: "No proceedings can be more unlike than those in the courts of common law and in the admiralty." In the case at bar, as we have before observed, the libellant was entitled to the lien for the freight, and was in rightful possession of the cargo for its security when he filed his libel to enforce his lien; but his action was deemed premature because he had not then made a complete delivery or tender of the cargo to the consignee. Thereupon his libel was dismissed by the district court, with costs, and in effect the cargo was left out of the hands of the libellant, and transferred to the possession of the consignee by force of the bond which had been given to take the place of the res. Although that court

had established complete jurisdiction over the res, had entertained his libel for the enforcement of the lien up to that time, and had taken the cargo in charge to that end, the libelant was peremptorily sent out of court, deprived of his cargo, and without any measure provided by the court for protecting his indisputable lien and right of possession. Is this course in accord with the equitable rules which govern a court of admiralty? Even at law, where the plaintiff in replevin fails for want of a demand of the goods, in a case in which a demand is a condition precedent to a right of action, the approved course is an imposition of costs only; and the goods, having come to the custody of the court through the replevin process, will not then be sent by its action into the hands of a defendant urging that technical defense alone, in the face of a showing that the right of possession is in the plaintiff, except for the failure to make demand, but will be retained for final disposition. Wells, Repl. § 372. Surely, it is incumbent on an admiralty court to have at least equal regard for its suitors. Applying the principles of equity to the admiralty practice, where a maritime lien exists, the fact that the indebtedness has not matured is not ground for dismissal of a libel brought to enforce the lien. Objection that it was premature will be met by a provision of costs or other terms to protect the adverse party from harm, but the libel will be retained to save the libelant from a dismissal which would defeat all remedy. This is the rule pronounced in the early case of *The Salem's Cargo*, 1 Spr. 389, Fed. Cas. No. 12,248, where the libel was prematurely filed for freight; and in the recent case of *The Pioneer*, 53 Fed. 279, Judge Green retained a libel which was filed more than two months before maturity of a right of action, and states as the rule which governs:

"The premature filing of a libel, if the right to libel accrues afterwards, and before the determination of the issue, affects the question of costs only. It is not necessary, nor is it the practice in admiralty, to dismiss such libel if, when the matter is presented to the court for final determination, it appears that the right to libel exists."

When this libel was dismissed, the freight was unquestionably due, and by the dismissal the libelant was deprived of his possessory rights in the cargo, and of all remedy in the district court. The decree is a final disposition of the controversy, and it can only be upheld by a record showing just cause for the summary dismissal. In an appeal in admiralty from the district court, this court is not reviewing "a question of discretion, but is hearing an appeal which is a new trial," and must deal with the questions involved "as though they were original questions." *Towboat Co. v. Pettie*, 1 U. S. App. 57, 1 C. C. A. 314, 49 Fed. 464; *The Philadelphian*, 9 C. C. A. 54, 60 Fed. 423; *The Beeche Dene*, 5 C. C. A. 208, 55 Fed. 526; *The Portland and The State of California*, 7 U. S. App. 20, 1 C. C. A. 224, 49 Fed. 172. All support for the decree rests upon a recognition of the ulterior proceedings in the state court as "accomplished facts." There is nothing in the conduct of the libelant which should give force to those proceedings beyond their prima facie value, or should prevent him from prosecuting his suit in admiralty where he has rightfully

sought relief. He was an involuntary party, as defendant, in the actions in the state court, and his presence there, alleged in the answer, was proper and necessary in the principal suits, and would constitute no waiver of rights in his libel. His appearance in the garnishment proceeding, if material, is not asserted, and there is no claim that he gave consent or countenance in any form to the alleged payment there by the respondent, as garnishee, of the amount of freight money, or waived any objections to impounding his lien claim. He had the right to rely on an assumption that there would be no invasion of the admiralty jurisdiction of the res—which was exclusive for all the purposes of his prior libel—by any attempted enforcement of the state court judgment, and that no payment would be made by the garnishee, except in pursuance of a determination of the primary cause in admiralty. Under the authorities cited, the proceedings in the state court were foreign to, and without effect upon, the controversy in the district court. They could not be made defensive matter in the cause, or enter into consideration to impede or interfere with a complete adjudication by the district court. This is not a status resting in discretion, convenience, or comity, but is one of necessity and absolute right. The court is without power to yield its jurisdiction, once firmly established, to any attempts in other coordinate courts to administer in the same matters. The question is not whether the state court had jurisdiction over the libellant, as defendant before it, to adjudge a liability to its suitors, or had jurisdiction over the garnishee. Such jurisdiction may have been complete, but it had no power to supplant or stay the prior libel in the district court, or to relieve the garnishee from liability for the freight (on its bond for possession of the cargo) in that court. The principles which govern the jurisdiction, and the limitations where jurisdiction is subordinate, are well defined by Judge Jenkins in *Ahlhauser v. Butler*, 50 Fed. 705. The garnishee had an absolute defense to this garnishment, aside from the fact that there was no indebtedness for the freight for want of a delivery of the cargo, in the answer that all liability was previously impounded by the libel in rem, in a jurisdiction where the garnishment could not be recognized. *Drake, Attachment*, (6th Ed.) § 621. The right and the duty to make this defense rested on the garnishee, and not on the libellant as defendant. Any peril which was involved there, either through neglect or through an overruling of the defense, was the peril of the garnishee; and any imposition of liability there cannot be transposed to thrust it upon the libellant, and destroy his remedy in the district court. Whether that defense was presented in good faith is not for this court to inquire, but the presumption is fair, and in accord with comity, that it would have prevailed in the state court if well asserted. If the respondent paid over the amount of the freight, without complicity or indemnity, in the face of the pending libel, and in compliance with a proceeding which must be disregarded in the admiralty court, no ground is presented for a denial of the admiralty jurisdiction. To recognize the alleged payment as raising an equity in favor of re-

spondent equivalent to a satisfaction of the libel claim, and thereupon dismissing the libel, is tantamount to an acceptance of the foreign proceeding as conclusive, and a practical subordination of the jurisdiction which was primary. In this case the effect of a dismissal does not even stop with the denial of all remedy to the libellant, but, leaving the res in the possession of the respondent through its bond, the arm of the admiralty court is made to serve in ratification and enforcement of the proceedings which were otherwise "vain, nugatory, and void."

Upon this record we are constrained to hold (1) that the jurisdiction of the district court for enforcement of the lien for freight was not impaired by the fact that delivery had not been perfected when the libel was brought, nor was that fact ground for dismissal under the practice in admiralty; (2) that the allegation of the subsequent attachment and garnishee proceedings in the circuit court for Cook county, and the payment thereunder, should have been disregarded by the district court; (3) that no equities or grounds of estoppel are shown, running against the libellant, which should prevent his prosecution of the libel, and the alleged equities in favor of the respondent, if alone entitled to consideration, are not faultless or free from doubt; (4) that the libel should have been sustained. While efforts of the courts are to be commended which tend to avoid conflicts in jurisdiction and uphold comity, so far as may be with just regard to the rights of suitors, there can be no surrender of jurisdiction. In the subject-matter of this libel there is special reason for upholding the jurisdiction, because the freight earnings of a vessel belong essentially to admiralty cognizance. Although the old maxim that "freight is the mother of wages" has been so far modified by statutes (Rev. St. § 4525), that the wages of seamen are no longer contingent upon the earnings of freight, the money which so accrues is regarded as a fund for security of the seamen, and they have a lien upon it as well as upon the vessel "which follows them into whose hands soever they may go." 2 Pars. Shipp. & Adm. 60. This fund is deemed a part of the vessel, and applicable to expenditures which are required for its navigation or care. There should be no encouragement of interference with it by jurisdictions foreign to the admiralty, and certainly not when the admiralty jurisdiction has obtained exclusive possession of the res. The decree of the district court is reversed, and the cause is remanded with instructions to decree in favor of the libellant for the amount due for freight, but without costs in the district court, and less the amount of costs allowed to the respondent there, and for further proceedings in conformity with this opinion; the respondent to pay the costs on appeal. So ordered.

## THE ALLIANCA.

## THE SEGURANCA.

## THE ADVANCE.

LONDON ASSUR. CO. v. PROCEEDS OF THE ALLIANCA. BROWN et al. v. PROCEEDS OF THE SEGURANCA. HARD et al. v. PROCEEDS OF THE ADVANCE.

(District Court, S. D. New York. January 10, 1895.)

## SURPLUS MONEYS—MORTGAGEE—NONLIEN CLAIMS DISALLOWED.

Claims for insurance premiums and for moneys advanced to disburse ships in a foreign port, and to keep the vessels of the line running, in so far as they are not maritime liens, cannot be paid out of surplus moneys in the registry arising from a sale of the vessels, in priority to the claims of a mortgagee of the vessels, (1) because such claims are neither legal nor equitable liens upon the vessels or their proceeds; (2) the allowance of certain unsecured labor and supply claims in priority to the mortgagee's claims, in cases of railway receiverships, are not analogous or applicable; petitions for the payment of such claims were accordingly dismissed.

In Admiralty. Claims on surplus moneys.

Cary & Whitridge and W. Parker Butler, for petitioners.

Carter & Ledyard and Mr. Baylies, for Atlantic Ins. Co., mortgagee, respondent.

BROWN, District Judge. The steamships Allianca, Seguranca and Advance having been sold under process, and the proceeds paid into court, as stated in the previous cases of *The Allianca* and *The Seguranca*, 63 Fed. 726; *The Vigilancia*, Id. 733; and the questions concerning maritime liens thereon having been adjudged in the cases above named, and in the cases of *Freights of The Kate*, Id. 707, and *Hard v. The Advance*, Id. 142, petitions have now been filed in behalf of Brown Bros. and of Hard & Rand, based upon the same claims, alleging an equitable lien, or right of priority, as against the mortgagee of the vessels, and asking the court to award payment of these claims out of the surplus moneys, in preference to the mortgage, upon the same principles upon which a receiver in railroad cases has been ordered to pay certain wages and supply debts, or other charges constituting a part of the current expenses necessary to maintain the operation of the road, either during the receivership, or for a limited period prior to the receiver's appointment. The claims here in question were undoubtedly for the operating expenses of the different vessels, and to disburse the ships at different ports in Brazil, as stated in the decisions above referred to.

The claim of the London Assurance Company is for a balance of \$470.85 premiums of insurance, due upon its policy upon the Advance, issued to the United States & Brazil Mail Steamship as owner, on account of whom it may concern, and insuring to the benefit of the Atlantic Trust Company, mortgagee, under the terms of its mortgage. The premium was for insurance for a period of between five



and six months prior to the 11th day of March, 1893, when the policy was canceled, a few days after the appointment by the state court of a receiver of the steamship company.

The payment of these claims out of the surplus is opposed by the mortgagee of the vessels, on the ground that none of the claims are either legal or equitable liens upon the surplus moneys in the registry of the court.

Upon several grounds the above claims must be disallowed. In the first place, it is well settled that in the distribution of surplus moneys, this court can only take cognizance of liens upon the fund; that is, some vested legal or equitable interest in the res from which the fund was derived, as distinct from the claims of general creditors. *The Advance*, 63 Fed. 704, and cases there cited. The court, therefore, though in possession of the fund, is not in the situation of a receiver on behalf of creditors at large, and in that respect the situation differs from that in many of the railroad cases cited.

2. It is quite clear that none of the claims above stated were ever either legal or equitable liens upon the vessels that have been sold; or at least not such liens as have been ordinarily recognized either in law or in equity.

3. The only ground upon which any priority of right over the mortgage can be claimed, analogous to an equitable lien, is the asserted similarity of the present cases to those of railway receiverships, in which it may, perhaps, be said, that a new order of equitable liens has been recognized and sanctioned by the decisions of the supreme court. *Fosdick v. Schall*, 99 U. S. 235, 252; *Hale v. Frost*, Id. 389; *Miltenberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675.

This class of cases, however, is acknowledged to be exceptional; and I have not been referred to any cases in which the same doctrine has been applied, except to those of railways, in which the quasi public function of the road, the peculiar relation of one railway to another, and the necessity of maintaining the road as a going concern, in the interest of the mortgagee, as well as of the public, and the understanding that current supplies are to be paid for out of current earnings, are all recognized. The underlying principle of those cases seems to be that the current receipts are understood by the mortgagee and by all other parties interested to be the fund for the payment of the current debts of supply and labor; and consequently that when a mortgagee, after default, has suffered such debts to be incurred upon that understanding, a receiver appointed at his instance should not be allowed to take possession of that fund, and divert those receipts, for the mortgagee's benefit, from the payment of those debts to which they have been understood to be devoted, and to which they should equitably be applied; and that if such a diversion has taken place, restoration by the mortgagee's receiver may be justly decreed to that extent, even out of the corpus of the property itself; but that when there is no such diversion, there is no such remedy. This is substantially the language of Chief Justice Waite in *Fosdick v. Schall*, 99 U. S. 235, 252-254, and in *Burnham*

v. Bowen, 111 U. S. 776, 782, 4 Sup. Ct. 675. The same principle was still further applied and elucidated in the opinions of the chief justice in *Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Railway Co.*, 137 U. S. 171, 196, 197, 11 Sup. Ct. 61; of Mr. Justice Brewer in *Kneeland v. Trust Co.*, 136 U. S. 89, 10 Sup. Ct. 950; and of Mr. Justice Shiras in *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824.

In the present case no current receipts, which might have been applied to the petitioners' claims, have been diverted from the payment of current debts, not even by the owner company, so far as the proof shows; certainly not by any act or privity of the mortgagee. On the contrary, in the litigation between the mortgagee and other lien claimants, the freights, or current receipts, of the various steamships have all been ordered by this court to be applied to certain current debts, to the complete exclusion of the mortgagee. *Freights of The Kate*, 63 Fed. 707, 716.

4. The petitions do, indeed, allege a diversion of funds by the steamship company from the payment of operating expenses at different times during 1892, "for the benefit of the mortgage creditors, by purchasing additional equipment covered by the mortgage, such as steam tugs, and lighters; and by making permanent improvements and repairs upon the steamers covered by the mortgage"; but it is not alleged that any such diversion took place since the claims here presented arose; and upon the argument of the case, in answer to inquiries by the court, it was admitted by counsel that no such diversion since that time was expected to be proved.

Even in the case of *Burnham v. Bowen*, supra, upon which the counsel for the petitioners principally relies, it was stated by Chief Justice Waite "that the payment [of the debt to which preference was given] would have been made [by the company] at the time agreed on, if the company had remained in possession" (111 U. S. 778, 4 Sup. Ct. 675); that "there is nothing to indicate that this debt would not have been paid at maturity from the earnings, if the court had not interfered at the instance of the trustees for the protection of the mortgage creditors" (page 781, 111 U. S., and page 675, 4 Sup. Ct.); and the preference was allowed, because the court took the earnings of the receivership and applied them to the payment of fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, constituting a diversion of the current debt fund.

Here the circumstances are wholly different. The mortgagee had no peculiar interest in the maintenance of the steamship company as a going concern, different from that of any other creditor in the prosperity of his debtor. The ships were not run for the mortgagee's benefit. While the mortgagee was out of possession, the freights belonged to the steamship company, and there has been no diversion of those freights since the claims in suit arose, to the benefit of the mortgagee. All the grounds for the exceptional allowance of a priority to certain unsecured claims in railway cases, seem to me here to fail. In the three cases of railway mortgages last cited in the supreme court a preference was denied, because of the absence

of any special circumstances justifying a preference; and because the claims were contracted upon the personal responsibility of the mortgagor company (136 U. S. 97, 98, 10 Sup. Ct. 950; 137 U. S. 198, 11 Sup. Ct. 61; 149 U. S. 112, 13 Sup. Ct. 824). It is the same as respects all these claims, except so far as the express written or oral hypothecations of the freights extend, to which hypothecations full effect, so far as legally possible, has been already given by this court in the decisions first above cited. The claim for insurance premiums evidently rested equally on a personal credit of the Brazil Company; otherwise a specification of such claim would have been filed to secure a lien under the state law. See *The Allianca*, 61 Fed. 507. I could not sustain this claim without practically reversing the rule of this country, that insurance premiums are no lien aside from the statute.

I have already held that there could be no subrogation; and as I cannot perceive any possible aspect in which an equitable lien upon the vessels, or priority over the mortgagee, can be maintained by the petitioners, I must sustain the exceptions and dismiss the petitions.

---

#### THE FLORENCE.

#### THOMAS v. THE FLORENCE.

(District Court, S. D. New York. January 2, 1895.)

#### SALVAGE—TOWAGE—BROKEN SHAFT—HARTER ACT, FEB. 13, 1893.

The steamship *Parkmore*, on a voyage from Baltimore to Liverpool, with a cargo in part of cattle, took in tow the steamship *Florence*, which had broken her main shaft, and towed her to New York, a distance of about 140 miles; actual time of towage 33 hours, the sea being rough, and the *Parkmore's* hawser once broken. The detention of the *Parkmore* was between four and five days. The value of the *Parkmore* and cargo was \$460,000, and of the *Florence* and cargo, \$240,000: *Held* (1) that \$8,500 was a suitable award for the salvage service besides the sum of \$1,845.42 for extra expenses; (2) that the provisions of the Harter act of February 13, 1893 (2 Supp. Rev. St. 81), authorizing deviation for salvage without liability to cargo, require less consideration to be given than formerly to the amount of cargo of the salving vessel in fixing the award.

#### In Admiralty.

Evarts, Choate & Beamen and Treadwell Cleveland, for libellant.  
Wing, Shoudy & Putnam, for claimant.

BROWN, District Judge. At about 6 p. m. of Saturday, October 27, 1894, the libellant's steamship *Parkmore*, bound from Baltimore to Liverpool, went to the assistance of the steamship *Florence*, in answer to her signals of distress, and thereafter took her in tow and brought her to the harbor of New York, where they arrived off quarantine at 1:20 p. m. of the 29th. The above libel was filed to recover salvage compensation.

The *Florence* had left New Orleans on October 6th, bound for Bremen, with a cargo of cotton and cotton-seed meal. Meeting with

bad weather, she had subsequently put into Key West, and afterwards coaled at Newport News, which she left on October 22d. On the 24th, at 1:30 p. m., her propeller shaft broke in the stern tube, at a point 7 feet 3 inches from the aft end. She was at that time somewhat out of the course of most ocean steamers; but setting all sail, during the following three days, making about 50 or 60 miles a day on a zigzag course, she had arrived to within about 140 miles of Sandy Hook, when the Parkmore sighted her and took her in tow as above stated. A new Manilla hawser was supplied by the Parkmore, which was once broken during the night in a rough sea, and the towage was necessarily suspended until the morning. The Florence also steered badly, which added somewhat to the difficulty of towage, and the towing bitts on the starboard quarter of the Parkmore were torn away. The actual time of towage was about 33 hours; and the time from sighting the Florence until anchorage in New York, about 44 hours. The whole detention of the Parkmore occasioned by her deviation, was between four and five days. Neither vessel had passengers on board, except that the Parkmore had some cattle men in charge of the 400 cattle that formed a part of her cargo.

The agreed value of the vessels and cargoes were: The Parkmore \$175,000, her cargo \$285,000; the Florence, in her damaged condition, \$70,000, her cargo \$170,000; total, Parkmore and cargo, \$460,000, the Florence and cargo, \$240,000. The extra expenses incurred by the Parkmore, including pilotage, port charges, coal, provisions, feed for cattle, and the injury to her cable and bitts, amounted to \$1,845.42. Her ordinary charter demurrage was about \$300 per day; and her officers and crew numbered 38.

The general circumstances of the salvage service were not such as to call for very high compensation. Aside from the circumstances above mentioned of the breaking of the cable and the bitts, there were no special circumstances of difficulty or loss; and the work of connecting the cable with the Florence in the rough sea, was mainly done by the men belonging to the Florence.

In fixing the amount of the award in this, as in all other salvage cases, I have endeavored to apply the rule laid down by Mr. Justice Bradley, in the case of *The Suliste*, 5 Fed. 99, 102, as one of the best expressions of the objects to be kept in view in salvage awards:

"Salvage," he says, "should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy, whilst salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor. Anything beyond that would be foreign to the principles and purposes of salvage; anything short of it, would not secure its objects. The courts should be liberal, but not extravagant; otherwise, that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril."

See *The Alaska*, 23 Fed. 597, 613, 614, and cases there cited; *The Leipsic*, 20 Blatchf. 288, 10 Fed. 585; *The Benison*, 36 Fed. 793; *The Phoenix*, 10 C. C. A. 506, 62 Fed. 487. See, also, *The New*

Orleans, 23 Fed. 909, 911, and Compagnie Commerciale, etc., v. Char-ente Steamship Co., 9 C. C. A. 292, 60 Fed. 921, 925, as to the encouragement of salvage services through suitable rewards to masters and crews.

I have carefully considered the circumstances urged by counsel, including the possible danger from the wheel, had heavy storms been encountered; and on the other side, the fact that here there were no passengers on either vessel; that the Florence was not wholly helpless, but under sail, and was getting so near Sandy Hook that abundant other help would soon have been offered her; and also the further circumstance that since the passage of the Harter act of February 13, 1893 (2 Supp. Rev. St. 81), a vessel is authorized to deviate for the purposes of salvage, without incurring any responsibility to cargo for so doing; so that less consideration than formerly is now to be given to the value of the cargo of the salving vessel.

Taking all the circumstances into view, my conclusion is that the sum of \$8,500 will be a suitable award, besides the sum of \$1,845.42 for extra expenses, as above stated, which sums are accordingly allowed. Of the sum first named four-fifths will be awarded to the owners, and but one-fifth to the officers and crew, from the fact that the additional labor imposed on them was comparatively small. From the latter sum, \$500 is awarded to the master, and \$150 to the chief engineer; and the residue of the one-fifth to the other officers and to the crew in proportion to their wages. Decree accordingly, with costs.

---

**BAXTER et al. v. INTERNATIONAL CONTRACTING CO.**

(District Court, S. D. New York. November 13, 1894.)

**COLLISION—UNBUOYED ANCHOR—DISPLACEMENT OF.**

Upon plaintiffs' claim that his boat ran upon an unbuoyed anchor in the nighttime which was out of position through the imbedding of the anchor chain so as to mislead the libelants' pilot as to its position: *Held*, (1) no buoy necessary upon anchors in ordinary anchorage ground; (2) evidence insufficient to prove displacement of the anchor as leading to the collision.

This was a libel by John F. Baxter and another against the International Contracting Company for a collision caused by the displacement of an unbuoyed anchor.

Wing, Shoudy & Putnam, for libelants.  
Sullivan & Cromwell, for respondent.

**BROWN**, District Judge. I find too much doubt as to the facts in this case to warrant a decree for the libelants. I find that 25 fathoms of chain were not unreasonable for this scow; and there is no evidence of knowledge of any displacement of the anchor, or imbedding of the chain, if there was any, such as to require the scow to buoy the anchor, which is not required of vessels in ordinary anchorage ground. I am not satisfied of any such fixed imbedding, or displacement, as being a cause of the loss of the propeller. The

change of current being much later than the change of tide, I am not at all sure that the scow was not on the swing when the accident occurred, as the testimony of one of the scow's witnesses makes probable; and if so, it was at the tug's risk that she did not keep at least 150 feet away from the scow. The scow and its owner cannot be held, except for proved negligence; and this is not sufficiently established.

Libel dismissed, without costs.

---

THE VANDERCOOK and THE THOMAS PURCELL, JR.

In re McWILLIAMS et al.

(District Court, S. D. New York. January 11, 1895.)

**TUG AND TOW—THREATENING WEATHER—IMPRUDENT START—TOW LOST.**

The tugs V. and P. took in tow 14 canal boats from New York, bound for Bridgeport, Long Island Sound. It was imprudent to start against an easterly wind because of the liability to meet heavy seas. A change of wind from the eastward to west of north is known to be usually followed, within about 12 hours, by a return of the wind to the eastward. The tugs about 12 hours after such a change to the northward started upon the trip at 6 p. m. They soon met the easterly wind, and before reaching Norwalk the tow was broken up by pounding in heavy seas with the loss of several boats. *Held*, that starting with such a tow was imprudent and negligent, and that the owners of the tugs were liable for the loss up to the amount of the value of the tugs.

In Admiralty. Loss of tow. Petition to limit liability.

Carpenter & Park, for petitioners.

Robinson, Biddle & Ward, for Pennsylvania R. Co. and British Marine Ins. Co.

BROWN, District Judge. At about 6 o'clock in the evening of November 9, 1893, the tugs Vandercook and Thomas Purcell, Jr., belonging to the petitioners, started from Hammond Flats with a tow of 14 canal boats and barges, bound for Bridgeport, including one boat to be left on the way at Stamford, and one at Norwalk. At about 3 or half past 3 a. m. of the night following, the tow broke up in an easterly wind and sea when about three miles to the westward of Norwalk, and more than half of the boats were sunk. Various claims having been presented against the owners of the tugs for damages, the above petition was filed to limit their liability to the value of the tugs Vandercook and Purcell; and at the same time the owners deny that there was any negligence for which they are liable. The answers to the petition charge negligence on the tugs, for improperly starting in the face of threatening weather, for insufficient tugs, and also for the failure to put in at practicable harbors on the route, before reaching the place where the tow broke up.

A great deal of evidence has been taken on the issue of negligence raised by the pleadings. The case is in some respects a close one. But taking all the circumstances into account, I am con-

strained to find that the start from Hammond Flats at 6 o'clock in the evening of the 9th was not a proper start; that the start at that time was not reasonably prudent for such a tow, with such tugs, and such a trip in the nighttime.

These tugs and tows, like several others, had been obliged to wait during the 8th of November, on account of a northeasterly wind all that day. The witnesses all agree that it is not prudent or safe to start with a flotilla of coal boats for a trip upon the Sound in the face of an easterly wind, even though the wind be light, and the weather clear; because a head sea is very likely to be met, which will cause the boats to pound or become swamped, and lead to the breaking up of the tow, and the loss of some or all of the boats.

Early in the morning of the 9th, the wind veered to the north, and remained between north and northwest all day; and the tugs and tow started from Hammond Flats (about a mile and a half west of Throgg's Neck) at about 6 p. m. The evidence shows that when the wind backs from the northeast to the westward of north, it is very likely to return again to the eastward before many hours, rarely exceeding 12 hours before its return. When these tugs left Hammond Flats at 6 p. m., the wind had already been 12 hours between the north and northwest, and its very speedy return to the eastward was, therefore, to be expected, though the wind at the time of starting was light, and the stars were shining. None of the other tugs with tows under these circumstances, so far as the evidence shows, considered it prudent to start, but continued to wait for proper weather.

The master of the Vandercook, who was chief in charge of the tow, had not been accustomed to the command of the Vandercook. This was his first trip upon her as master. The tow was not a light one for the two tugs, but nearly up to their full capacity. They were ordinarily expected to reach Norwalk—where there was a good harbor, easily approached—in eight hours. The distance was not over thirty-five miles to Norwalk; and when the tow broke up three or four miles to the eastward of Shepan Point, and about two or three miles to the westward of Norwalk, the tow was at least three hours behind the average time. From Shepan Point the sea began to roll in more heavily from the eastward, and it increased so much that there came to be a great deal of rolling, and pounding, between the boats. Finally, one boat in the head tier caught—probably by her guard—against an adjoining boat, which ripped up her upper plank streak, and caused her to take in water, from which she suddenly sank; and this led to the immediate break-up of the tow. That was the danger to be apprehended in encountering a head wind and a consequent easterly sea; the danger which it was known to be necessary to avoid. The witnesses for the tugs contend that there were no safe harbors to which the tugs could have safely taken such a tow as this, during the preceding six hours in the nighttime. The weight of testimony, I think, sustains this contention. But if this is correct, it only makes the obligations of prudence the more emphatic, that such a trip should not be entered

upon during the nighttime, when the probabilities are so strong that an easterly wind and sea will be speedily met.

In the case of *The Allie & Evie*, 24 Fed. 745, the start was not made in unpromising weather, and the damage arose from a sudden and unexpected squall. In the case of *The Frederick E. Ives*, 25 Fed. 447, the question was not one of a faulty start, but of the obligation to put into Norwalk harbor, instead of continuing on four hours further towards Bridgeport; and the weight of evidence was that at the time of passing Norwalk there were no such indications of bad weather as reasonably to prevent the *Ives* from going on. The case of *The Robert Burnet* was similar. 56 Fed. 266. In the present case the weather had been threatening for 12 hours previous. It was not settled. The trip was long, with no practicable intervening harbor in the nighttime after passing Cow Bay, only a few hours ahead; and the tugs before starting with the tow had already waited the full usual interval of temporary favorable weather, and started just at the time when bad weather was to be hourly expected. According to some of the evidence, the wind was already northeast when Cow Bay was reached, at about 8 or 9 o'clock p. m., where the tow might easily have put in.

To justify any start in such weather, the case must present exceptional circumstances in the staunch character of the tow itself, and the shortness of the trip; while the tugs should not only have full general fitness for the work, but such a reserve of power for service in emergencies as will fully offset, and prevent, the dangers expected to be met by ordinary tugs and tows in bad weather. Neither the boats of this tow, nor the tugs, had any such exceptional character. They had no fitness for such a trip, undertaken at such a time; and I must hold the tugs, therefore, liable for lack of reasonable prudence in starting with such a tow at a time when the bad weather that followed was according to all experience, and within the ordinary knowledge of boatmen, to be hourly expected. The petitioners are entitled to limit their liability to the value of the tugs.

---

#### THE EDDIE GARRISON and THE SOUTH BROOKLYN.

#### SHERRIDAN v. THE EDDIE GARRISON and THE SOUTH BROOKLYN.

(District Court, S. D. New York. January 7, 1895.)

#### COLLISION—TUG AND FERRYBOAT—PREMATURE START—THWARTING BY STOPPING.

The ferryboat *S. B.* left her slip to cross the East river a few moments only after the ferryboat *A.* left the adjoining slip, so that the boats were lapping each other as they went out. The ordinary course of the two required the *S. B.* to fall back and pass under the stern of the *A.*; this was hastened by the presence of a sail lighter going down the river, so that the *S. B.* was compelled to stop or slow down, when a little out of her slip directly in the path of the tug *E. G.*, with her tow, coming down on the ferryboat's port hand. On starting, the *S. B.* gave the usual starting signal, which was heard by the *E. G.* The latter did not stop until the *S. B.* was part way out of the slip, and collision ensued about 300 feet



from the shore: *Held*, (1) that the ferryboat was partly to blame for the collision, for starting out abreast of the A. and under circumstances which would oblige her to stop her speed soon after leaving the slip, and would mislead the tug; (2) that the tug was to blame for not stopping on hearing the starting whistle of the S. B., and for undertaking to pass her too closely.

**In Admiralty. Collision.**

Carpenter & Park, for libellant.

Hyland & Zabriskie, for the Garrison.

Burrill, Zabriskie & Burrill, for the South Brooklyn.

BROWN, District Judge. At about 7 o'clock a. m. of August 16, 1894, a few moments after the ferryboat South Brooklyn left her slip between piers 2 and 3 East river, bound for South Brooklyn by way of Buttermilk channel, she came in collision with two canalboats which were in tow alongside of the steam tug Eddie Garrison, coming down out of the East river. The bows of the libellant's canalboat, which was the outer boat on the port side, struck the ferryboat's port quarter about 25 feet from her stern, and suffered considerable damage, to recover which the above libel was filed.

The tug had taken the two canalboats from the slip between piers 6 and 7 East river upon her port side, had swung around so as to be headed down river when about 400 feet, as her witnesses say, off from the docks, and then proceeded slowly down river against the flood tide. The pilot, when about off pier 4, saw the Brooklyn coming out of her slip, about half way out, and at the same time got a signal from her of one whistle. He had previously, when off pier 5, heard from her a signal of one whistle before seeing her, which he understood to be a signal that she was about to come out of the slip in accordance with the rules governing the departure of ferryboats. He answered the second signal with one whistle, and claims that he immediately stopped and backed; that collision ensued because the Brooklyn herself, on going out of her slip, did not continue at her regular speed, but stopped, and a little before collision, ported her wheel, so that with the drift in the tide, and the swing of her stern under a port wheel on starting up a few seconds before collision, the stern was swung against the canalboat in the manner above stated.

On the part of the ferryboat it appears that just prior to the departure of the South Brooklyn, the ferryboat Atlantic, which has a berth next to the South Brooklyn to the west, had started for her destination at the South ferry, Brooklyn; that her usual course was across the course of the South Brooklyn, towards Buttermilk channel, and that the Atlantic diverged to port and across the course of the Brooklyn somewhat sooner than she ordinarily would do, in consequence of a lighter which was coming down further out in the stream, which required the Atlantic to port somewhat in order to go astern of her. The Atlantic did not check her speed, which was equal to that of the South Brooklyn; but the South Brooklyn was so close to the Atlantic that she was compelled to slacken, though

according to her own testimony she did not stop her paddle wheels; and her stop, or slackened speed, lasted probably not over 15 or 20 seconds, when she went on at full speed as before.

The pilot of the South Brooklyn testified that as he went out of his slip he was completely astern of the Atlantic, and that there was 25 feet of clear water between his bow and the Atlantic's stern. It is manifest, however, that he is mistaken in this testimony, not only from the direct testimony of the Atlantic's pilot, and other witnesses, that the South Brooklyn was lapping his port quarter as he went out; but from the further consideration that the Atlantic, if completely ahead of the South Brooklyn, when the latter left her slip, must have already acquired a higher speed, and could not have embarrassed the South Brooklyn afterwards by her course. The collision was about off pier 3, and the distance from shore I find to have been about 300 feet. That it was not less is shown, I think, not merely by the tug's witnesses, but also by the fact that the Brinckerhoff, coming around the Battery from the North river into the East river with a small sloop in tow on a hawser, passed under the stern of the South Brooklyn as she came out of her slip, and at the time of the collision had reached pier 5, East river. During this interval, considering the clear water that must have been between the South Brooklyn and pier 3 at the time when the Brinckerhoff passed astern of her, it seems to me impossible that the stern of the South Brooklyn should have been less than about 300 feet from shore at the time of collision, when the Brinckerhoff had reached pier 5.

Upon the above facts I think both vessels must be held in fault. It was not prudent, nor justifiable navigation for the South Brooklyn to start out of her slip lapping the Atlantic, which was going ahead of her and close alongside of her, when the ordinary course of the Atlantic would require her to cross the bows of the South Brooklyn; and particularly so, when the lighter visibly going down the river would compel the Atlantic to turn to port sooner than usual, as the South Brooklyn ought to have perceived. The ordinary course of the Brooklyn was to pass under the stern of the Atlantic. Reasonable prudence, and the spirit, if not the exact letter of the state law, which forbids vessels to pass within 60 feet of each other, required her to wait until the Atlantic was sufficiently clear. Moreover, by going out prematurely, as she did, she presently had to stop or slow, when directly in front of other vessels coming down river, and could not "keep her course and speed"; and that was directly calculated to mislead other vessels, and to bring on collision by thwarting their expectations; because they could not anticipate such a stop. *The Britannia*, 153 U. S. 130, 141-143, 14 Sup. Ct. 795; *The Nutmeg State*, 62 Fed. 847. It was this stop that was the immediate cause of this collision. The tug would not naturally suppose that the ferryboat would stop in the stream or materially check her speed a few moments after starting when directly in front of the tug; and the tug, no doubt, calculated on passing safely astern of the South Brooklyn. The tug was not in such a position as to enable

her pilot to perceive and appreciate the precise navigation necessary for the South Brooklyn; so that I cannot hold the tug chargeable with knowledge that the South Brooklyn would be obliged to stop as she did; while the South Brooklyn, on the other hand, was in position perfectly to understand that necessity before she started.

It is these two circumstances, the close proximity of the Atlantic, and her own inability to continue her course, making it sufficiently evident to the South Brooklyn that by her premature start she would be obliged to stop in the path of other vessels just outside the slip, and thus mislead them, which make this case wholly different from that of *The Breakwater*, 39 Fed. 511, affirmed in 15 Sup. Ct. 99, where no such embarrassment or tendency to mislead existed.

I must find the South Brooklyn, therefore, to blame; because her imprudent navigation manifestly contributed to the collision. See *The Boston*, Olcott, 407, 414, Fed. Cas. No. 1,672; *Randolph v. The United States*, Newb. 497, 500, Fed. Cas. No. 11,562; *The Electra*, 1 Ben. 282, Fed. Cas. No. 4,337; *The Nereus*, 23 Fed. 448, 456; *The John S. Darcy*, 29 Fed. 644.

2. The tug was navigating unlawfully too near the shore. She claims that she did all she could to avoid collision after the signals of one whistle were exchanged, and that it was ineffectual only because the ferryboat stopped and then swung her stern to port. This tug, as in the *Intrepid*, 48 Fed. 327, and *The Brooklyn*, 62 Fed. 759, had the ferryboat on her starboard hand, and was bound to keep out of the way.

I am not quite satisfied as to the tug's immediate reversal after the exchange of signals, since she would naturally stop in the water very quickly when moving slowly against a strong tide. But aside from that consideration, I must hold the tug in fault not only for navigating too near the mouth of the ferry slips, as above stated, but for not stopping her engines when off pier 5, at the time when the ferryboat's first starting signal was heard and understood. She was then only 500 or 600 feet at most above the line of the ferryboat's course, which would naturally swing towards her in the strong flood. The tug was bound to allow a reasonable margin for the contingencies of navigation,—a rule continually applied in the interest of life and property. *The Carroll*, 8 Wall. 302; *The Benefactor*, 14 Blatchf. 254, Fed. Cas. No. 1,298; *The Cyclops*, 45 Fed. 124, and cases there cited; *The Beta*, 40 Fed. 899, and cases there cited.

If instead of observing this obligation, close shaving is indulged in, it must be at the risk of being held liable for contributory negligence, if accident ensues. The damages are, therefore, divided. Decree for the libellant against both vessels.

CENTRAL TRUST CO. OF NEW YORK v. CHARLOTTE, C. & A. R. CO.  
et al. (BOUKNIGHT, Intervener).

(Circuit Court, D. South Carolina. December 31, 1894.)

## 1. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—JUDGMENT LIEN—SOUTH CAROLINA STATUTE.

B. recovered a judgment, in South Carolina, for personal injuries, against the C. R. Co., a corporation chartered by the states of North Carolina, South Carolina, and Georgia, and owning a line of road running through the three states. Long before the accident causing the injury, the railroad company had mortgaged its road, to secure an issue of bonds, and the mortgage had been duly recorded. It had also leased its road to another company, which was operating it when the accident happened. A statute of South Carolina, in force when the mortgage was made, provided that, when a cause of action against a railroad corporation for personal injuries should be prosecuted to judgment, the judgment should relate back to the date when the cause of action arose, and be a lien as of that date, of equal force with the lien of employés for wages, and should take precedence of any mortgage given to secure bonds. The mortgage having been foreclosed, B. intervened, asking for payment of his judgment in advance of the bonds. *Held*, that the statute referred to, having been in force when the mortgage was made, and so having entered into and become a part of the contract, was valid, and did not displace or impair the lien of the mortgage.

## 2. SAME—LIABILITY OF RAILROAD CORPORATION FOR ACTS OF LESSEE.

*Held*, further, that the judgment recovered by B. was entitled to the protection of the statute, the South Carolina court having jurisdiction of the subject-matter, though the accident occurred in Georgia, and the C. R. Co. being responsible, under the law of both South Carolina and Georgia, for all acts of its lessee unless specially released from such responsibility by the legislature and no such release appearing in this case.

## 3. SAME—EFFECT OF JUDGMENT.

*Held*, further, that the trustees of the mortgage had no right to be made parties to B.'s suit for damages, and the judgment in such suit was conclusive as against them, if the court had jurisdiction, and in the absence of fraud or collusion.

This was a suit by the Central Trust Company of New York against the Charlotte, Columbia & Augusta Railroad Company and others for the foreclosure of a mortgage. After a sale of the road, Joseph H. Bouknight intervened, asking payment of a judgment against the railroad company.

Sheppard Bros., E. F. Verdery, and Fleming & Alexander, for petitioner.

Henry Crawford, for defendants.

SIMONTON, Circuit Judge. This is an intervention by petition, praying payment of a judgment obtained against the Charlotte, Columbia & Augusta Railroad Company for personal injuries. The petitioner asks that his judgment be declared a lien superior to that of the first mortgage upon the property of the said company. As this mortgage has been foreclosed under the order of this court, the purchaser at the sale has come in, and resists the prayer of the petition. *Secor v. Singleton*, 41 Fed. 728. The cause has been heard on the pleadings, the master's report, with the testimony, and on the exceptions duly filed thereto. The Charlotte, Columbia & Au-

gusta Railroad Company had its termini at Charlotte, N. C., and Augusta, Ga. It passed across the state of South Carolina, and by far the largest part of its track was in the last-named state. It was incorporated by the three states of North Carolina, South Carolina, and Georgia, under the same corporate designation, owned all the property, and was in practical effect one corporation. In 1886, the Charlotte, Columbia & Augusta Railroad Company, styling itself a "corporation," created by and organized under the laws of North Carolina, South Carolina, and Georgia, leased all of its franchises and property in the three states, including the whole line of railway "from Augusta to Charlotte," constituting 191 miles of "continuous railway," to the Richmond & Danville Railroad Company. Thenceforward all the rolling stock on the road was owned and all of its operations were controlled and managed by the lessee company, whose agents, without interference on the part of the lessor, were in charge of all the business on the road. The Richmond & Danville Railroad Company, and all its property and leased lines, went into the hands of receivers in June, 1892; and the Charlotte, Columbia & Augusta Railroad Company was placed in the hands of receivers, at the instance of its own mortgage creditors, in July, 1893. When the lease above referred to was made, there was a mortgage upon all the property and franchises of the Charlotte, Columbia & Augusta Railroad Company, executed to secure certain bonds, bearing date July 1, 1883. The mortgage covered the property in the three states, and was duly recorded, according to law in South Carolina, in the several counties through which the road ran. When that mortgage was executed, there was on the statute book of the state of South Carolina (Gen. St. § 1528) the following provision of law:

"Whenever a cause of action shall arise against any railroad corporation for personal injury or injury to property sustained by any person, and such cause of action shall be prosecuted to judgment by the person injured, or his or their legal representatives, said judgment shall relate back to the date when the cause of action arose, and shall be a lien as of that date, of equal force and effect with the lien of employes for wages, upon the income, property and franchises of said corporation, enforceable in any court of competent jurisdiction by attachment or levy and sale under execution, and shall take precedence and priority of payment of any mortgage, deed of trust or other security given to secure the payments of bonds made by said railroad company: provided, any action brought under this section shall be commenced within twelve months from the time that said injury was sustained."

On 24th November, 1891, the petitioner purchased at Trenton, in South Carolina, a station on this road, a round-trip ticket from Trenton to Augusta and back, from the Richmond & Danville Railroad, the lessee; and on this ticket proceeded to Augusta, Ga. On his return, before the train had gone out of Augusta, he was injured in his person by the alleged negligence of the agents of the railroad company carrying him. He brought his action therefor against the Charlotte, Columbia & Augusta Railroad Company, in the court of common pleas for Edgefield county, S. C., within 12 months thereafter; and on the 18th March, 1893, obtained a verdict, subsequently entered in judgment in the sum of \$10,000, and costs. An appeal was taken from this judgment to the supreme court of South Caro-

lina, and the judgment of the lower court was affirmed, after full hearing. 19 S. E. 915. This judgment roll was produced before the master. He reported in favor of the prayer of the petition. Exceptions were taken to his report. The cause has been exhaustively argued.

The first question is as to the validity of this provision of the statute law of South Carolina. It is said that practically it displaces, and to this extent renders null, a prior recorded lien. This section has never been construed by the court of last resort of the state, and this court must reach its own conclusion. All contracts are made with reference to the law of the state in which the subject-matter of the contract is, and in which the contract is made. This certainly is true with regard to mortgages by a railroad corporation. The law enters into and becomes a part of the contract, as if it were there in express terms. *Brine v. Insurance Co.*, 96 U. S., at page 634; *Insurance Co. v. Cushman*, 108 U. S. 52, 2 Sup. Ct. 236. It is recognized in *Provident Sav. Inst. v. Jersey City*, 113 U. S. 506, 5 Sup. Ct. 612, and in *Railroad Co. v. Hamilton*, 134 U. S., at page 301, 10 Sup. Ct. 546. In this particular case the section which is under consideration is a part of the general law regulating railroad corporations. The provisions of the chapter are declared to be amendments of the charters of all railroad corporations theretofore created in this state. Gen. St. § 1416. This section restricts the power of railroad corporations to execute mortgages of the franchises and property to the extent that they cannot create a lien superior to that of judgments obtained against them for personal injuries incurred in the exercise of their franchises. See *Mor. Priv. Corp.* § 1120. When, therefore, the Charlotte, Columbia & Augusta Railroad Company, in 1883, entered into this first mortgage contract, and thereby covenanted with the trustee to give the bondholders, secured by the mortgage, a first lien on all of its property and franchises in South Carolina, this must mean subject to the law now of force in this state. And as the law of 1882, then in force, provided that certain judgments obtained whenever a cause of action shall arise against any railroad corporation shall have lien which shall take precedence of any mortgage, this provision entered into the mortgage contract. The lien of the mortgage is declared subordinate to such judgment liens; and, in accepting the mortgage under these circumstances, the mortgagee gives his assent to this. The lien of the mortgage is not displaced. It is defined and restricted with full notice to the mortgage creditor.

Is the judgment in question one of the class of judgments secured preference by this section of the General Statutes? Was it obtained in a court of competent jurisdiction, upon a cause of action for which the mortgagor was liable? The injury was received in the state of Georgia. The track upon which the injury was received was that of the Georgia corporation. The persons through whose negligence the injury was incurred were in the employment of the Richmond & Danville Railroad Company, and not under the control of the Charlotte, Columbia & Augusta Railroad Company. The petitioner was

carried upon a ticket issued by the Richmond & Danville Railroad Company, not of the mortgagor company. Under these circumstances, did the court which rendered this judgment have jurisdiction over the subject-matter and person in the suit?

Although the Charlotte, Columbia & Augusta Railroad Company held a charter from three states, and was incorporated by each, for the purposes of contracting, suing, and being sued, it is a single corporation in fact and in law. *Mor. Priv. Corp.* § 996; *Stone v. Trust Co.*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191; *Graham v. Railroad Co.*, 118 U. S. 161, 6 Sup. Ct. 1009. The action is for a tort,—a transitory action,—and could be brought wherever the defendant could be served. The right of action was not confined to the territory of the state of Georgia where the injury was received. *Dennick v. Railroad Co.*, 103 U. S., at page 18; *Railroad Co. v. Babcock*, 154 U. S. 196, 14 Sup. Ct. 978. The plaintiff in the action was a passenger, holding a return ticket from Trenton, in South Carolina, to Augusta. He was injured by the common carrier while in possession of that ticket, and on the train because of that ticket. But this carrier was the Richmond & Danville Railroad Company. The train and the agents on the train were in the control of that company, and not of the company defendant in the suit at law. Does this relieve the defendant? A railroad corporation accepting and operating under its charter assumes duties to the public. Among these, perhaps, the chief of them is the safe carriage of passengers and freight. The sanction for the performance of these duties is pecuniary responsibility to the parties injured. In consideration of the public grant, it contracts to exercise its privileges and perform these duties. When, therefore, instead of doing this itself, it, of its own volition, and for valuable consideration, executes a lease to another corporation substituting that other in its place, it cannot free itself from the obligations it has incurred without the consent of the power creating it. It cannot escape from responsibility for the acts of its lessee. Were it otherwise, the lessor would enjoy an income from the use of its franchises, and be free from the burdens which these franchises impose.

The Richmond & Danville Railroad Company were lessees for 99 years of all the property and franchises of the Charlotte, Columbia & Augusta Railroad Company. It is the settled law of South Carolina that a railroad company clothed with a franchise cannot escape the performance of the obligations arising from that franchise, or from the general law of the state, by a voluntary surrender of its property and franchise into the hands of a lessee. *National Bank v. Atlanta, etc., Ry. Co.*, 25 S. C. 222; *Harmon v. Railroad Co.*, 28 S. C. 404, 5 S. E. 835. In this case the lessor was held responsible for cattle killed by the negligence of the agents of lessee. *Hart v. Railroad Co.*, 33 S. C. 427, 12 S. E. 9. This was an action against this same corporation, the Charlotte, Columbia & Augusta Railroad Company, for personal injuries received from the negligence of employes of the Richmond & Danville Railroad Company, its lessee, under the lease above referred to. *Bouknight v. Railroad Co.*, 19 S. E. 915, the case at bar, in which, after a learned and exhaustive argument, reviewing

all previous cases, the court adhered to its previous rulings, and held the action well brought, confirming the judgment below. The same rule exists in Georgia. The original obligation of a railroad corporation to the public cannot be discharged except by legislative enactment, consenting to and authorizing the lease, with an exemption granted to the lessor company from liability. Legislative consent to the lease is not sufficient. There must be a release from the obligation of the company to the public. *Singleton v. Railroad Co.*, 70 Ga. 471, 48 Am. Rep. 574, and notes; *Railroad Co. v. Mayes*, 15 Am. Rep. 678. The same doctrine is laid down by the supreme court of the United States in *Railroad Co. v. Brown*, 17 Wall. 450, affirmed in *Railroad Co. v. Jones*, 15 Sup. Ct. 136. There are authorities which take an opposite view, notably *Arrowsmith v. Railroad Co.*, 57 Fed. 165. But the conclusion here reached is sustained in the courts of Georgia, where the cause of action arose, and in South Carolina, where the judgment was rendered. Apart from any general principle of law, an examination of the lease between the Richmond & Danville Railroad Company and the Charlotte, Columbia & Augusta Railroad Company will show that the lessee was conducting this road wholly in the interest of the lessor, and to this extent occupying the place of its operating agent. The covenants of the lease on the part of the lessee are that it will appropriate and apply the whole of the receipts, income, and revenues derived from the use and operation of the said demised lines to the purposes and in the manner following, that is to say: (1) To operating expenses, cost of new rolling stock, improvements and betterments on the property, payment of all claims and charges now or hereafter payable by the lessor growing out of the use of the property prior to the lease, premiums of insurance, and all taxes leviable on the property. (2) The payment of the necessary expenses, not exceeding \$1,500 per annum, to keep up the corporate organization of the lessor. (3, 4, 5, and 6) Payment of interest on bonds secured by mortgages of the lessor, dated May 1, 1867, September 1, 1869, October 15, 1872, and the mortgage of July 1, 1883. (7) "Any and all residue of said receipts, income, and revenues remaining after each and every of the above mentioned and specified payments have been made shall be paid over to the said party of the first part (the lessor) and be by it applied to the payment of dividends upon its capital stock, as its board of directors may direct." "*Qui sentit commodum sentire debet et onus.*"

In his clear and forcible argument, the counsel for the trustee of the first mortgage and the purchaser contended that this judgment does not come within that class of judgments protected by the South Carolina statute, and, even if it were such a judgment it cannot operate but as *res inter alios acta*, the trustees not being parties to the action; that they have the right to inquire into the facts on which the verdict was based, and upon such inquiry to set it aside. Sustaining his first proposition, he calls attention to the stress laid on the cause of action. Not only are these words used three times in the section, but the lien of the judgment is made to relate back to the date of the origin of the cause of action. The conclusion is that the statute confines itself to causes of action originating in this state.



This construction he contends is strengthened by the fact that the section is a part of the chapter prescribing regulations for the prevention of accidents, and concerning the responsibility therefor, all of which are local in their coloring. A suit can be maintained in South Carolina upon a cause of action originating in Georgia, and the Charlotte, Columbia & Augusta Railroad Company is liable to be sued in its corporate name in any of the states incorporating it. Wherever, by either the common law or the statute law of a state, a right of action has become fixed and legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties. *Dennick v. Railroad Co.*, 103 U. S. 18. In *Railroad Co. v. Babcock*, 154 U. S. 197, 14 Sup. Ct. 978, the action was for the death of a man killed on the railroad in Montana. The law of Montana gave a right of action. The suit was brought in Minnesota. Not only was the jurisdiction maintained, but the recovery was governed by the laws of Minnesota. The statute of South Carolina is very general in its terms: "Whenever a cause of action shall arise against any railroad corporation"; "and such cause of action shall be prosecuted to judgment,"—that is to say, judgment in this state. These are the only conditions,—a cause of action existing, cognizable in South Carolina; a suit thereon prosecuted to judgment in this state.

His second proposition is that this judgment is *res inter alios acta*, and can be challenged by those claiming under the mortgage. The cause of action upon which this judgment was had was cognizable only in a court of law. The proceedings were in a court of law. To these proceedings the mortgage trustees were not only not necessary parties; they would have been improperly made parties, and the joinder would have been demurrable. When the mortgagees took this mortgage, they did so with notice of the priority of this kind of judgment, obtainable only in this way,—a way in which they could not be parties,—and with that notice and its consequences they accepted the mortgage. But this does not deprive the mortgage creditor of his property without due process of law. When, in marshaling the assets of this insolvent railroad company, the mortgage creditors and those claiming through them are met by this judgment and its claim to priority, they have the right to examine it, to look into the cause of action, to ascertain when and where the action was brought, to know if the conditions of the law existing when their mortgage was executed have all been complied with. They have the right to inquire into the jurisdiction of the court, and, above all, they are entitled to know that there was no fraud or collusion or gross neglect in obtaining the judgment. But, when all these are established, this judgment, when duly pleaded and proved in the court of the United States sitting in South Carolina, has the effect, not only of *prima facie* evidence, but of conclusive proof of the rights thereby adjudicated. A refusal to give it force and effect in this respect, which it has in the state in which it was rendered, denies to the judgment creditor a right secured to

him by the constitution and laws of the United States. *Huntington v. Attrill*, 146 U. S. 685-686, 13 Sup. Ct. 224.

The judgment of the state court is produced in these proceedings, not in order to establish a demand against the mortgagees or their property, or to assail the validity of their mortgage, but for the purpose of showing that the claim of the petitioner comes within the protection of the South Carolina statute. It is entitled to full faith and credit. "When such a judgment is presented to the court for affirmative action, while it cannot go behind the judgment for the purpose of examining into the validity of the claim, it is not precluded from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it." *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 293, 8 Sup. Ct. 1370. In *Hassall v. Wilcox*, 130 U. S. 493, 9 Sup. Ct. 590, there is nothing which conflicts with these views. In that case the intervener claimed a lien prior to the mortgage under a statute of Texas, creating a mechanic's lien, and giving it priority. The statute was of force when the mortgage was executed. The proceedings for establishment of the lien were instituted long after that date. The supreme court of the United States held that the trustees of the mortgage had the right to come into the circuit court of the United States, and contest the priority of the lien, and, as the claim originated after the mortgage was made, to compel the intervener to prove affirmatively in that court the existence and priority of his lien under the statute of Texas. He failed to do so. On the contrary, the record showed that under the law of Texas he had no lien. The judgment was attacked because obtained by fraud and collusion upon a note without consideration, and in a suit brought after the time permitted in the statute. In the case at bar the purchasers, exercising the right of trustees of the mortgage, have come into this court, and have challenged the lien of the judgment, and, in reply to the challenge, have had exhibited to them a judgment against the common debtor for personal injuries, obtained in a suit brought within 12 months after cause of action arose, without shadow of fraud or collusion. The conditions of the South Carolina statute are thus fulfilled.

It is objected that the special master contented himself with the production of the judgment roll, and that he erred in not requiring evidence as to the facts of the case. But the law of South Carolina gave the preferred lien to the judgment. The existence of the cause of action would not have availed, unless it were reduced to judgment in an action brought within 12 months after it originated.

It is urged that the master has given priority to a judgment entered long after the record of the mortgage, obtained upon a cause of action originating several years after the mortgage had been executed, and had become a recorded lien. This is so, but it is not an anomaly in the law. In *Provident Sav. Inst. v. Jersey City*, 113 U. S., at page 514, 5 Sup. Ct. 612, Justice Bradley discusses a law of New Jersey which gave priority to water rates over recorded liens on realty. Passing by the question whether these rates were a tax or an assessment for benefits, he treats the rents imposed for water actually used as valid, on the ground of an implied con-

tract to pay them. The question was as to the constitutionality of the statute, passed in 1852, giving such rents, due under such a contract, priority over all mortgages. The mortgages were made in 1863 and 1869. The water rents were due in 1871. The case came up on foreclosure of the mortgages. The learned justice says:

"What may be the effect of these statutes in this regard upon mortgages which were created prior to the statute of 1852 it is unnecessary at present to inquire. The mortgages of complainant were not created prior to that statute, but long subsequent thereto. When the complainant took the mortgages, it knew what the law was; it knew that by the law, if the mortgaged lot should be supplied with Passaic water by the city authorities, the rent of that water, as regulated and exacted by them, would be a first lien on the lot. It chose to take its mortgages subject to the law. It is idle to contend that a postponement of its lien to the water rents, whether after accruing or not, is a deprivation of its property without due process of law. Its own voluntary act—its own consent—is an element in the transaction."

So, in the admiralty jurisdiction, in which the most exact justice prevails, the recorded lien of a mortgage of a vessel is postponed to a claim for damages in a collision occurring months after the execution and record of the mortgage.

The learned counsel also urges that, when this suit and judgment were being prosecuted, the property was in the hands of a receiver of this court. This is an error. The Richmond & Danville Railroad company was in the hands of a receiver. But no receiver was appointed for the Charlotte, Columbia & Augusta Railroad Company until 28th July, 1893, after the judgment was had. This opinion has already exceeded reasonable limits.

It is ordered that these exceptions be overruled, and the report of the special master be confirmed. Let a decretal order be prepared accordingly.

---

CENTRAL TRUST CO. OF NEW YORK v. CHARLOTTE, C. & A. R. CO.  
et al. (WYLIE, Intervener).

(Circuit Court, D. South Carolina. January 5, 1895.)

RAILROAD FORECLOSURE—CLAIMS ENTITLED TO PREFERENCE—RENT OF LEASED LINES.

The L. R. Co. was leased to the C. R. Co., which undertook to pay, as rent, the coupons on certain bonds of the L. R. Co. The lease created no lien on the property of the lessee company for the rent. After the making of the lease, the C. R. Co. mortgaged its road, to secure an issue of bonds. Suit was afterwards brought to foreclose this mortgage, and a receiver of the property of the C. R. Co. appointed; at a time when that company was in default in payment of certain coupons of the L. R. Co., and during such default had paid certain coupons on its own bonds, secured by the mortgage. The receiver refused to operate the leased line, and did not take possession thereof. The C. R. Co. having been sold, a holder of bonds of the L. R. Co. applied for payment, out of the purchase money, of the coupons which were due when the C. R. Co. went into the hands of the receiver. *Held*, that such coupons, as rent of the leased road, did not form part of the operating expenses of the road, and were not entitled to priority over the lien of the mortgage.

This was a suit by the Central Trust Company of New York against the Charlotte, Columbia & Augusta Railroad Company and

others for the foreclosure of a mortgage. After a sale of the road, Joseph Wylie intervened, by a petition, asking payment of certain claims. The cause was heard upon a motion by complainant to strike the petition from the files.

J. S. Muller and S. W. Melton, for petitioner.

Henry Crawford, for mortgage trustees.

SIMONTON, Circuit Judge. This case comes up on a motion to strike from the files the petition in this case, and to set aside the order requiring respondents to answer thereto. The petition was filed in the main cause by a bondholder of the Chester & Lenoir Narrow-Gauge Railroad Company, on behalf of himself and all other holders of coupons of mortgage bonds of the said narrow-gauge railroad company, maturing January 1, 1893, who may come in, etc. He avers in his petition: That the said Chester & Lenoir Narrow-Gauge Railroad Company, a corporation, on 22d September, 1882, executed a lease for 99 years, of all of its property and franchises, to the Charlotte, Columbia & Augusta Railroad Company, another corporation. One covenant by way of payment of the rents thereon reserved was that the lessee company would pay the interest on the mortgage bonds of the lessor company then outstanding. Among these were the bonds whose coupons he holds. That the lessee entered under this lease, and operated the leased railroad until 1st December, 1893, when it refused longer to retain possession of it, and tendered it back to the lessor, and then abandoned it, so that the lessor was compelled to retake possession of the leased premises. That recently the Charlotte, Columbia & Augusta Railroad has been sold, under the decree of this court, foreclosing a mortgage securing the first consolidated bonds of the said last-named railroad company, with a proviso in the decree that all such claims as may be decreed by the court to be prior in lien or equity to the lien of the mortgage foreclosed in said suit shall be paid out of the proceeds of such sale, in priority to said consolidated bonds. That the rent of this road leased to the Charlotte, Columbia & Augusta Railroad Company, accruing from time to time in the shape of maturing coupons on the bonds of the class held by petitioner, was a part of the operating expenses of the Charlotte, Columbia & Augusta Railroad Company, and as such entitled to be paid out of current income, prior to the interest on its bonded debt. That coupons on these mortgage bonds of the Chester & Lenoir road, maturing January 1, 1893, were not paid, in all \$12,250, and have not been paid, but that the current earnings of the Charlotte, Columbia & Augusta Railroad Company, applicable thereto, were diverted to pay coupons of the consolidated bonds of the last-named company, maturing at that time, to the amount of \$15,000. The prayer is that this diversion be now corrected, and the moneys diverted be paid out of the proceeds of sale.

The respondents, the Central Trust Company of New York, upon being served with a copy of the petition, come in and move to strike it from the files, and to vacate the rule to show cause, on four

grounds: (1) That the petitioner, one of several bondholders, has no right to file this petition, as he neither alleges nor shows any request to the trustee of the mortgage to institute the proceedings, or any refusal on the part of the trustee to do so. (2) That the petitioner fails to show that there are any moneys or funds in court, or in the hands of the receivers, from which the coupons mentioned in the petition can be paid. (3) That it appears from the petition and the record in this cause that the coupons mentioned in the petition have no priority, and are not entitled to any priority, over the lien of the first consolidated mortgage of the Charlotte, Columbia & Augusta Railroad Company, foreclosed in this suit. (4) That the petitioner has shown no right to intervene.

This motion is in the nature of a demurrer, based on the whole record. To understand the case fully, certain facts must be noted which are in the record. The Richmond & Danville Railroad Company, a great railroad system, was put into the hands of receivers, by original proceedings in the circuit court of the United States for the Eastern district of Virginia, and by auxiliary proceedings in other districts, including the circuit court of this district. It owned, as a part of its system, a lease for 99 years of the Charlotte, Columbia & Augusta Railroad and its leased lines, the Chester & Lenoir Narrow-Gauge Railroad being one of these leased lines. In July, 1893, the main cause in which this petition was filed was brought in this court by trustees of a mortgage on the Charlotte, Columbia & Augusta Railroad, dated in 1883. The bill sought the foreclosure of that mortgage, and a sale of the property of the Charlotte, Columbia & Augusta Railroad, no claim being made as to the leased lines of lien or otherwise. Receivers were appointed under these proceedings, who took charge of the Charlotte, Columbia & Augusta Railroad only, and who refused to operate the leased lines. A decree was taken under which the property of the Charlotte, Columbia & Augusta Railroad was sold, which sale did not refer to or include any interest in the leased lines. The money in the hands of the court is derived from this sale only.

The first ground on which the motion of the respondents is based is the right of the petitioner to maintain his petition on his own behalf, or on behalf of holders of bonds in like plight with him who shall come in, etc. The position is that the suit should be in the name of the trustee of the mortgage, in the absence of any showing of his refusal or neglect or default. The trustee holds the mortgage for the common benefit of all the bondholders and for their security. To any proceeding seeking to enforce the mortgage he is the proper party in promoting it, and, if he does not appear, his absence must be accounted for by a refusal or neglect on his part to do his duty, or by his default or misconduct. But the position of the petitioner is this: He is proceeding on his coupons, and he produces a promise on the part of the Charlotte, Columbia & Augusta Railroad Company, under its lease from the Chester & Lenoir Narrow-Gauge Railroad Company, to pay to the bondholders the coupons on their bonds as they mature. He contends that this gives to each coupon

holder a right to sue. He sustains his position with a wealth of authorities to the effect "that, when one person makes a promise with another for the benefit of a third, that third person may maintain an action upon it against the promisor in his own name." *Brown v. O'Brien*, 1 Rich. Law, 268; *Schermerhorn v. Vanderheyden*, 1 Johns. 140; *Thompson v. Gordon*, 3 Strob. 196. No further discussion of this point is needed, as the importance of this case calls for a decision of it on its merits.

Passing by this preliminary question, and coming to the merits of the case, the petitioner alleges that the rent of this leased railroad, accruing from time to time, in the shape of maturing coupons on its mortgage debt, was a part of the operating and current expenses of the lessee railroad, and, as such, entitled to payment out of its earnings and income, in priority to the payment of principal or interest of its own mortgage debt; that the payment of coupons on the bonds of the Charlotte, Columbia & Augusta Railroad Company, maturing 1st January, 1893, the coupons on the bonds of the lessor road being unpaid, created a diversion; that now this diversion should be corrected by requiring payment of the pretermitted coupons out of the proceeds of sale of the Charlotte, Columbia & Augusta Railroad, which has been sold for the foreclosure of the mortgage securing the debt whose coupons have thus been improperly paid.

The covenant by the lessor in the lease to the Charlotte, Columbia & Augusta Railroad Company is in these words:

"And the said party of the second part, in consideration of the letting and demising as aforesaid of all the above-described railroad, property, and franchises, with their appurtenances, doth hereby covenant and agree to and with the said party of the first part that they, the said party of the second part, will assume upon themselves the payment of, and will pay, directly to the stockholders of said the Chester and Lenoir Narrow-Gauge Railroad Company, or to their treasurer or agent, annually, a sum equal to an annual dividend of one and one-half (1½) per centum upon the par value of the capital stock of said the Chester and Lenoir Narrow-Gauge Railroad Company; such payments to be made semiannually, in advance, from the date of the transfer of the railroad, property, and premises hereinbefore described and set forth; also, to assume the payment, by renewal or otherwise, of the mortgage bonds of said the Chester and Lenoir Narrow-Gauge Railroad Company; provided, however, that, if the same be paid not by renewal, then the amount of said mortgage bonds shall become a debt due to the said party of the second part by the said party of the first part, which debt shall be secured by a mortgage of all the railroad, property, and franchises hereinbefore described; also, to pay the interest on the mortgage bonds of said the Chester and Lenoir Narrow-Gauge Railroad Company now outstanding, or that may hereafter be issued, regularly, as the coupons attached to said bonds shall mature."

It will be observed that the covenant of the lessee is the consideration for the letting of the road for 99 years. It contains three items,—a dividend to stockholders of a fixed sum semiannually; the assumption of the payment of the mortgage debt; and, as a corollary for this, the payment of the coupons on this debt as they mature. No allusion whatever is made to current earnings. No percentage of them is payable to the lessor, as in *St. Louis, A. & T. H. R. Co. v. Cleveland, C. C. & I. Ry. Co.*, 125 U. S. 658, 8 Sup. Ct. 1011; but it is a promise to pay certain moneys, and to do certain things, absolutely

and at all events. This is a contract between the lessor and lessee upon the responsibility of the latter, secured by no lien, subject to all the contingencies of business. After this contract was made, the lessor company, for a present valuable consideration, gave a lien, by way of mortgage of its own property, to the complainant in this case. This was recorded, and gave a paramount lien. Does this open contract, without lien, displace the recorded lien, which gave a vested right? The language of the supreme court of the United States in *Kneeland v. Trust Co.*, 136 U. S. 97, 10 Sup. Ct. 950, must be borne in mind in considering this question.

"Upon these facts we remark, first, that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because, in a few specified and limited cases, this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens."

The petitioner claims that these payments on this lease were a part of the operating expenses of the Charlotte, Columbia & Augusta Railroad, and as such they are entitled to the equity established, first, in *Fosdick v. Schall*, 99 U. S. 235, and confirmed by a long line of subsequent decisions of the supreme court of the United States. See cases collected in *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S., at page 673, 8 Sup. Ct. 1011. The doctrine is this: Railroads are of great public benefit. They are clothed by the public with valuable franchises. These franchises are bestowed upon them in order to promote prompt and easy communication between the several portions of this country. To maintain and preserve its usefulness, the railroad must be kept a going concern. Whatever expenditures are absolutely necessary to this end are always protected by the courts of equity, even against vested liens when the latter seek the aid of that court. In effect, the holders of these liens take them subject to this equity. But it is not every expenditure made by a railroad company in aid of its operations, nor every contract extending and widening its field of operations, which is entitled to this equity. The debt incurred or the expenditure made must be necessary to keep the railroad a going concern,—such a debt or such an expenditure as without it or one like it, the road would

cease its operations. *Thomas v. Car Co.*, 149 U. S. 111, 13 Sup. Ct. 824. The language of *Fosdick v. Schall* is "necessary operating and managing expenses, proper equipment, and useful improvements." In *Kneeland v. Trust Co.* the language is "a few specified and limited cases." In *Bound v. Railway Co.*, 7 C. C. A. 322, 58 Fed. 480, the circuit court of appeals discuss an allowance made by the court below for steel rails furnished the railway company, for which notes had been given, payable out of earnings. They reversed the court below, and declared the claim not to be within *Fosdick v. Schall*.

"The claim," says the court, "is quite different from their ordinary and necessary current expenses of operating a railroad, contracted but a short time before the receivership, and which, by the sudden action of the court, are left unpaid."

The court go on:

"The supreme court has recently, in *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, indicated the narrow limits to which an equity court should confine itself in allowing any unsecured claim to displace vested contract liens. Wages due employes, current operating expenses, current balances of ticket and freight money arising from indispensable business relations, and similar current debts accruing within 90 days, are recognized as among the limited class of claims which, in its discretion, the court may allow to have priority."

The learned counsel for the petitioner insist that the consideration for the lease must be treated as rental, and that the rental of a leased line is a part of the operating expenses of the road. The rental under a lease is no more a part of the operating expenses of a railroad than the rental for cars and locomotives in actual daily use on the road. Yet from *Fosdick v. Schall*, 99 U. S. 235,—the case which recognized and enforced this equity relied on, down to *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, the last reported case on this doctrine the rental of cars necessary to operate the road for six months prior to the receivership was disallowed as a claim on the fund.

In *Railroad Co. v. Humphreys*, 145 U. S., at page 102, 12 Sup. Ct. 787, it was sought to obtain payment of rent due on a leased road from the corpus of property sold by the court. The supreme court state the question:

"Were the petitioners entitled to the relief they prayed, upon any ground heretofore recognized as justifying such an imposition upon the corpus of the property in priority to the claims of lien creditors?"

In refusing the relief, the court again declares what classes of debts are protected under *Fosdick v. Schall*. The court says:

"In *Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 197, 11 Sup. Ct. 61, we said that the doctrine of *Fosdick v. Schall*, 99 U. S. 235, is, 'that a court of equity may make it a condition of the issue of an order for the appointment of a receiver that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver or from the proceeds of sales; that, the property being in the hands of the court for administration, as a trust fund for the payment of incumbrances, the court, in putting it in condition for sale, may, if needed, recognize the claims of material men and laborers, and some few others of similar nature, accruing for a brief period prior to its intervention, where current earnings have been used by the company to pay mortgage debt or improve the property, instead of to pay current expenses, under circumstances raising



an equity for their restoration,—as, for instance, where the company, being insolvent and in default, is allowed by the mortgage bondholders to remain in possession and operate the road long after that default has become notorious, or where the company has been suddenly deprived of the control of its property,—and the pursuit of any other course might lead to cessation of operation.”

See, also, *United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 289, 14 Sup. Ct. 86.

The broad principle is stated in *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 281:

“Rent accruing before the receivership \* \* \* is not entitled to any priority. It is an unsecured liability, and must rank along with all other claims on the final distribution of the assets of the lessee company.”

The only case in the federal court which seems to adopt a contrary doctrine is *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S. 658, 8 Sup. Ct. 1011. In that case the leased line was a part of the main trunk, over which all the business of the road passed, and by which alone the line reached the Mississippi. The terms of the lease were payment of 30 per cent. of the gross earnings of the leased line. The facts of the case did not bear out the contention that these earnings had been diverted, nor enable the court to pass upon the contention that the gross earnings of the leased road were a fund impressed with a trust to pay 30 per cent. of them to the lessor. In consequence of this, the case gave no preference to the claim for rent of this leased line. All that the justice says on the preference of rent is obiter dictum. At all events, it is in conflict on this point with every other case on the subject, and for this reason, apparently, Mr. Justice Brewer alludes to it in *Kneeland v. Trust Co.*, 136 U. S., at page 98, 10 Sup. Ct. 950.

“It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize the fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of displacement of vested liens. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S. 658, 8 Sup. Ct. 1011.”

An examination of the case of *Miltenberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140, will show that it does not sustain the position of the petitioner. It is an authority to the contrary. A claim was made for rent on behalf of the Evansville Railroad. This road ran from Rockville to Terre Haute, 23 miles. The mortgagor had in June, 1872, hired that road by a written lease, terminable by either party on notice, at a rental of \$2,012.50 per month; and the covenants of the lease were to maintain the road in good condition, and to permit the Evansville Company to use six miles of it at a stipulated price. The mortgagee road went into the hands of a receiver, who adopted the lease, used the leased road, and received regularly from the Evansville Company the price it had agreed to pay for the six miles,—\$262.50 per month. The master reported in favor of a claim for all the rent due before as well as after the receivership,—\$56,036.21. Exceptions were taken, and the court ordered an inquiry as to the fair rental value for the use of the property by the receivers

and the value of the delapidation. A new report was made, allowing \$35,318.62. This was confirmed. "It is on the basis, not of the lease, but of the actual value of the use of the property used by the receivers, with the clear assent of all the parties interested." 106 U. S., at pages 312, 313, 1 Sup. Ct. 163, 164. The rent prior to the receivership was not allowed. And at page 311, 106 U. S., and page 162, 1 Sup. Ct., the court indicates what debts due before the receivership may be preferred. It is easy to see that the payment of unpaid debts for operating expenses accrued within 90 days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated in the interests both of the property and the public; and the payment of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, the outcome of indispensable business relations, when a stoppage of such relations would be the probable result in case of nonpayment, involving largely the interests of track and traffic, may well place such payments in the category of payments to preserve the mortgage property in a large sense, and entitle them to be made a first lien.

In the case at bar the receivers of the Charlotte, Columbia & Augusta Railroad Company never took charge of the leased property, nor used it a day. They assumed charge of and conducted the mortgagor road. This itself is a circumstance going to show that the use and control of the leased lines were not necessary in order to keep the mortgaged road a going concern. The consideration expressed in this lease does not appear to be one of those exceptional claims which are given precedence over a vested lien. The motion is granted, and the petition is dismissed.

---

NEW YORK SECURITY & TRUST CO. v. LOMBARD INV. CO. et al.  
(FERREE, Intervener).

(Circuit Court, W. D. Missouri, W. D. January 21, 1895.)

1. MORTGAGE—NOTES MATURING AT DIFFERENT TIMES—PRIORITY—FOLLOWING STATE LAW.

The law of Missouri that where notes of the same date, but maturing at different times, are secured by mortgage on land, the note first maturing is entitled to priority in the security, though it is not resorted to till all the notes are due, and though the first note has been transferred without assignment of the mortgage, will be followed in a federal court as a rule of property, where the land is in that state, and the parties to the mortgage resided there at the time of its execution.

2. SAME—ASSIGNMENT OF NOTE.

L., an investment company, took from D. two debenture bonds of even date, maturing at different times, secured by trust deed on Missouri land, and assigned them with the trust deed to B., and also guarantied payment of interest at maturity and of the principal at maturity, if it was then paid by the maker; if not, then two years after maturity. Though neither the interest nor bonds were paid by the maker, L. paid the interest and first bond at maturity, from its own funds, nothing being said as to whether the money came from the maker, and B. not knowing that it

did not. B., however, indorsed the bond, "Pay to the order of —, without recourse," and delivered it to L. Thereafter L. substituted it for other security held by a trustee for the benefit of purchasers of debentures from L. Before the end of the two years after the maturity of the first bond, when, under the guaranty, L. was bound to pay the bond, it became insolvent. Held, that the transaction between B. and L. as to the first bond was not a satisfaction of the debt, but, what it appeared on its face, an assignment of the bond, carrying with it priority in the security of the trust deed, at least so far as those were concerned for whose benefit it was placed with the trustee in substitution for other security.

**3. NOTICE—TO OFFICERS OF CORPORATION.**

Where the same persons are officers of a corporation and trustees for the benefit of its creditors, notice to them as such officers is not notice to them as trustees.

**Suit by the New York Security & Trust Company against the Lombard Investment Company and others. Heard on the petition in intervention of Leslie C. Ferree.**

This cause is submitted upon an agreed statement of facts, the substance of which is about as follows: The Lombard Investment Company, at its office in Kansas City, Mo., took from one Donaldson two debenture bonds, of date February 1, 1889, payable to David H. Ettien, as trustee,—one for the sum of \$2,000, and the other for \$9,000; the \$2,000 bond running three years, and the \$9,000 bond running five years,—with interest coupons attached, payable semiannually, secured by a deed of trust on real estate situated in Kansas City, Mo. These bonds the Lombard Investment Company transferred by indorsement on the 4th day of February, 1889, to Daniel Bushnell, of Pittsburgh, Pa., with a guaranty of payment of the coupons at their maturity, and also to collect at its expense, and pay over, the principal, at maturity, provided the same was paid by the maker, and, in default of payment by the maker, to collect and pay over within two years from the maturity of the principal sum. Accompanying this transfer, the company also assigned the deed of trust to said Bushnell. On the 1st day of May, 1889, the said company made an indenture agreement with Benjamin Lombard, Jr., James L. Lombard, and H. W. L. Russell, as trustees, which set out that the said company, desiring to issue and sell its debentures, "secured by pledge of real-estate mortgages and other evidence of indebtedness, secured by real estate," the said trustees were designated to hold the collateral securities of said company, "to be held by the said trustees in trust for the benefit of the purchasers of said debentures." This indenture contained the following provisions: "Whereupon said trustees shall indorse their certificate of such fact upon debentures, not exceeding \$1,000 for every \$1,050 of securities so transferred to them. Each series of debentures shall be wholly independent of any other series in the matter of securities, and said trustees shall not certify or countersign any debentures for which they do not hold at least five per cent. of securities of real estate in excess of the bonds so countersigned. It is understood and agreed that, when securities or real estate shall be placed in the hands of the trustees under this trust as collateral for debentures, the company may have the right to withdraw such securities or real estate, and substitute in its stead other securities or real estate which, in the opinion of the company, have equal value. It is agreed that, whenever the said Lombard Investment Company shall produce and surrender any of the debentures which have been countersigned by said trustees, the said trustees, when requested by the company so to do, shall redeliver a pro rata share of the securities pledged for the payment of said series, whereupon the debentures so surrendered shall be canceled." Neither the interest coupons nor the principal of said bonds were paid by the mortgagor; but, as the coupons matured, they were paid by the Lombard Investment Company, out of its funds, at its branch office in the city of Philadelphia, although, by the terms of the bond, the principal and interest were made payable at its office in Kansas City, Mo. At the maturity of the first bond for \$2,000, the Lombard Investment Company likewise paid the principal sum to the executor

of the estate of said Bushnell, he having in the meantime died. Nothing was said by either party, at the time of these payments, as to whether or not the money came from the mortgagor,—nor did Bushnell nor the executor know that the moneys so paid were advanced by the Lombard Investment Company; but, at the time of the payment of said first-named bond of \$2,000, the executor made the following indorsement thereon: "Pay to the order of —, without recourse. Joseph Bushnell, Executor of the Estate of Daniel Bushnell, Deceased,"—and delivered the said bond to said company. Thereafter the said company, pursuant to the provisions of the said arrangement with said trustees, presented the same to said trustees, and substituted it for a corresponding amount in value of other securities held by the said trustees. What particular security of like value the company thus withdrew from the custody of the trustees is not known. This \$2,000 note has ever since remained with the trustees, as aforesaid. At the time of the transactions aforesaid, the said trustees were directors and managing officers of the Lombard Investment Company. In June, 1892, said Russell resigned as trustee, and A. D. Rider was appointed his successor, and acted until September 15, 1893, when he resigned, and Sanford B. Ladd was appointed his successor. On the day last aforesaid, said Benjamin Lombard, Jr., also resigned as trustee, and Frank Hagerman was appointed his successor, and said James L. Lombard continued to act as such trustee. Neither said Hagerman and Ladd nor any of the debenture holders had any knowledge of the facts of the manner of the payment of said \$2,000 bond and coupons to the assignee thereof, or the manner of placing said bond with said trustees as aforesaid, until after the appointment of receivers for said investment company, which appointment was made on the 18th day of September, 1893. The said Lombard Investment Company also paid out of its own money the interest coupons on the \$9,000 note, which has ever since the transfer remained the property of said Bushnell and his estate; the interest on said \$9,000 note being paid to August, 1893. The said company and the maker of said notes are wholly insolvent, and the property covered by the deed of trust is now worth not exceeding the sum of \$9,750. The said executor of Bushnell has paid out for insurance and taxes on said property, according to the provisions of the deed of trust, various sums of money stated in the agreed statement of facts. The intervener, Leslie C. Ferree, has qualified as administrator of Daniel Bushnell in the probate court of Jackson county, Mo., as ancillary to the executorship in the state of Pennsylvania. The last note, of \$9,000, and interest thereon since August, 1893, remaining past due and unpaid, the said administrator, Ferree, presents his petition to this court, setting out in substance the facts aforesaid, and asks this court for a determination in advance of a foreclosure sale under said deed of trust as to the respective priorities of the said receivers and the said estate in the proceeds to arise under such foreclosure sale.

O. A. Lucas, for intervener.

Frank Hagerman and S. B. Ladd, for defendant Lombard Investment Co.

PHILIPS, District Judge (after stating the facts). As there are a number of cases of like character with this, growing out of several transactions of the Lombard Investment Company, which this court will be called upon to determine, I have given to the questions of law arising on the agreed statement of facts herein much consideration.

It has been since 1865 the settled law of this state (where the mortgaged property is situated, and the parties thereto at the time of its execution resided) that where several notes of equal date, but maturing at different times, are secured by deed of trust on real property, in a foreclosure proceeding the notes are payable out of the proceeds of the sale in the order of their maturity, and the mere failure or neglect on the part of the holder of the first note to pursue

his remedy on default of payment until all the notes become due does not affect his right of priority in the proceeds, where he has done no act to work an estoppel in favor of the junior notes. *Mitchell v. Ladew*, 36 Mo. 527-534. In that case there were three notes. The mortgagor, Ladew, paid off the first note. Anderson, the payee, transferred by indorsement the second and third notes, which passed by successive indorsements into the hands of the plaintiff. After the second note went to protest, Anderson, being bound as indorser, paid plaintiff the amount due thereon, and took it up, and then transferred the same for value to George Knapp. There was no formal assignment of the mortgage. But the court asserted, what is now the generally recognized rule, that the assignment of the note carried with it the mortgage, as the mere incident of the note, as effectually as if there had been a formal assignment of the trust instrument. So the courts hold that the mere transfer of the mortgage without the debt is a nullity. *Thayer v. Campbell*, 9 Mo. 280; *Pickett v. Jones*, 63 Mo. 195; *Carpenter v. Longan*, 16 Wall. 271. Although Anderson, in the case first cited, the original payee and mortgagee, had, as indorser, taken up the second note, it was held in the controversy between Knapp, to whom Anderson transferred it, and the holder of the third note, that, the mortgaged property not being sufficient to satisfy both notes, Knapp's note should first be satisfied out of the proceeds. This rule has been reaffirmed in the following cases: *Thompson v. Field*, 38 Mo. 320; *Hurck v. Erskine*, Id. 484; *Freeman v. Elliott*, 48 Mo. App. 74,—where it is so held and applied, although the three notes secured by the trust deeds, maturing at different times, were originally made to different payees. See, also, *Manufacturing Co. v. Roeder*, 44 Mo. App. 324; 2 Jones, *Mortg.* pars. 1699, 1700, note 1, and 1701. This being the settled law of the state in respect of the construction and application of mortgages on property situated here, I understand that a like construction and operation will be given thereto by the federal courts, sitting within the state, because the matter is not one of general commercial law, but pertains to the transfer of property; and therefore such rule of construction becomes, in effect, a rule of property. See *Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013; *Etheridge v. Sperry*, 139 U. S. 276, 277, 11 Sup. Ct. 565; *Randolph's Ex'r v. Quidnick Co.*, 135 U. S. 457, 10 Sup. Ct. 655.

Intervener invokes the rule, which obtains in some jurisdictions, that, where the holder of a mortgage securing more than one note assigns one of the notes and the mortgage with it, it would be inequitable for him, after receiving the money on the note so assigned, to come into competition with his assignee, if the mortgage property should prove insufficient to satisfy the claims of both. The case of *Noyes v. White*, 9 Kan. 640, is chiefly relied on. All this case, outside of persuasive discussion, decides, is that where the mortgagee holds two notes, and assigns the one last maturing, together with the mortgage, it implies a contract of election on the part of the assignor that the note retained by him shall be postponed in favor of the assignee of the transferred note. This rule springs from good

faith in equity, as asserted by good authorities. In *Mitchell v. Ladew*, supra, the case of *Gwathmeys v. Ragland*, 1 Rand. (Va.) 466, is cited with approval as a leading case. In that case the deed of trust was executed by A. and wife, to secure the payment of three notes to B. The first note was paid. The second note was transferred by indorsement to Ragland, without any assignment of the deed of trust. The third note was indorsed to Gwathmeys, who took an assignment of the trust deed. The trustee having advertised the land for sale under the trust deed to satisfy Ragland's claim, Gwathmeys interposed by bill in equity to enjoin the sale to satisfy Ragland's claim. The contention was that, as Gwathmeys had taken an assignment of the deed of trust, he was entitled to a preference out of the trust property. The court of appeals affirmed the judgment dissolving the injunction, and held that the deed of trust operated as a security for the payment of the notes in the order in which they fell due.

The case under consideration is to be restrained to its own peculiar facts. Both of the debenture bonds secured by the trust deed were assigned to intervener's intestate. The formal assignment of the deed of trust invested the assignee with no greater security or right than he would have possessed by the mere assignment of the bonds. Being possessed of the bonds and the security, had he again assigned and transferred the note first maturing to a third purchaser for value, without more, no question could be made that the benefits of the mortgage security would have passed as an incident to his indorsee, who, according to the Missouri rule, would be entitled to have his bond first satisfied out of the proceeds of the security. The debenture bond conveyed on its face notice to the purchaser that the bond belonged to a certain series of bonds, and that, to further secure them, there was placed in the hands of designated trustees collaterals held by them, "as a guaranty fund for the payment of these bonds, and are subject to the inspection of the holders of the same at all reasonable times." Indorsed on the bond was expressed the extent and limitation of the guaranty made by the Lombard Investment Company, as the assignor, to guaranty—First, the payment of the coupons attached at the maturity thereof; second, "to collect at its own expense, and to pay over, the principal hereof at maturity, provided the same is paid by the maker; third, "in the event of default being made by the maker, to collect at its own expense, and to pay over, the principal hereof within two years from the maturity of the same, and to pay interest thereon at the rate of six per cent. per annum, payable semiannually, until the principal is paid." In paying off the coupons as they matured, the Lombard Investment Company was but discharging the obligation of its guaranty. But, as to the principal of the bond, no liability thereon attached to the company to pay until two years after its maturity. So that, as between the holder of the bond and the guarantor, the first question is, did the transaction, on its face, in the absence of any statement or declaration by either party, or any common understanding between them, amount, in contemplation of law, to a satisfaction of the debt?

In the consideration of this question, it seems to me it ought to be divested of all assumption of any special equity in favor of the intervener. If the company had taken the two years' time accorded it by the contract of guaranty in which to pay, when the intervener came to enforce his claim, in 1894, he would have found the guarantor insolvent, and he would have had to look to the mortgaged property for the payment of the two notes, with recourse only over against the insolvent estate. So that, should the \$2,000 be enforced against the security, the status of intervener would be precisely as if the guarantor had not paid. With respect of the \$2,000 bond, intervener had the right and power to protect himself as the holder of the mortgage, so as to reserve to himself the sole benefit of the security for the payment, first, of the remaining bond of \$9,000. This he failed to do by any express act. What is the implication, in the eye of the law, from what he did do? He simply indorsed the bond in blank, without recourse, payable to order, and so left it with the Lombard Investment Company. This, *prima facie*, negatived an intent to treat the transaction as a payment and satisfaction of the debt. The indorsement in blank of a negotiable note, as this was, invests title in the holder; and, although without recourse, it implies that, while the indorser declines to assume any responsibility, yet, "by the very act of transferring it, he engages that it is what it purports to be,—the conveyed obligation of those whose names are upon it. He is like a drawer who draws without recourse, but who is, nevertheless, liable if he draws upon a fictitious party or one without funds." 1 Daniel, Neg. Inst. par. 670. As said in *Dodge v. Trust Co.*, 93 U. S. 383:

"Such parties may either pay in satisfaction of the note, or pay and hold it as by a transfer, leaving it an existing security. It can therefore make no difference to the holder whether, when taken by a stranger, it is taken and held as upon a transfer, or in satisfaction of the instrument. The negotiability of a bill or note remains after maturity, as before, subject to the equities between the parties."

Such being the legal intendment of the indorsement made by intervener, it is questionable whether it would have been competent for him to undertake by parol testimony to give to the written indorsement any other effect. *State v. Hoshaw*, 98 Mo. 358-361, 11 S. W. 759. In the case of *Champion v. Investment Co.*, 45 Kan. 103, 25 Pac. 590, it was held that where the investment company took and negotiated through A., acting for and on its own behalf, mortgaged securities, and, on the maturity of the first interest coupon, advanced the money therefor out of its own funds, and the holder thereupon delivered up to the company, uncanceled, the coupon, the investment company was entitled to participate pro rata in the proceeds of the mortgage property with the holder of the principal bond and remaining coupons. In that case, however, stress is laid by the court upon the fact that the payee of the coupon had notice of the fact that it was the custom of the investment company to pay the coupons at their maturity, without having collected from the obligor. Nor was there in that case, as here, any guaranty on the part of the company to see that payment was made on the coupons at maturity.

But the court does assert the principle that "the transfer of the coupon from the plaintiff to the investment company was presumptively a transfer of title." What difference in principle can be distinguished against the *cestuis que trustent* of the receivers in this case, where the Lombard Investment Company, out of its own money, paid to intervener the amount of the principal debt two years before its obligation to pay attached, and without any inquiry on the payee's part as to whether or not the mortgagor had paid it? At the time of the payment to the Lombard Investment Company, the relation of creditor and debtor did not exist between it and intervener. And, if he saw fit to accept the money without inquiry whether the same had been paid by the debtor, but, on the contrary, indorsed over in blank and delivered the bond to the company, it does seem to me that he should be held to have intended the broad effect which the law affixes to his indorsement.

It may be, as suggested by counsel for intervener, that if the transaction is to be viewed as not equivalent to a satisfaction of the \$2,000 bond, and that the Lombard Investment Company could be entitled to participate in the mortgage security, a court of equity would not go through the idle ceremony of so decreeing, when the intervener would be entitled to judgment over against the company as guarantor for the debt, the company being insolvent. In reply to which, receivers, representing the estate and all of its creditors, contend that by reason of the transfer by indorsement, payable to order in blank, the intervener put it in the power of the company to again transfer by delivery the bond to any other purchaser, or to employ it as collateral security in any other like series of debenture bonds, and that it was so employed, and therefore other and new rights have supervened. As already stated, the indorser without recourse of a past-due note impliedly warrants that the note is genuine, and that it is what it purports to be on its face,—a living debt. *Bank v. Smiley*, 27 Me. 227; *Challiss v. McCrum*, 22 Kan. 157. Daniel, in his work on *Negotiable Instruments* (volume 1, par. 700), approves the following statement of the rule made in *Lomax v. Picot*, 2 Rand. (Va.) 260:

"An indorsement without recourse is not out of the due course of trade. The security continues negotiable, notwithstanding such an indorsement, nor does such an indorsement indicate in any case that the parties to it are conscious of any defect in the security, or that the indorsee does not take on the credit of the other party or parties to the note. On the contrary, he takes it solely on their credit; and the indorser only shows thereby that he is unwilling to make himself responsible for the payment."

Pursuant to the terms of the agreement between the Lombard Investment Company and the trustees for the debenture holders, securing the right to the company to withdraw any collateral security by substituting in its stead other security which, in its opinion, is of equal value, after the transfer by intervener by indorsement, the company delivered the same to said trustees, in lieu of an equal amount of collaterals then surrendered by the trustees to the company. Thereby the trustees became the holders of said \$2,000 bond for the benefit and use of the debenture holders of that series,



whereby such debenture holders acquired an interest in this apparent security. The bond held by intervenor recited on its face that any security held by said trustees was subject to the right of visitation and examination at all reasonable times; so that, had any such debenture holder interested in the given series, at any time after the substitution of the \$2,000 bond, gone to the trustees, he would have found this bond among the collaterals as security for his bond, with no evidence on its face that it was dead.

But, say counsel for intervenor, at the time of the transaction aforesaid, the trustees were officers of the Lombard Investment Company, and, as such officers, they are to be presumed to have had notice of the manner in which the company reacquired possession of the bond in question, and that the knowledge so obtained by them as officers of the company affects them as trustees. I do not so understand the law. The office of director or other officer of a corporation, and that of the trusteeship, were entirely separate and distinct. The knowledge or notice such trustees may have acquired in the performance of their duties would not be imputable to the corporation. *Johnston v. Shortridge*, 93 Mo. 227-232, 6 S. W. 64, and citations. The converse of this proposition must logically be true,—that the information acquired by the corporation officers while acting for it cannot be imputed to the trustees, so as to bind the beneficiaries of the trust. Furthermore, all the knowledge the officers of the investment company had was that the money had not been paid by the mortgagor, but the same in fact was advanced by the Lombard Investment Company; and we have already maintained that the manner of the transfer of the bond by intervenor precludes the inference that he himself regarded the bond as satisfied.

Whatever else may be said or held respecting the rights and equities of intervenor against the Lombard Investment Company, as against the holders of the debenture bonds of the series in which the said \$2,000 bond was substituted with the trustees, it does seem to me that the facts present an apt instance for the application of the equitable rule that, where one of two innocent persons must suffer a loss consequent upon the wrongful act of a third person, the loss must fall on him who put it in the power of the third person to do the wrong. *International Bank v. German Bank*, 71 Mo. 183. The elaborate discussion of this just rule by so distinguished a jurist as Judge Napton, in the case last cited, leaves nothing to add in its application to the case in hand. It concludes, in my humble opinion, the right of intervenor to be declared a prior lienor as to the bond held by him. A decretal order will be entered, on the agreed statement of facts, in conformity with this opinion, allowing to intervenor a preference as to taxes paid by him on the property, and also as to insurance paid by intervenor.

## FIELD et al. v. HASTINGS &amp; BRADLEY CO. et al.

(Circuit Court, N. D. Iowa, W. D. January 3, 1895.)

## 1. EQUITY PLEADING—BILL OF DISCOVERY—SUFFICIENCY OF ANSWER.

Since parties in interest have been made competent to give testimony as witnesses, bills for discovery have become obsolete, save in exceptional cases, and the rules applied to answers in cases wherein discovery was sought, under the former practice, are not now the proper guides for determining the sufficiency of an answer.

## 2. SAME.

A bill in equity charging fraud should state the facts relied on with sufficient particularity to justify the conclusion, and to apprise the defendant of what he must meet in the way of evidence; but this should be done without undue minuteness of detail, and, if the bill contains details of evidence not necessary to be averred as matter of sufficient pleading, an answer which fairly meets the general facts properly pleaded in the bill will not be held insufficient simply because it does not fully admit or deny every matter alleged, so as to relieve the complainant of the necessity of adducing evidence.

## 3. SAME—IMPERTINENCE.

A creditors' bill alleged the recovery at law of a judgment against the principal defendant. The answer of two of the defendants other than the judgment debtor averred that the court had no jurisdiction to render such judgment at law, for reasons which in effect amounted to an allegation that the court had decided erroneously one of the issues in the case. *Held*, that such allegation was immaterial, and should be stricken out as impertinent.

This was a creditors' bill by Marshall Field and others against the Hastings & Bradley Company and others. The defendants having answered, the complainants except to the answers for impertinence and insufficiency.

Chase & Dickson, for complainants.

E. C. Roach, for defendants.

SHIRAS, District Judge. In the bill filed in this case the complainants aver that on the 22d day of May, 1894, they obtained judgment on the law side of this court for the sum of \$2,019.27 against the Hastings & Bradley Company; that execution thereon has been duly issued, and returned unsatisfied; that the judgment defendant has made a fraudulent transfer of its property to its co-defendants, the details of the transaction claimed to be fraudulent being set out at length. The bill prays a decree setting aside the alleged fraudulent transfers of property, and expressly waives answer under oath. The defendants having filed answers to the bill, the complainants except thereto for impertinence and insufficiency, and upon the questions thus presented the case is now before the court.

In support of the exceptions are cited the rules laid down in regard to answers filed to bills for discovery. When it was necessary to resort to equity in order to obtain the testimony of a party interested in a matter in suit, courts, in order to compass the purpose sought, enforced the rule that a party must answer fully the statements of fact contained in the bill, and must make complete discovery of all

facts within his knowledge pertinent to the matters in issue. A party thus called upon to answer was in fact called upon to give testimony, and an answer which might be entirely sufficient as a pleading might be held insufficient when viewed in the light of being a response to the interrogatories in the bill contained. The answers in the case now before the court are not to be viewed in the latter light. As parties in interest are now made competent to give testimony as witnesses, all need for a resort to a bill for discovery is done away with, except possibly under peculiar, and therefore exceptional, circumstances. Thus in *Preston v. Smith*, 26 Fed. 884-889, *Brewer, J.*, said:

"I do not understand that a bill can be sustained solely for the sake of discovery; at least, that is the general rule. Indeed, bills of discovery are rarely, of late, resorted to."

In *Ex parte Boyd*, 105 U. S. 647, 657, it is said:

"It follows, then, that although at one time courts of equity would entertain bills of discovery in aid of executions at law, because courts of law were not armed with adequate powers to execute their own process, yet the moment those powers were sufficiently enlarged by competent authority to accomplish the same beneficial result, the jurisdiction in equity, if it did not cease as unwarranted, would at least become inoperative and obsolete. A bill in equity to compel disclosures from a plaintiff or a defendant of matters of fact peculiarly within his knowledge, essential to the maintenance of the legal rights of either in a pending suit at law, would scarcely be resorted to, unless under special circumstances, now, when parties are competent witnesses, and can be compelled to answer under oath all relevant interrogatories properly exhibited."

The bill in the case now before the court is not merely for discovery, but is for substantial relief, and is therefore maintainable in equity; but it is also true that in determining the sufficiency of the answers the rules applied to answers in cases wherein discovery was sought under the practice formerly in force, but now practically obsolete, are not now the proper guides for determining the sufficiency of an answer. As already stated, the bill expressly states that the defendants are not required to answer under oath, and therefore, under the provisions of equity rule 41, unless the case is set down for hearing on bill and answer, the answer cannot be held as evidence for the defendants; and, furthermore, as the bill does not contain any special interrogatories, it is entirely clear that the complainants' bill must be treated as one for relief only, and the sufficiency of the answers is to be determined as a matter of pleading. While it is true that when a bill charges fraud as a basis for relief it should state the facts relied upon with sufficient particularity to justify the conclusion sought to be based thereon, and also to apprise the defendant of what he must meet in the way of evidence, this should be done without prolixity, and without undue minuteness of detail. *Railway Co. v. Johnston*, 133 U. S. 566-577, 10 Sup. Ct. 390; *U. S. v. American Bell Telephone Co.*, 128 U. S. 315, 356, 9 Sup. Ct. 90. If the bill, out of abundant caution, contains recitals of matters which in fact are details of the evidence upon which the complainant relies, and not necessary to be averred as a mat-

ter of sufficient pleading, and the answer thereto, by way of admission, denial, or both, fairly meets the general facts properly pleaded in the bill, it will not be held insufficient simply because it does not fully admit or deny every matter alleged in the bill, so as to relieve the complainant of the necessity of adducing evidence in support of the allegations of his bill. Thus it is alleged in the bill that on the 22d day of May, 1894, the complainants obtained judgment against the Hastings & Bradley Company for a named sum in this court, and in the joint answer of B. L. Richards and the First National Bank it is averred that they have not sufficient knowledge in regard thereto to admit the allegation, and therefore deny the same, and exception is taken thereto on the ground that the defendants should have ascertained the truth of the matter, and answered accordingly. The fact of the rendition of the judgment in question is a matter known to the complainants, and not peculiarly nor necessarily at all within the personal knowledge of the defendants whose answer is excepted to; and the defendants cannot be compelled to search the records in order to ascertain the truth of an alleged fact, the proof of which is fully within reach of the complainants. A large part of the exceptions seem to be based upon the theory that it is the duty of the defendants to fully ascertain the truth of the matters alleged in the bill, and, by admitting them, to relieve the complainants of the necessity of adducing evidence in support of their case. The answers, by admission or denial, meet the substantial allegations of fact contained in the bill, and, being sufficient as pleadings, cannot be held to be insufficient on any other ground. There is, however, one allegation in the answer of B. L. Richards and the First National Bank which is immaterial, and to which the exception of impertinence is well taken. In the fifth paragraph of the joint answer of these defendants it is in substance averred that the court did not have jurisdiction to render the judgment in the law action, because that action was based upon accounts due to C. P. Kellog & Co. and Hibbard, Spencer & Co., as well as on an account due complainants; and it is averred that the accounts of the former parties were transferred to complainants in form only, and were so transferred to create a sum in controversy in excess of \$2,000. In the action at law the fact of the assignment or transfer of the accounts in question was duly averred, and was a matter in issue in that case. The judgment rendered could not have been entered except upon evidence satisfying the court that these accounts had been duly assigned, and were in fact owned by the plaintiffs in that action. The attack now sought to be made on the validity of the judgment at law is purely collateral. The court had jurisdiction over the person of the defendant in that case. The judgment is therefore not void, and it cannot be collaterally impugned. A dismissal of the present bill would not affect the judgment at law, and that is the only relief grantable to defendants in the proceedings now before the court. The argument based upon the proposition that the defendants Richards and the First National Bank were not parties in the law action, and cannot be bound by a pro-

ceeding in which they could not be heard, is not applicable to the question at issue. As a basis for a creditor's bill, it is necessary that the creditor should establish his claim by a judgment at law, and exhaust without avail his legal remedies for the collection thereof. In the present instance the complainants brought an action at law against their debtor, the Bradley & Hastings Company. Proper service was had upon the defendant within the territorial jurisdiction of the court, and upon the hearing in that case judgment was rendered for the plaintiffs, and the same remains unreversed and in full force upon the record. In the bill filed the complainants recite or aver the rendition of the judgment, and the issuance and return unsatisfied of execution thereon. The answer excepted to does not seek to show that the court was not of competent jurisdiction, or that it did not have jurisdiction over the defendant personally, or that there was a lack of proper service of process upon the defendant, or any other matter which would show that upon the face of the record the court was without jurisdiction in the law action; but, in effect, the plea is that the court erroneously found and held that the accounts due Kellog & Co. and Hibbard, Spencer & Co. had been duly assigned to the plaintiffs, so as to confer on them a right of action on the assigned accounts. If the defendants Richards and the bank could be permitted to question or attack the judgment thus rendered, it could not be done collaterally, as is attempted in the present proceeding; but in fact, for the purposes for which the judgment at law is pleaded in the present bill, it is not open to attack in any form by these defendants.

As already stated, it is necessary, in order to sustain a creditor's bill, that the creditor should obtain a judgment at law against his debtor upon his claim. The fact necessary to be shown in aid of the creditor's bill is an existing judgment, valid on its face; and it is not open to a defendant to the creditor's bill to aver that the bill should be dismissed because, if the court at law had correctly decided certain questions of fact and law, the judgment would not have been rendered. In entertaining the creditor's bill, the court in equity is not sitting as a court for the correction of errors, either of law or fact, committed by the court in the law action. The judgment at law, if valid on its face, is sufficient to sustain the creditor's bill, and it is not open to a defendant to the creditor's bill to aver that it was erroneously entered, though valid on its face. The judgment in question was rendered by a court of competent jurisdiction. The defendant being duly served with process, and the judgment being valid on its face, and not being appealed from or otherwise directly attacked, it cannot be impeached in the method sought in the present case. Strictly speaking, the fact to be proven is the existence of a judgment at law against the debtor, valid on its face, and this is proven by the production of the record containing the necessary recitals; and the fact of the existence of the judgment is not disproved by averments to the effect that the court rendering it was misled or mistaken as to the facts of the case. In other words, the question whether the court was mistaken or deceived as to matter of law

or fact, and therefore erred in rendering judgment, is not in issue in this case, and allegations to that effect are immaterial, and must be stricken out as impertinent. It does not follow, however, that the defendants Richards and the bank, who were not parties to the action at law, are bound by the judgment as an adjudication upon matters of fact necessary to be proven against them. The effect of the judgment as an adjudication upon matters of fact is a separate and distinct question from that of the right of the defendants to assert in a collateral proceeding that it was erroneously entered.

The exception to the fifth paragraph of the joint answer of B. L. Richards and of the First National Bank is sustained, but the other exceptions to the answers filed are overruled.

---

ROTHSCHILD et al. v. HASBROUCK et al.

(Circuit Court, S. D. Iowa, C. D. December 31, 1894.)

No. 2,324.

**1. ASSIGNMENT FOR CREDITORS—CUSTODIA LEGIS.**

Property in the hands of an assignee for the benefit of creditors, under a general assignment, who has filed his bond and inventory in a state court, advertised for creditors, etc., pursuant to the Iowa statutes relative to the administration of such trusts, is not in custodia legis, so as to exclude a federal court from acting with reference thereto, or as to the validity of the assignment.

**2. ABATEMENT—ANOTHER ACTION PENDING.**

It is not a good plea in abatement to a bill in equity seeking, in aid of an attachment in an action at law, to set aside, as fraudulent, an assignment for the benefit of creditors, that the same issue—as to the validity of the assignment—is raised by a reply to the answer of the garnishee in the action at law, since the validity of the assignment could not be so, collaterally, attacked.

This was a suit by Emanuel Rothschild and others against J. J. Hasbrouck, M. O. Barnes, and others to set aside certain conveyances, as in fraud of creditors. Defendant Barnes filed two pleas in abatement, to which plaintiffs except.

Cummins & Wright, for plaintiffs.

Park & Odell, for defendants.

WOOLSON, District Judge. The bill herein avers that plaintiffs duly recovered judgment in this court, by action at law, against defendant Hasbrouck, and that in said action defendant M. O. Barnes was duly garnished as a debtor of said Hasbrouck; that said Barnes filed his answer as such garnishee, showing in his possession, realized from sale of goods, etc., owned by said Hasbrouck, an amount exceeding plaintiffs' said judgment; that in October, 1893, Hasbrouck, then a merchant at Humeston, Iowa, with intent to delay and defraud his creditors, and as parts of one and the same transaction, and knowing himself to be insolvent, and with intent to give unlawful preference to three certain creditors (who are made parties defendant to this bill), executed three certain chattel mortgages on his stock of

goods to said creditors, and immediately thereafter, and also as part of said transaction, executed to defendant Barnes a pretended deed of assignment of all his property for the benefit of his creditors, said mortgagees then knowing of said unlawful and fraudulent intent on the part of said Hasbrouck, and participating therein; that said conveyances are fraudulent and void under the statutes of the state of Iowa. Decree is asked declaring said conveyances void, and directing said Barnes to pay out of the said funds in his hands an amount sufficient to discharge plaintiffs' said judgment. Defendant Barnes files his pleas in abatement, averring (1) that in October, 1893, defendant Hasbrouck executed to said Barnes a general assignment for the benefit of his creditors, under the laws of the state of Iowa; that said Barnes at once duly qualified as such assignee, and filed with the district court of Wayne county, Iowa, his bond and inventory, duly gave notice thereof to all creditors, including plaintiffs, and, under the order and direction of said Wayne county court, disposed of said property, and filed in said court a list of all creditors who had filed their claims, and now has in his hands the funds remaining after paying preferred creditors and expenses, subject to the order and direction of said Wayne district court; that said court obtained and has jurisdiction over said defendant as such assignee, and over the said funds in his hands, and said proceedings are pending and undisposed of in said Wayne district court. (2) For further plea, said defendant states that at an action at law pending in this court, and undisposed of, wherein plaintiffs herein are plaintiffs and said Hasbrouck is defendant, this defendant was garnished as a supposed debtor of said Hasbrouck, and there answered, setting up the above-stated facts with reference to said assignment and this defendant's proceedings thereunder, and the pendency thereof in said Wayne district court; and thereupon, and before filing this bill of complaint, plaintiffs herein filed their reply to said answer of this defendant as aforesaid, controverting the same, and asking therein the same relief they herein ask, and same is yet pending in said action.

1. The first point raised by the pleading of said Barnes is as to whether property in the possession of an assignee under a general assignment for the benefit of creditors is, in the state of Iowa, in custodia legis, so that this court cannot act with reference thereto, or as to the validity of said assignment. It is conceded that, if said property is thus in possession of an officer of the state court,—has been drawn within the dominion of said court,—this court ought not to disturb, and would be powerless if it attempted to disturb, the possession of such property. This proposition received extended consideration, and most clear and forcible presentation and application, in *Senior v. Pierce*, 31 Fed. 625, in an opinion written by Judge Love, and concurred in by Judges Brewer and Shiras. If an assignee, carrying into operation within this state a general assignment for the benefit of creditors, is, within the recognized definition of the term as used in this respect, an "officer" of the court wherein he files his bond, and to whom he makes his reports, then

the property in his hands as such assignee is beyond the power of this court, because the same is within the dominion of, and undisposed of by, the state court; and, as to the funds in the hands of such garnishee, it would seem that the plea must be sustained. The question as to whether such an assignee, in whatever state he may be acting, is an officer of that court which has supervision of his acts, has not met with uniformity of answer. To a considerable degree, this contrariety of views may be explained by the differing provisions of statutory enactment in the different states regarding the relation which such assignee sustains to the court to whom his reports are made, and whose direction he follows in the performance of his duties. That receivers appointed by the direct order of the court, and executors and administrators receiving their appointment from the court, are officers of the courts whose appointments they bear, so far as regards the question now under consideration, has passed beyond the point of doubt, and is settled by the decisions of all the courts to which counsel have called our attention. But the assignee, in Iowa, does not receive his appointment from the court; and while, under the statutes of this state, he is subject to the orders of the state court, and may even be removed by that court for causes provided in the state statutes, yet his appointment is wholly the voluntary act of the assignor. The debtor cannot be compelled to make the assignment. Nor can the state court, by any order or decree, obtain control over or possession of the debtor's property, and place it in the hands of such assignee. On the principle that the deed of assignment creates a trust for the creditors of the insolvent debtor, and that the assignee is the trustee thereof, it is claimed that courts of chancery may rightfully assume and exercise that supervisory control and direction which said courts possess over trusts generally, except as to any matters wherein the statutes of the state have declared the manner of the performance by the assignee in the execution of his duties. In *Adler v. Ecker*, 2 Fed. 126, Judge Nelson has considered the question now under consideration; and in a subsequent case (*Lapp v. Van Norman*, 19 Fed. 406) the same learned judge gave further examination to the question, and reached the same conclusion,—that the actual possession by the assignee, under such general assignment, of property of his assignor, is not custodia legis. The first decision was rendered before the enactment of the Minnesota statute as to insolvency proceedings, while the later case was subsequent to such enactment. In *Lapp v. Van Norman*, he says:

It is claimed that the property in the possession of the assignee is in custodia legis, and not subject to seizure by writ of attachment. I do not agree to this. The statute of Minnesota (March, 1881) did not validate all assignments purporting to be made in pursuance thereof, and forbid a judicial investigation; and while I concede that an attachment would not hold the property to satisfy a judgment against defendants unless the assignment is fraudulent and void against the plaintiffs, yet, under the law, the property is not in custodia legis, so as to exempt it from seizure. This instrument is the source of title in the assignee, and its execution is the voluntary act of the debtors, and not a proceeding instituted by law against them.



*Lehman v. Rosengarten*, 23 Fed. 642, arose in the Eastern district of Michigan, and was decided by Judge Brown, now a justice of the supreme court of the United States. The plea in abatement squarely presented the question we are now considering, and was heard on demurrer to such plea. The opinion presents an elaborate analysis of the statute of Michigan, which shows that statute to be in the main identical with the statute obtaining in this state. And the conclusion is reached that property in the hands of such assignee is not in custodia legis. Counsel for defendant have cited the court to but one federal decision which is claimed to hold to the contrary, —the case of *Cleveland Rolling-Mill Co. v. Joliet Enterprise Co.*, 53 Fed. 683. But it should be noticed, that, while the court denied the power of the federal court to interfere with the property described in the bill, the opinion of Judge Gresham expressly states that the sheriff of the Illinois state court had levied on such property under various writs in his hands. The bill sought to restrain the sheriff from selling under his levies, and that the assignee, under state law, be required to deliver to the receiver to be appointed by the federal court, etc. So that, while the opinion indicates the view of the court on the point now under consideration, the decision is abundantly sustained on the other grounds stated, and is not a decision as to this point. *Morris v. Lindauer*, 4 C. C. A. 162, 54 Fed. 23, is another case arising in Michigan. The bill was filed to set aside a mortgage given to secure certain creditors by an insolvent, who soon thereafter executed a general assignment for the benefit of creditors. The bill attacks the mortgage as fraudulent, and that it and the assignment constituted one transaction. Judge Severens, in the course of his opinion, deals with the general point now under consideration, and specially refers to the extended discussion of the principles involved, as they are considered in *Ball v. Tompkins*, 41 Fed. 486. He concludes in harmony with the result reached by Judge Brown in *Lehman v. Rosengarten*, *supra*. The general principle on which *Ball v. Tompkins* is based appears from the following extract:

And this brings us to the pivotal question in the present inquiry: What is the nature and character of the possession of the state or federal court, which excludes the exercise of authority over the subject or thing by the other? From the authorities on this subject (which, in the circuit courts, are not altogether harmonious), and from the reasons for the rule, I apprehend it to be, substantially, that the possession contemplated as sufficient to make it exclusive is that the court, by its process, or some equivalent mode, has, either for the direct purpose of the proceeding, or for some other purpose ancillary to the main object, drawn into its dominion and custody some thing. That thing may be corporeal or incorporeal,—a substance or a mere right. But a controversy, a question, an inquiry, is not such a thing. These may be the subject-matter of jurisdiction in a pending cause, which often proceeds, from the beginning to the judgment, without the court's having taken actual dominion of anything. But there is no exclusive jurisdiction over such a matter. The result may be a judgment which will establish a right, but the court has not had any possession. The pendency of a controversy in a suit in a state or federal court is no bar to a suit in the other court involving the same controversy (*Stanton v. Embrey*, 93 U. S. 548); and each will proceed, in its own course, to a judgment establishing the right.

The control which each court has over its own processes has always been found adequate to prevent mischief from diverse judgments in the several jurisdictions. But, in proceeding on its way, whenever either court finds that the other has already taken actual dominion over some objective thing related to the subject, it will let the thing alone, so long as that dominion is retained, and proceed, if there be enough material besides to support the exercise of its jurisdiction, and the pursuit may reach fruit. If not, it will stop. There are many cases in the Supreme Court Reports where this subject has been discussed and these principles applied. Some of them have already been cited. Others are *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135; *Railroad Co. v. Vinet*, 132 U. S. 565, 10 Sup. Ct. 168.

The case of *Morris v. Lindauer*, *supra*, was appealed to the circuit court of appeals for the Sixth circuit, and the opinion—by Circuit Judges Jackson (now of the United States supreme bench) and Taft, and District Judge Barr—fully sustains and adopts the reasoning and conclusion reached by the court below.

In *Wickham v. Hull*, 60 Fed. 329-331, will be found a logical presentation and résumé by Judge Shiras of the general doctrines largely underlying and controlling the case at bar, although there applied to the matter of estates of decedents.

In 2 Story, Eq. Jur. § 1037, it is said:

The trusts arising under general assignments for the benefit of creditors are, in a peculiar sense, the objects of equity jurisdiction; for, although at law there may, under some circumstances, be a remedy for the creditors to enforce the trusts, that remedy must be very inadequate as a measure of full relief. On the other hand, courts of equity, by their power of enforcing discovery and account from the trustees, and of making all the creditors, as well as the debtor, parties to the suit, can administer entire justice, and distribute the whole funds, in their proper order, among all the claimants, upon the application of any of them, either on his own behalf, or on behalf of himself and all the other creditors.

But, without attempting further to pursue the general cases touching on this matter, we turn to the case of *Kohn v. Ryan*, 31 Fed. 636, which was decided in this district by Judge Shiras in 1887. Ryan had answered, as garnishee, that he held certain funds as proceeds realized from sales of property which had come into his hands as assignee, under a general assignment for the benefit of creditors, executed by the principal defendant, and which funds he held subject to the orders of the state court wherein he had filed his inventory, etc., and that he held no property of said principal defendant, save that which came into his hands by virtue of said deed of assignment. Whereupon the garnishee moved to be discharged. Two points were urged in support of the motion for discharge. The first point is thus stated in the opinion:

First, that the subject-matter of the controversy, to wit, the validity of the assignment, can only be heard and determined in the court having control of the assignment proceedings; the contention being that the provisions of the statute requiring the assignee to file bond and inventory in the district court of the county, and giving that court full authority over the assignee, in effect confers upon that court exclusive jurisdiction over all questions affecting the assignment. The statute of Iowa does not create the right to make an assignment for the benefit of creditors. It simply recognizes, and in some particulars restricts, this right, and provides the method by which the trust created by the deed shall be carried into effect.

And having considered at some length this matter, further, and shown that, by the decisions of the supreme courts of the state of Iowa and of the United States, courts of equity have jurisdiction to entertain proceedings to set aside a will, even though the probate court has allowed it, and administration is in process in such probate court thereunder, the learned judge adds:

If the jurisdiction over estates and wills vested in the probate courts of the states does not oust the jurisdiction of other courts over the question of the validity of the will, why should the control given to the district court of the state in cases of an assignment deprive all other courts of jurisdiction over cases brought to test the validity of the assignment? The argument in support of the exclusive jurisdiction of the probate court is in fact much stronger than in cases of assignment. Before a will can be probated, notice of the hearing must be given, and a contest may be made by parties interested. \* \* \* In case of an assignment the statutes of Iowa do not provide for a hearing upon the question of the execution or validity of the deed, and to secure a hearing upon these questions it is absolutely necessary that an independent proceeding should be instituted; and unless the invalidity of the deed is apparent upon its face, ordinarily, a bill in equity would be the proper mode of attack, especially if the title to realty is involved. The jurisdiction over such independent proceeding to test the validity of an assignment is not limited to the court in which the assignee has filed his bond and inventory, but exists in any court, state or federal, of otherwise competent jurisdiction. [Citing various Iowa and United States court authorities.]

The second point is stated as follows:

Admitting that the state court having statutory control of the assignment proceedings has not, ipso facto, exclusive jurisdiction of the question of the validity of the assignment, nevertheless the assignee and the assigned property are so completely under the control of the state court that a due regard to his duties and obligations, and the comity existing between courts of concurrent jurisdiction, require the adoption of the rule that the United States courts will not compel an assignee to respond to a writ of garnishment, as he may thus be subjected to conflicting orders and judgments, and that in fact the assigned property is practically in the custody of the state court, and that the assignee should not be held to account, upon the process of garnishment, for property or proceeds which he is bound to distribute as directed by the state court.

The opinion is marked with the clearness and vigor of presentation and discussion which eminently characterize all the decisions of that learned judge, and is so satisfactory in the treatment of this question that, although inclined to insert it in full upon this point, I am compelled to content myself with one further extract:

The general rule that one court will not seek to take possession of property already within the possession or control of a court of concurrent jurisdiction is too well settled to need discussion. If a state court, through a receiver or administrator appointed by such court, or by levy of a writ issued to the sheriff or other executive officer of the court, has taken possession of property, the United States court will not interfere with such possession. \* \* \* It will be remembered, however, that, in cases of assignments, possession of the property is not taken under or by virtue of any order or process of court. The assignee derives title and possession from the voluntary act and deed of the assignor, and the state court controls the execution of the trust through its control over the assignee. If it be true that the United States court has jurisdiction to entertain a bill in equity to set aside an assignment on the ground of fraud, then it must have the right to compel the assignee to appear and answer to such bill, or to submit to a decree by default; and, if this be true, then the assignee is liable to be subjected thereby to the same diffi-

culties as arise upon garnishment. The fallacy in the position taken lies in confounding the jurisdiction of the state court over the execution of the trust created by the deed of assignment with the jurisdiction over the wholly distinct question of the validity of the deed of assignment. So far as it now appears, no proceeding to test the validity of the assignment has been brought in the state court, and there is nothing to prevent the United States court, at the suit of citizens of states other than Iowa, from taking jurisdiction of this issue.

The conclusion reached was the overruling of the motion to discharge the garnishee.

Counsel for defendant have cited the court to the case of *Shoe Co. v. Mercer* (Iowa) 51 N. W. 415, decided by the supreme court of Iowa. In that case the plaintiffs brought action at law in the Des Moines district court, Iowa, against one Byrne, attaching property as belonging to defendant. Mercer intervened, claiming that before the levy of the writ Byrne had conveyed to him the property seized under the writ, by general assignment for the benefit of creditors of the attachment defendant. Plaintiff replied, attacking the validity of the assignment deed, as being fraudulent, etc. The intervenor asked the court to instruct the jury—which the court refused—that plaintiffs could not thus collaterally attack the assignment and assignee's right to the property. The supreme court hold the instruction should have been given. In the course of the opinion filed, the court say:

It is likely true, as counsel seem to think, that much depends upon whether or not the property, when taken under the attachment, was in custody of the law, and; if so, much of the contention in support of the present proceeding is removed.

With reference to this question, the court say (page 416):

We think that, without doubt, under our statute, where an assignment is regularly made, and the assignee is in possession of the property for the settlement of the estate, such property is in the custody of the law; but we are not to be understood as holding that an assignment invalid or void, as contravening the provisions of the statute, will operate to place the assigned property in such custody.

This statement of the views of the court, as announced, according to the opinion of the court, is not essential to the determination of the question which the court declare is the controlling element in the case then under discussion, viz. whether a general assignment for the benefit of creditors can, in the courts of Iowa, be collaterally attacked. And we are therefore authorized to regard the statement above quoted as the statement of what the court would have decided, had the point been essential to the determination of the law of the case, rather than an authoritative decision, thereafter to be binding on that court. The cases from the supreme court of the United States cited in the opinion of the court do not touch the merits involved in the above quoted extract from the opinion. These cases are *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355; and *Freeman v. Howe*, 24 How. 450. *Krippendorf v. Hyde* was an appeal from the United States circuit court for the district of Indiana. The main facts, as stated by the court, are that a suit aided by attachment was

brought in the circuit court, and writ levied on goods claimed by Krippendorf, his claim being that he had purchased the goods from the attachment defendant. Krippendorf executed to the marshal, who had taken the goods into his custody, a delivery bond, and received the goods. On his own motion, Krippendorf was made a party defendant, that he might assert his title to the goods, but on plaintiff's motion his name was stricken from the record. Such proceedings were afterwards had as that judgment was rendered in favor of the attachment plaintiff, and various other creditors who had come in with their claims, against the attachment defendant, and the marshal was ordered to sell the goods to discharge these judgments. Krippendorf, being unable to return the goods, paid to the marshal the amount of the appraisement, as stated in his bond, and thereupon filed this bill to restrain the marshal from paying said funds, or any part thereof, to the attaching creditors, and for decree establishing his ownership of the goods; making the marshal, the attachment plaintiffs, and the other creditors all parties. The contest in the court below was as to his right to maintain this suit in the federal court, since he and various creditor defendants were citizens of the same state, and therefore the diverse citizenship was not present, which was claimed to be necessary to sustain the jurisdiction of that court. The court decide the bill to be "an ancillary or dependent bill, supplemental to an original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties"; and the decree of the court below dismissing the bill is reversed, and cause remanded for trial.

Covell v. Heyman, *supra*, was a case which came to the supreme court on writ of error from the supreme court of the state of Michigan. The United States marshal, having an execution, issued from the United States circuit court, levied on certain property as belonging to Adolph Heyman, and took same into his custody. Thereupon the wife of Heyman, claiming this property as her separate, individual property, sued out of the state court a writ of replevin; and the sheriff of such court, assuming the right by virtue of the writ, took the property from the custody of the marshal. The supreme court of Michigan affirmed his right so to do. The United States supreme court state the point before them to be:

The sole question presented for our decision is whether it was error in the state court to permit the recovery of the possession of the property thus held, against the marshal of the United States, for the rightful owner, and whether, on the other hand, it should not have been adjudged in favor of the defendant below, that his possession of the property by virtue of the levy under the writ was in itself a complete defense to the action of replevin, without regard to the rightful ownership.

And they declare that the property in the hands of the marshal, under the writ of the court, was not subject to be taken from him by the sheriff of the state court. In this case the court state the point decided in *Freeman v. Howe*, *supra*:

The point of the decision in *Freeman v. Howe* is that when property is taken and held under process, mesne or final, of a court of the United States, it is in the exclusive custody of the law, and within the exclusive jurisdiction

of the court from which the process has issued, for the purposes of the writ; that the possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer; that any person not a party to the judgment, or suit, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute by ancillary proceedings, in the court whence the process issued, his remedy for restitution of the property or its proceeds, while remaining in the control of the court, but, that all other remedies to which he may be entitled, against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties and the subject-matter. And, vice versa, the same principle protects the possession of property while thus held, by process issuing from the state courts, against any disturbance under process of the courts of the United States; excepting, of course, those cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the constitution and laws of the United States.

It will be readily noticed that in none of the cases thus cited from the supreme court of the United States was the point decided or involved which is contained in the foregoing extract from the decision in the Mercer Case. The only other cases from the United States courts which the opinion in the Mercer case cites are *Adler v. Ecker*, 2 Fed. 126, and *Lehman v. Rosengarten*, 23 Fed. 642, both of which have heretofore been noticed herein, and both of which are adverse to the announcement of the court as given in the Mercer Case, as above quoted. The cases of *Lapp v. Van Norman*, supra; *Morris v. Lindauer*, supra; *Kohn v. Ryan*, supra; and *Wickham v. Hull*, supra,—evidently were not cited by counsel, and have escaped the notice of the court. The cases are exceedingly few in which the federal courts in Iowa have found themselves compelled to differ with the supreme court of the state in matters which have been presented for decision. The high standing justly awarded to that learned court, and which is not restricted within the state boundaries, abundantly justifies this court in giving great weight to the decisions there announced. But, while cheerfully and loyally following its decisions upon matters based upon the constitution and laws of that state, this court finds in the decisions of the supreme court of the United States abundant justification, if not imperative direction, for adopting that view of the general law which commends itself to the judgment of this court, though that view may not be entirely in harmony with the view announced by the supreme court of the state. In the matter above considered the opinion of that court is not a construction of the statutes of the state, but rather its announcement of its deductions or views of general principles applied to the subject, as to which the statute is silent. We may here adopt and use the words of the supreme court of the United States, in a situation very similar to the present, in *Clark v. Bever*, 139 U. S. 96, 116, 11 Sup. Ct. 468, as appropriate to the present situation:

The decision of the state court is not, therefore, to be regarded as resting upon the local statute, but only as expressing the views of that tribunal in respect to \* \* \* principles of general law. \* \* \* We cannot, consistently with our deliberate judgment upon this question of general law, accept the decision in *Shoe Co. v. Mercer* as controlling the determination of the

present case. Upon questions of that character the federal courts administering justice in Iowa have equal and co-ordinate jurisdiction with the courts of that state, although they will "lean towards an agreement of views with the state court if the question seem to them balanced with doubt."

Our attention is called to the closing portion of the decision in *Shoe Co. v. Mercer*, as extracted above, as being a qualification of the general principle in such extract stated, and as justifying, under that opinion, the contention that the supreme court of Iowa would hold the bill herein as permissible under such opinion. It is not deemed necessary to determine this contention, which, however, has much of force, for, under the views hereinbefore expressed, we are compelled to overrule the first plea, as presented by defendant Barnes.

2. As to the second plea,—that this bill cannot be sustained because of the pendency of the action at law, wherein are raised, as between the parties hereto, the same issues which are tendered by this bill,—an order must be entered overruling this plea. The present action must be conceded to be eminently proper, if indeed it be not the only method whereby the deed of assignment can be attacked. In the *Mercer Case*, *supra*, the supreme court of Iowa expressly hold that such an assignment cannot be collaterally attacked. And the doctrine of that case would forbid, in the state courts, such an attack by a reply to the answer of the garnishee. In the *Ryan Case*, *supra*, Judge Shiras, while declining to rule on this point, as not essential to the determination of the question then before him for determination, indicates his views to be in accordance with the rule laid down in the *Mercer Case*, and which is abundantly sustained by authority, state and federal. The bill herein appears to be an ancillary or dependent bill, so far as it relates to the action at law, within the opinion in *Krippendorf v. Hyde*, *supra*. And, being such, it may properly now be presented, and the validity of the chattel mortgages and the deed of assignment here determined. Besides, only by such a bill can the chattel mortgagees be brought in, and the whole matter thus determined. Let an order be entered overruling the pleas in abatement tendered, by defendant Barnes, to which defendant excepts. And defendant is given until next February rule day to plead further herein.

---

#### SUMMERFIELD v. PHOENIX ASSUR. CO.

(Circuit Court, W. D. Virginia. December 21, 1894.)

##### 1. FIRE INSURANCE—PROOFS OF LOSS—BUILDER'S CERTIFICATE.

A policy of fire insurance contained a clause requiring the insured, within 30 days after a fire, to furnish preliminary proofs of loss, containing certain information about the risk, and another clause requiring, if the claim of loss was for a building, that the insured should procure and attach to the preliminary proofs of loss a duly verified certificate of a builder as to the actual cash value of the building immediately before the fire. *Held*, that this requirement was sufficiently complied with by the insured procuring from a responsible firm of builders an itemized estimate of the cost of rebuilding the burned building, signed by them as

architects and builders, but not sworn to, and attached to the preliminary proofs of loss more than 30 days after the fire.

2. SAME—WORKING OF CARPENTERS.

The policy also contained a clause that the working of carpenters in building, altering or repairing the premises, would vitiate the policy. *Held*, that the policy was not avoided, under this clause, by the fact that, on the day before the fire, a carpenter, under instructions to make certain alterations, had gone upon the premises and removed two small pieces of stair rail, no actual connection appearing between the fire and the carpenter's presence or work.

This was an action by Rebecca Summerfield against the Phoenix Assurance Company upon a policy of insurance. The case was, by agreement, heard by the court without a jury.

On the 23d day of February, 1893, the plaintiff took out a policy of fire insurance from the defendant upon a large building in the city of Danville, composed, in the principal story, of three storerooms entered severally from the street, and of three upper stories and an attic, containing numerous rooms arranged for the purposes of a hotel. Two of the storerooms on the principal floor, on a level with the pavement, were occupied for mercantile purposes. All the upper stories of the building were used as a hotel, and so, also, was the third storeroom below, which was used as a hall, office, and entrance room to the hotel above, from which a staircase ascended to the upper stories. The building insured was leased, at the time of the issuance of this policy, to three different tenants, the hotel to one tenant, and the two storerooms to as many other tenants; but the policy was single and entire, covering the building as a whole. The amount for which the policy which is the subject of this suit was issued was \$3,000. Other risks were taken out by the plaintiff on this building to the amount of \$19,500, the total insurance being \$22,500. The proofs show that the value of the whole building insured much exceeded the total amount of the policies upon it, the estimates of different witnesses varying from \$30,000 to \$50,000. The insurance policy on which this suit is brought was for the year ending on the 23d February, 1894. Soon after this policy was taken out the lessee of the hotel gave up the lease, and vacated the parts of the building which he had occupied, but the two storerooms remained in the occupancy of their respective lessees. On the hotel keeper moving out, the plaintiff employed a carpenter to remove the staircase from the office room below, which has been mentioned, intending in the future to lease that room separately. Nothing was actually done towards removing the staircase, except that a workman took off one or two joints of the hand railing. The hotel apartments being then vacant, the carpenter was intrusted with the key of the lower room, in which the staircase was. There seems from the evidence to have been another entrance to the hotel apartments, of the key to which this carpenter had not the custody. A few nights after the lessee of the hotel had vacated the building, and on the night after the pieces of hand railing had been taken off the staircase,—that is to say, on the night of the 7th March, 1893,—a disastrous fire broke out in the upper part of the hotel, and completely destroyed the entire building; the loss being total, one witness stating that the value of all the debris was not as much as \$1,000. After the fire the usual steps were taken, prescribed for such an event by the policy, looking to an adjustment and payment of the loss. These proved to be unsatisfactory to the insurance company, who finally denied all liability for the loss, and this suit is brought to enforce payment.

Among the provisions of the policy were the following, which I shall recite and number:

(1) One clause provides as follows: "Persons sustaining loss by fire shall forthwith give notice of said loss to the company, and shall within thirty days render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon; also the actual cash value of the property, and their interest therein; for what pur-



pose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss; when and how the fire originated; and shall also produce a certificate, under the hand and seal of a notary public, \* \* \* stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary shall certify." It was not contended at the trial that there had been a failure to comply with this provision of the policy, except in a matter claimed by the defense to have been incidental to this 30-days requirement, under a clause of the policy following the one just given.

(2) That clause was, in part, as follows: "As a part of the preliminary proofs of loss, the assured shall, if the claim be for building destroyed by fire, procure the duly-verified certificate of some reliable and responsible builder as to the actual cash value of it immediately before said fire, which shall be attached to and form a part of such proofs, and, if required so to do, shall furnish the company with plans and specifications of the building destroyed, which shall be duly verified by the oath of the assured."

(3) Another clause of the policy provided that the cash value of the property insured shall not be estimated at a greater amount than the cost of replacing it anew, reduced by a fair allowance for depreciation from the use it had sustained.

(4) The policy also contained a clause under the caption of "Builder's Risk," providing that "the working of carpenters \* \* \* in building, altering, or repairing the premises will vitiate this policy," unless permission be indorsed in writing, etc.

(5) Still another clause of the policy declared that "if the premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain, without notice to and consent of this company in writing, or the risk be increased \* \* \* by any means whatever within the control of the assured, without the assent of the company indorsed hereon, then \* \* \* this policy shall be void."

Notice of the fire was promptly given to the agent of the defendant company in Danville, and preliminary proofs of loss were furnished on the 28th of March, the fire having occurred on the 7th of that month. Objection was made on 26th April by the defendant that a builder's certificate of the cash value of the premises at the time of the fire had not been included in the proofs, as required by the policy. Thereupon a paper which the plaintiff claims to have been such a one as the policy required was furnished on the same day on which the objection was received. This paper was an estimate in detail made by a builder of the cost of rebuilding the premises, omitting any deduction for deterioration from the use which the building had undergone. It purported to be an estimate, it was signed by the builder, and was not sworn to by him or by the assured. This paper was afterwards, to wit, on the 12th of June, coupled with and made a part of the supplemental proofs of loss furnished by the plaintiff, and was sworn to by the plaintiff herself on the 13th of June. It is marked "Exhibit 1, Graham," in the record. The language of the caption is: "Estimate of Cost to Rebuild the Summerfield Building on Present Foundation as Before the Fire"; and at the bottom are the following inscriptions: "April 24th, 1893. Graham Bros., Architects & Builders, Danville, Va."

Peatross & Harris and Green & Miller, for plaintiff.

Berkeley & Harrison, Withers & Withers, and Staples & Munford, for defendant.

HUGHES, District Judge (after stating the facts). This is a case of total loss. The property burned was completely destroyed. It had been insured for a total sum of \$22,500, and it was worth, at minimum valuation, \$30,000. In such a case, and in the absence of any charge of perjury, fraud, or incendiarism, the policy itself would

seem to liquidate the amount of loss to be recovered, and to render unnecessary such formal and technical proofs of loss as the policy prescribes, with reference necessarily to cases of partial loss. Policies of the character of the one now under consideration contain numerous important and valuable stipulations, all applicable to cases of partial loss, all binding upon and enforceable between the parties to them, but, so far as they are intended to ascertain the amount of loss, useless and immaterial in cases of total loss. In this latter class of cases to require the observance of such formalities would seem to be unreasonable, and in contravention of the maxim, "*Lex neminem cogit ad vana seu inutilia peragenda*" ("The law compels no one to do useless things"). In cases of total loss, where the value destroyed exceeds indisputably the amount of insurance, the policy liquidates the amount, *res ipsa loquitur*, and dispenses in general with affirmative and formal proofs of loss. But in the present case we have a written contract, and that document requires formal proofs from all persons sustaining losses of every character under it. That contract is binding upon the insured, and she must comply with its stipulations, however technical and perfunctory they may be. The pleadings show that the defendant company refused payment of the loss in this case on five several grounds. At the trial, and in the briefs, however, only two of these grounds were relied on, and it is only these two that need to be examined in this opinion. One of them relates exclusively to the proofs of loss. This ground of defense is that a duly-verified builder's certificate of the cash value of the burned premises just before the fire was not furnished, in compliance with the requirements of the policy. The other ground of defense is that the builder's risk clause of the policy was violated when a workman took off two pieces of hand railing from the staircase in the lower room of the hotel on the afternoon before the night of the fire, and was intrusted with the key of that room. This objection is urged in connection with the clause of the policy described in paragraph numbered 5 in the above statement of the facts, relating to an increase of risk. These two objections will be examined severally. In respect to both objections the case turns wholly on facts; it presents no disputable question of law.

As to the builder's certificate of loss: The question presented is whether the "estimate" of Graham & Bro., dated on the 24th April, and signed by them professionally, giving an itemized account of what the cost of rebuilding anew would be, and furnished the defendant on April 26th, fulfilled the requirements of the policy as set out in the paragraph numbered 2 in the above statement of facts. The defendant contends that this paper was not such a certificate as the policy required, and that it was not furnished in time; that is to say, was not furnished within 30 days after the fire. The policy, in the clause set out in the paragraph numbered 3 of the above statement of facts, indicates that the cash value of the premises before the fire may be established by estimating the cost of rebuilding anew, and deducting from the estimate the probable deterioration suffered by the premises from previous use. Such a paper, suggested

probably by this provision of the policy, prepared by Graham & Bro. as architects and builders, and signed by them professionally, was furnished by the plaintiff on the 26th of April, and was then made a part of her preliminary proofs of loss. The relation of that paper to the present litigation is this: It was furnished by the plaintiff as her statement of the amount of her loss, and it was verified by the signature of Graham & Bro. as builders, and upon their professional responsibility and reputation. I do not think the phrase "duly verified," as used in the policy, necessarily requires an attestation by affidavit. In the clause next preceding that in which this certificate is required, papers there mentioned are required to be sworn to, but an express requirement is omitted in regard to this paper. It is true that the term "verify" applied to legal papers generally means, or implies, an oath; but it is equally true that it does not always, or necessarily, do so. Affidavits are usually made to facts, not to opinions; to actual expenditures, not to estimates of them. It would have been anomalous for this policy to have required affidavit to a certificate merely conjectural on its face. In the case at bar I think that when the plaintiff furnished an estimate of the cost of rebuilding her premises anew, verified by the names of Graham & Bro., and signed as builders, in their professional character, the paper conformed, as to its verification, to the requirements of the policy, and was a "duly-verified certificate." As to whether this paper ought not to have contained an item estimating the deterioration of the building from the use it had undergone before the fire: There is no requirement of such an item in the policy, and the deterioration seems to me to be too intangible a thing to admit of any but the most vague and conjectural valuation. It is not such a matter as a builder can consider as an expert, nor a proper subject for professional estimate. It belongs to that class of subjects which can best be dealt with by negotiation between fair-minded parties in interest. I think the builders acted properly in leaving the vague and intangible item of deterioration, which did not fall within their duties as experts, to negotiation between the parties to the contract of insurance.

It is further objected that, even if this were a valid paper, it was not furnished and made part of the preliminary proofs within 30 days after the fire. The policy requires that the preliminary proofs shall be furnished within 30 days, and it also requires that the builder's certificate of the cash value of the premises burned shall be attached to and made a part of the preliminary proofs, but it significantly omits to require that such attaching and making part shall be done within 30 days. The 30-days requirement is in one clause of the policy, and embraces a category of things that are directed to be done within 30 days. The builder's certificate of cash valuation is in another clause, containing no 30-day requirement, and is put into a category of things which are expressly not required to be done, and some of which could not be conveniently done, within 30 days. All the rules of construction forbid that, in such a case, an inference and implication should be raised for the purpose of work-

ing a forfeiture. On the subject of this builder's certificate, I hold that the estimate of Graham & Bro. was such a certificate as satisfied the requirement of the policy; that it was duly verified; and that, having been furnished and made part of the preliminary proofs on the 26th of April, it was in time, the policy not requiring the attaching and making of it part of the proofs to be done within 30 days.

I come, therefore, to the second and more important contention of the defense, viz. that the work, or "working," which was done on the staircase, and the custody of the key of the room containing the staircase, vitiated the policy. It was not shown at the trial, and it is not contended in the briefs, that the fire which consumed the building originated in the room embracing the staircase, or was actually due to the negligence, or any act, of the workman who has been mentioned. No connection whatever was shown to have existed between the fire and this workman and his work on the staircase. The question, therefore, is simply this: Whether this policy was vitiated by the mere fact that a single workman took off two pieces of the hand rail of the staircase, and had custody of the key of the room in which the staircase was when the fire occurred. Insurers are the draughtsmen of their printed policies. They frame them with the primary object of protecting their own interests, and they do this with the skill of experts. The insured are not in their counsels when these instruments are framed, and know nothing of the language employed in them until the time of contracting comes. They are not experts. They have little, if any, experience of the practical effect of the forms of language employed in the policies. For these and other reasons it has become well-settled law that policies of insurance containing in printed form numerous provisions of the sort embraced in the policy now under consideration must be construed strictly, and most strongly against the insurers. Evidently, the clause of this policy providing for a forfeiture in the event of the "working of carpenters" in altering this plaintiff's building contemplated such work as would really alter the building, and the working of carpenters, in such numbers of two or more, as would really produce the risk which it was the object of the policy to provide against. I cannot bring myself to believe that it would be a liberal or a just construction of this policy to hold that half an hour's work upon an alteration that did not alter, by a solitary workman, was a practical violation of a clause of the policy making the working of two or more carpenters in altering the building a forfeiture of the insurance. No alteration was effected, and there was but one workman. To hold that this was a violation of the policy would be to construe this clause strictly against the insured, rather than strictly against the insurer. I hold that there was no actual violation of this clause of the policy. As to the key, it was that of a room which was an inconsiderable part of the premises that were burned. It was of but one room, and the fire originated in a different and distant part of the premises. The mere possession of the key of one of probably more than a hundred rooms of a building was

not such a change of custody of the building as was contemplated by the policy. I think this objection is not well taken, and must be overruled. Judgment must go for the plaintiff.

=====

**JACKSON IRON CO. v. NEGAUNEE CONCENTRATING CO.**

(Circuit Court of Appeals, Sixth Circuit. January 8, 1895.)

No. 125.

**1. CONTRACTS—NOVATION.**

The J. Iron Co., in 1881, made a contract with the U. Co., by which the former agreed to sell and the latter to buy, for reduction by a concentrating process, certain iron ores of two different kinds, produced by the J. Iron Co., at prices fixed in the contract. It was provided that the price of the ore to be taken and paid for by the U. Co. at the prices fixed should amount to at least \$2,500 per year, payable in equal monthly installments, or the contract might be forfeited. Lands were to be leased by the J. Iron Co. to the U. Co., if desired by it, for the purpose of erecting mills and machinery, at a nominal rent of \$1 per year. The contract contained various stipulations as to the way in which it should be carried out, and provided that the U. Co. might assign it, or any share of or interest in it. Immediately after the making of the contract, the U. Co. sold to the N. Co. the right to take and use one of the kinds of ore referred to, the N. Co. agreeing to take and use only a certain limited amount of ore, to pay the U. Co. a certain amount of stock for the privilege, and to pay to it, or at the N. Co.'s option, to the J. Iron Co., the price stipulated in the first contract for the ore taken and used by it. The N. Co. also agreed not to suffer or permit any violation of or default in the first contract, so far as its operations were concerned, and to perform the same, so far as its operations should make it necessary or proper so to do. The N. Co. entered upon the performance of this contract, took and used ore, and paid the \$2,500 per year, in monthly installments, to the J. Iron Co., until November, 1883, when it ceased its operations and stopped payment. The U. Co. never did anything under its contract. The J. Iron Co. afterwards sued the N. Co. for payments due, under the agreement in the first contract to pay it \$2,500 per year, claiming that the N. Co. had been substituted in place of the U. Co. *Held*, that there was no novation whereby the U. Co. was absolved from its obligation, or the N. Co. substituted in its place.

**2. SAME—CONTRACT FOR THE BENEFIT OF THIRD PARTY.**

*Held*, further, that as the N. Co. contracted only to pay the price of the ore taken by it to the U. Co., or, at its own option, to the J. Iron Co., there was no contract for the benefit of the J. Iron Co. upon which it could sue.

**3. SAME—STATUTE OF FRAUDS — CONTRACT NOT TO BE PERFORMED WITHIN A YEAR**

The J. Iron Co. also alleged that the N. Co. had specially agreed with it, in consideration of its forbearance to enforce immediate payment or forfeit the contract, to make the annual payment of \$2,500 stipulated in the original contract. The only evidence to support this allegation was of an oral declaration by an officer of the N. Co. The contract was, by its terms, to continue 16 years. *Held* that, if any contract arose from such oral statements, it was within the statute of frauds of Michigan, requiring a written memorandum of any contract not to be performed within a year.

**4. SAME—LANDLORD AND TENANT.**

*Held*, further, that no obligation to pay the \$2,500 could be established on the ground of a privity of estate between the J. Iron Co. and the N. Co. as landlord and tenant, since this stipulated payment was the price of ore to be taken, and not rent, which was provided for only by the nominal sum of one dollar, named in the contract.

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Michigan.

This was an action by the Jackson Iron Company against the Negaunee Concentrating Company to recover installments of money claimed to be due upon a contract.

The action below was begun in the circuit court for the county of Marquette, Mich., and was duly removed to the court below on the ground of diverse citizenship. The controversy in this case arose out of two contracts. The first was made on the 14th day of November, 1881, between the Jackson Iron Company, a corporation organized and existing under the laws of the state of Michigan, and the Union Ore Concentrator Company, a joint-stock association organized under the laws of the state of New York. By the terms of said contract, the Jackson Iron Company agreed to sell to the Union Ore Concentrator Company, and the latter agreed to buy from the former, its entire stock piles of refuse low grade ores then accumulated and thereafter to accumulate at its mines in the state of Michigan, which should contain not less than 25 per cent. of concentrated ore, to be used in the works of the vendee company, its assignees or licensees; the price of the finished concentrated product to be, to wit, 45 cents per ton of such concentrated product of all hard or specular ores worked from the Jackson mine, and 35 cents per ton of such concentrated product of all hematite or soft ores worked from the south side mine, payable in cash on the 15th of each month for all ores removed or worked the previous month, the title to such ores to remain in the vendor until payment should be made. The said sale and purchase was to include all the above-described refuse product of said mines already accumulated and thereafter to be accumulated during the 16 years next succeeding September 1, 1882, which should contain 25 per cent. or more per ton of concentrated ore, and the Union Ore Concentrator Company was given the right to commence operations on said refuse piles before September 1, 1882, if it should be in readiness therefor. The ores were to be handled so as not to inconvenience the operations of the Jackson Iron Company, and subject to its approval; and the latter agreed to give the vendee all reasonable facilities for sorting, concentrating, and loading the said ore. The vendee company agreed that all the ore now in the stock piles and sold under the contract should be removed within 16 years from the date named, and, should it fail in any one year from the last-mentioned date to remove as much as 10,000 tons, or to pay to the Jackson Iron Company the sum of \$2,500 annually, payable in equal monthly installments on the purchase price, then said contract, at the option of the Jackson Iron Company, might terminate. But said provision for monthly instead of annual payments was to be regulated in such manner as not to destroy the spirit of the contract, and no default was to be taken without a request for payment, and neglect or refusal to comply therewith. It was further mutually agreed that, in case the Union Ore Concentrator Company should pay during any one year in the aggregate the sum of \$2,500, without having removed sufficient ore to amount to that sum, the surplus should be credited on future deliveries. The Jackson Iron Company also agreed to sell to the Union Ore Concentrator Company, and the latter agreed to buy, any and all of the same class of ores described that could not be profitably shipped or sold for smelting, and all that the vendor company, its successors or assigns, might mine in said mine during the 16 years described, at the same prices, and on the same conditions as before stated. It was further provided that nothing in the contract should be construed to operate to oblige the Jackson Iron Company to deliver or mine any specific amount of ores, or to prevent it from removing the ores, or any part thereof, to any other point or points which might be reasonably convenient for the Union Ore Concentrator Company, should the safety of the mine or mines or the convenience of the vendor company require it; nor was it to be obliged to raise from its mine or mines and deliver to the vendee company any of said refuse ores that it might wish to leave in said mines or use for other purposes than for sale or smelting. And, as the vendee company proposed not only to concentrate ores from said refuse low grade ores, but also to mine ores of the same class

on the same premises, the vendor company granted to it the right to do so within certain reasonable limits for its production. And therefore the vendee company was to be allowed to blast down and mine mixed ores of the quality described for concentrating from any suitable place on its said property, but not in any way to interfere with the operations of the vendor company; the latter to be the sole judge of the convenience and expediency of granting such leave to mine ores. The ores thus mined were to be considered the same as if they belonged to the stock piles of refuse low grade ores, and the vendee company was to pay therefor in the same manner before provided for ores to be taken from said piles. When the vendee company, in its process of excavating and removing the inferior class of ores should open or expose ores suitable for shipment or smelting, the vendor company was to be notified, and all operations at that point were to cease as soon as directed by the vendor company. In case the vendor company considered the process for removing ores to be dangerous or damaging to its property, the vendee company was to cease such operations on receiving written notice from the vendor. Should the vendee company desire to use steam power for its concentrating operations suitable for mills and machinery for carrying on operations under the contract, lands were to be leased by the vendor company to the Union Company or assigns at a nominal rent of one dollar per annum. The Jackson Iron Company agreed that the vendee company might assign said contract, or any share thereof, or interest in or under the same, to the Marquette Concentrating Company, or to such other corporations, companies, or associations as it might see fit, but solely for mining and concentrating ore as herein provided. Subsequent to the making of said contract of November 14, 1881, the Union Ore Concentrator Company, on the 7th of January, 1882, entered into a contract with the Negaunee Concentrating Company, a corporation organized under the laws of Michigan, whereby the first-named company sold to the defendant in this case certain rights under the first-named contract to take, separate, refine, and sell out of and from the hard or specular ores mentioned and described in the first contract, either by mining the same under said contract, or out of and from the refuse or waste piles therein mentioned, so much of said ores sufficient at all times to supply and keep in full operation all mills and machinery which should be erected by the defendant company for the purpose of refining and separating said ore, provided that the same should never exceed 1,000 tons per day of refined or separated ore, and that the defendant company should have no right to mine, take, or use of said ores any more than would be sufficient to keep its mills and machinery to be erected in full operation, nor more, under any circumstances, than sufficient to produce and yield 1,000 tons of separate or refined ore; and the Union Ore Concentrator Company further sold to the defendant company the full and ample right and authority to use all patents and patented machinery now owned by the said vendor company which should be needful or required by the defendant company for the purpose of refining or separating said ores, not to exceed the quantity it can separate or refine, nor to exceed 1,000 tons per day of refined or separated ore. And the Negaunee Concentrating Company agreed to pay to the vendor company for the rights and privileges conveyed in said contract the sum of \$225,000 in and by the issuing and delivery of that amount at par value of certificates of its capital stock, and further agreed to pay to said vendor company, or, at its own election, to the Jackson Iron Company, 45 cents per ton for each and every ton of concentrated ore made, refined, separated, or produced by it; payable in cash on the 15th of each month for all such product of the previous month. All the acts and doings of the vendee company under said contract were to be in strict compliance with all the terms of said written agreement of November 14, 1881, with the Jackson Iron Company. The vendee company was not to be guilty of any violation of said agreement, nor suffer or permit, so far as it or its operations were concerned, any default therein or violation thereof; and it agreed to perform the same on its part so far as it or its operations should make it necessary or proper so to do. The vendee company further agreed not unnecessarily to interfere with the business operations of the vendor company or its assigns; that neither party should have the right to oust the

other, or to occupy any part of the premises mentioned in said agreement upon which the other should have erected any mills, or which should be in active use by said party. It was further expressly understood that the vendee company was not to interfere with or in any way obstruct the vendor company or its assigns in mining or obtaining its or their full supply of ores as specified in its contract with the Jackson Iron Company, dated November 14, 1881, or in using any road or tramways or any rights of ingress or egress to said ores owned or occupied by the defendant company. But the vendor, its assigns or successors, whenever wishing to use said roads or tramways, was to pay one-half the cost of construction.

On the 5th of July, 1889, the Jackson Iron Company filed its declaration in the circuit court for the county of Marquette, Mich., against the Negaunee Concentrating Company, setting forth the terms of the contract of November 14, 1881, between the Jackson Iron Company and the Union Ore Concentrator Company, but averring that said last-named company never entered upon the plaintiff's lands, or took or paid for any of said ores, or built or erected any mills for concentrating ore, or performed any other act or thing to carry out its agreements or the purposes of its organization; but, on the 7th of January, 1882, and between that date and the 1st day of March next thereafter, transferred expressly certain of its rights, and in effect all its rights, to the Negaunee Concentrating Company, the defendant in said suit, and placed said defendant in possession of the premises of the plaintiffs selected by said defendant for the erection of the mills and carrying on of the business described in said contract, and required the defendant to permit or suffer no violation of the covenants and agreements of the said Union Ore Concentrator Company with the plaintiff, to permit no default therein on the part of the said Union Ore Concentrator Company, and to perform the obligations of said last-named company thereunder; that thereafter the defendant built mills on the plaintiff's lands, demanded and received from it all the rights and privileges granted by the plaintiff to the said Union Ore Concentrator Company, and received from the plaintiff, under the terms of said contract, and in all respects assumed, exercised, and received all the property rights granted to the said Union Ore Concentrator Company under said contract, and assumed and discharged all the covenants and obligations to the plaintiff imposed upon and entered into by the said Union Ore Concentrator Company until the default hereinafter mentioned, and accounted to the plaintiff in all things as contracting party, whereby the defendant became bound and liable to the plaintiff, according to the terms of said contract, to take and pay for all said stock piles of accumulated ore during said period of 16 years, and to pay to plaintiff therefor at the rate, at the times, and in the manner aforesaid, and thereby promised, undertook, and agreed with the plaintiff so to do, and, among other things, became bound to, and then and there promised, to pay to the plaintiff the minimum sum of \$2,500 per year, in monthly installments of \$208.33, for each and every year of said period up to the close thereof; but that on the 15th of November, 1883, defendant made default therein, and thence hitherto has disregarded its said promises and obligations, and has failed to make such payments, to the plaintiff's damage in the sum of \$15,000. The declaration then continues with a second count, alleging the terms and conditions of the contract of November 14, 1881, substantially as set forth in the first count, and then sets forth the terms and provisions of the second contract, of January 7, 1882, between the Union Ore Concentrator Company and the Negaunee Concentrating Company, and then, alleging that the defendant under its contract covenanted with the Union Ore Concentrator Company to permit no default by which the contract could be forfeited, upon which the payment to the plaintiff of the \$208.33 monthly, or the removal of and payment for 10,000 tons yearly, became an obligation of the defendant, averred that by such covenant the defendant became obligated to plaintiff, and made a new contract or promise to pay in consideration of a forbearance by plaintiff to sue this defendant or claim immediate payment from it, and a further forbearance for defendant's benefit to terminate the contract; that the promise thus made was not only to pay an obligation of defendant, but to obtain additional special benefits to itself. The evidence disclosed that the defendant, the



Negaunee Concentrating Company, had gone upon the lands of the plaintiff, the Jackson Iron Company, had erected mills and machinery, and had taken out ore from 1882 until 1886; that up to that time the defendant had paid the plaintiff everything due under either contract, but that thereafter no ore was taken out, and no money was paid. A watchman remained in the mill, and looked after the machinery, until about the time this suit was begun, in April, 1889, when the defendant took away the machinery, and abandoned the mill.

George Hayden, for plaintiff in error.

Ball & Hanscom, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

RICKS, District Judge, having stated the case as above, delivered the opinion of the court.

The plaintiff, in the first count of its declaration, proceeds upon the claim of a novation, and the trial judge in the circuit court, so construing it, held that neither by the second contract nor by what transpired between the parties under it was there a novation whereby the Union Ore Concentrator Company was absolved from its liability to the Jackson Iron Company under the original contract. This conclusion is well warranted from the terms of the contracts. The new contract did not take the place of or satisfy the old contract. The chief difference between them was that the defendant had no right to mine soft ores while the Union Company had that right and retained it. Both could have occupied land of the Jackson Iron Company and conducted operations under the two contracts. Under the contract between the Union Ore Concentrator Company and the Negaunee Concentrating Company, therefore, the former made a partial assignment of its rights under the first contract between it and the plaintiff. The plaintiff was in no sense a party to the second contract. The second contract was a partial transfer of rights and a division of the obligations of the Union Company between it and defendant, but without any new and distinct agreement on the part of the plaintiff confirming or permitting a novation. It is true, as contended, that the defendant under the last contract did pay the amount of the monthly installments in pursuance of its contract with the Union Company, and that it did that to prevent default and forfeiture by the Union Company, and to protect itself; but it cannot be inferred from that fact that the plaintiff and defendant entered into a contract by which the defendant assumed and agreed to pay the sum of \$2,500 per annum, and for which consideration the plaintiff absolved the Union Company from the obligations of the first contract, and accepted the defendant as the obligee under that contract. We therefore fully concur with the trial judge that there was no novation to support the first count of the declaration.

Next it is said that the written agreement between the Union Company and the defendant company amounted to a promise on the part of the defendant company to pay the amount stipulated in the contract between the plaintiff and the Union Company to the

plaintiff, and that this, therefore, became a contract for the benefit of the plaintiff, upon which the plaintiff might sue the defendant, on the principle of *National Bank v. Grand Lodge*, 98 U. S. 123; *Hendrick v. Lindsay*, 93 U. S. 143, and other cases. This brings us to consider what the obligation of the defendant company was in respect of the payment of the \$2,500 per year in monthly installments. The obligation, if it existed, arose in this wise: Its contract with the Union Company provided that the defendant should pay to the Union Company, or, at its own election, to the plaintiff, the Jackson Iron Company, 45 cents per ton for each and every ton of concentrated ore made, refined, separated, and produced by it, payable in cash on the 15th of each month for all such concentrated product for the previous month. The same contract provided that the defendant should not occasion or be guilty of any violation of the contract between the Union Company and the plaintiff, or suffer or permit, so far as its operations were concerned, any default therein or violation thereof, and that it would perform the same on the part and behalf of the said Union Company so far as it or its operation should make it proper so to do. The contract between the plaintiff and the Union Company provided, in effect, that the minimum payment by the Union Company each month on account of ore sold to the latter should be \$208.33, or \$2,500 per year, on failure to pay which the plaintiff might terminate the contract; and that, if the ore, actually taken by the Union Company in any month or year, did not equal in its contract price the minimum payment above required, the surplus should be credited on future deliveries. If the defendant became liable at all to pay the \$2,500 a year as minimum royalty or purchase price of ore, it was by reason of its stipulation to perform the contract of the Union Company so far as its operation would make it proper to do so, taken in connection with its agreement to pay 45 cents a ton for ore taken by it. As the \$2,500 was to be treated as a payment of the purchase price of ore taken or to be taken, and as in paying for the ore taken by it the defendant had the option to pay either the Union Company or the plaintiff, as it might elect, there was no absolute agreement by the defendant in its contract with the Union Company to pay the plaintiff this \$2,500. It would fully comply with its contract by paying this sum to the Union Company. The necessary result is that no right of action to enforce such payment could accrue in favor of the plaintiff from the contract between the defendant and the Union Company.

The second count of the declaration proceeds on the theory of an independent promise made directly by the plaintiff to the defendant to pay the \$2,500 per year in monthly installments mentioned in the contract between the Jackson Company and the Union Company in consideration of the forbearance by the plaintiff to terminate that contract, and thus to prevent the defendant from enjoying so much of the rights conferred by that contract as were assigned to it by the Union Company. The averment in the count is that the defendant has repeatedly promised to pay the amount due under the con-

tract, and has induced the plaintiff to rely thereon, and has by means thereof maintained possession of the plaintiff's premises, and has kept in force this contract. The evidence offered to support this count consisted of the oral declaration of the superintendent of the defendant company to an officer of the plaintiff company, that the defendant "would pay up as it had been doing; that the company had no funds to pay with until they could effect some changes in their stockholders, and perfected some machinery they wanted to put in place of old machinery that didn't work well; that the company intended to go on and fulfill its contract, and proposed to hold the land, and they would be greatly favored if the Jackson Company would wait on them, and not press for payment." The plaintiff company did not, as it had the right to do by reason of the default of the Union Company, terminate the contract. We are of opinion that if any contract can be said to have arisen from the conversation above stated, it was within the statute of frauds of Michigan, which renders unenforceable every agreement not in writing that by its terms is not to be performed within one year from the making thereof. How. Ann. St. § 6185. Giving the evidence the construction most favorable for the plaintiff, the contract was an agreement by the defendant to pay during the life of the contract at least \$2,500 a year for the privilege of taking the iron ore and using it, in consideration of the plaintiff's agreement to forbear to forfeit the rights of the Union Company under the contract, and thereby to prevent the defendant company from continuing its operation under its contract with the Union Company. This was certainly an agreement on the part of the defendant to do something which, by its terms, could not be performed within a year, for both contracts had at least 10 years to run. Even if it can be said that the plaintiff could and did fully perform within a year on its part that which formed the consideration of the defendants promise, namely, the forbearance to terminate the contract for a reasonable time, this was not, in Michigan, such a part performance as would take the case out of the statute of frauds. *Whipple v. Parker*, 29 Mich. 369; *Perkins v. Clay*, 54 N. H. 518; *Emery v. Smith*, 46 N. H. 151; *Frary v. Sterling*, 99 Mass. 461; *Reinheimer v. Carter*, 31 Ohio St. 579; *Pierce v. Payne's Estate*, 28 Vt. 34; *Lockwood v. Barnes*, 3 Hill, 128; *Broadwell v. Getman*, 2 Denio, 87; 1 Smith, Lead. Cas. 45, etc.; *Brown*, St. Frauds, § 286. It fully appears, and was conceded by counsel in the court below, that after the alleged promise upon which the second count is based the defendant company took out no more ore, and therefore no recovery could be had against it in *assumpsit* as upon a *quantum valebant*.

The next claim of the plaintiff is that the defendant was in privity with the plaintiff as a tenant, and as such was directly liable to plaintiff to pay and discharge all the obligations necessary to maintain such leasehold interests. It appears that, while the defendant took no ore from the plaintiff's ore pile after the time up to which it had paid in full the monthly payment of \$208.33 as minimum royalty or price for ore, its mill stood on plaintiff's ground, and its ma-

chinery lay there, in charge of a watchman, till just before the bringing of this suit. The land which was occupied by the defendant was rented by the Jackson Iron Company to the Union Company at a nominal rent of \$1 per annum, and, even if there was privity established between plaintiff and defendant by defendant's continued occupancy of this land, it would not involve the payment by the defendant of more than that rent, and would certainly not create the liability sought here to be established on the agreement of the Union Company to pay \$2,500 to the Jackson Company as a minimum payment of royalty or purchase price of the ore to be sold under the contract. The \$2,500 was not to be paid as rent, and cannot be recovered against defendant as such, on any theory of privity of estate. The judgment of the circuit court is affirmed.

---

MILLER v. CHICAGO, B. & Q. RY. CO.

(Circuit Court, D. Colorado. December 29, 1894.)

No. 3,104.

NEGLIGENCE—STIPULATIONS AGAINST LIABILITY.

A railway company organized a relief department among its employes, for the purpose of giving pecuniary aid to those who might be injured or sick. The funds of said department were provided by contributions from the members, the company agreeing to make up any deficiency which might occur in any year. The rates of contribution by the members were such that a deficiency would seldom occur, and in fact was a very rare occurrence. In the application for membership in the relief department and in the contract of insurance a clause was inserted providing that, in consideration of the payments by the company, the acceptance of benefits by a member should operate as a release of all claims for damages against the company. Plaintiff, who was a member of the relief department, received injuries in consequence of the negligence of the railway company, and thereafter accepted benefits as a member of the relief department. Held, that plaintiff's right of action against the railway company to recover damages for such injury was not barred by the acceptance of such benefits.

This was an action by I. E. Miller against the Chicago, Burlington & Quincy Railway Company to recover damages for personal injuries. The defendant pleaded, among other things, an agreement by plaintiff to release in consideration of certain payments made on a contract of insurance. Plaintiff demurred to the answer.

O'Donnell & Decker, for plaintiff.

Wolcott & Vaile and H. F. May, for defendant.

HALLETT, District Judge. Action by a fireman to recover for an injury to his person received while in the service of the company. In the first and second defenses the defendant makes some specific and general denials of matters alleged in the complaint. The third answer is, in substance, that the defendant and its employes organized an association for the relief of employes of the company injured while in the service of the company, known as the Burlington Voluntary Relief Department. The nature and purpose of the organization are not very fully stated in the answer, but counsel has furnished

a copy of the articles of association, and its rules and regulations, which may be regarded as supplying all details necessary to be considered. From this it appears that the association mentioned as the Burlington Voluntary Relief Department is composed of seven similar organizations, organized by seven or more different railroad corporations in different states and territories, which corporations make up the Burlington system. It is modeled upon the relief department of the parent company, which is known as the Chicago, Burlington & Quincy Relief Department, and it accepts the rules and regulations of the latter as its own. The composite organization here in question was formed from all the others for convenience of administration merely, without changing the character of any of the constituent bodies. From the rules and regulations of the parent company it appears that the funds of the association are raised by contributions from employes, ranging from 75 cents to \$3.75 per month, according to the amount earned by the contributing members. The first sum is paid by those who earn not exceeding \$40 per month; the last sum by those who earn more than \$100 per month. If any deficiency arises in the funds thus raised, the companies must make up the amount. The regulations on that subject are here quoted at length:

"(3) The relief fund will consist of voluntary contributions from employes, income derived from investments and from interest paid by the company, and appropriations by the company when necessary to make up deficiencies."

"(14) If during the period prior to the 1st day of January, 1892, or during any one of the successive periods of three years thereafter, the amount contributed by the members of the fund and received from other sources shall not be sufficient to meet the liabilities incurred for such period, the company shall pay the deficiency; and if at the end of any such period there shall be a surplus, after making due allowance for liabilities incurred and not paid, such surplus shall not be used to make up any deficiency in any other such period, but shall be used for the sole benefit of members of the relief fund in such manner as shall be determined by vote of two-thirds of the advisory committee, and approved by the board of directors."

In connection with this provision for paying a deficiency in the funds it should be remarked that the rates paid by members are manifestly intended to cover the cost of insurance, and the deficiency is a contingency not likely to happen. It does in fact happen sometimes, but the amounts thus paid by the companies are inconsiderable. In case of disability and loss of time from accident or sickness, employes who are members of the relief department receive certain sums weekly or monthly, according to the class in which they belong. There is also insurance upon the life of the employe in consideration of other and additional payments, which need not be mentioned in this connection. In the contract of insurance, and set out in the application for membership, there is a provision as follows:

"I also agree that, in consideration of the amounts paid and to be paid by said company for the maintenance of the relief department, the acceptance of benefits from the said relief fund for injury or death shall operate as a release and satisfaction of all claims for damages against said company arising from such injury or death, which could be made by me or my legal representatives."

This clause forms the basis of defendant's third answer. It is alleged that plaintiff was a member of the relief department, and—

"That the acceptance of benefits from the said department for injury should operate as a release and satisfaction of all claims for damages against the defendant company arising from or out of such injuries; that the said plaintiff has subsequently received and accepted the benefits due to him by reason of his membership in said relief department on account of the injury complained of by him in his complaint herein, and the defendant company has paid to the plaintiff the amount of the benefits due to him by reason of his membership in the said relief department on account of said injury, and the same have been received by the plaintiff as benefits accruing to him by reason of said injury on account of his membership in said association. And more particularly the defendant alleges that there was paid by the said relief department to the said plaintiff, on account of said injury, benefits to the amount of \$24.50, being the amount due for 49 days next after the 22d of August, 1890, at the rate of 50 cents a day, which was the rate to which the plaintiff was entitled as a member of said relief department; and there was also paid by said department the sum of \$43 to certain physicians for care and surgical attendance upon the said plaintiff; and that the said relief department did all on its part to be done for and in behalf of the said plaintiff by virtue of his membership in the said department; whereby the defendant was released from any and all claims for damages against the defendant company arising in any way out of the injury of which he complains in his said complaint."

Upon demurrer to this answer we are to consider the nature and effect of this provision of the contract, and whether the acceptance of benefits by the plaintiff under this contract of insurance should bar this action for injuries received through the negligence of defendant. It is clear that what the plaintiff received from the relief department was only that for which he had paid from time to time from his monthly earnings. As already stated, the consideration mentioned, being the amounts paid and to be paid by the company for the maintenance of the relief department, is only a pretense. From motives of humanity, employers are compelled to have some care for the sick and injured in their service. In recent times various schemes have been adopted for getting the cost of this care and attendance from the persons employed. Some employers require their men to contribute to a hospital fund, from which the sick and injured in their service may be maintained; others insure the life and health of their servants in one or more of the many accident and casualty companies who make it their business to care for those who may be engaged in hazardous and dangerous service. Whatever method may be adopted, it is plain that any one who employs large numbers of men must be at some cost of time and money in respect to the care of their bodies, if not of their souls, to keep them in health, and cure their hurts. If the men can be induced to pay the cost of this either to the employer or to an insurance company, the employer is so far relieved of a heavy burden, which in most instances he ought not to bear. In ordinary sicknesses and in most cases of injury the men ought to pay the cost of their keep, of nursing, of medical attendance, and the like, because these things come without fault of the employer in the ordinary course of human infirmity. Therefore the employer ought not to be blamed for putting the burden of caring for the sick and the injured, in general, on

the shoulders of the men, where it properly belongs. In doing this, however, he should not seek to evade the responsibility imposed upon him by law for the consequence of his own negligence. The rule which requires an employer to respond in damages to his servants for his negligent acts is sound and wholesome. It ought not to be set aside on any pretense of waiver on the part of the party injured from doing something which he has a clear right to do. It is said that the employé is not bound to accept benefits from the relief fund, and, if he does accept them, with full knowledge that he waives his right of action, he ought to be bound by his act. The logic of the proposition should be differently stated. Having paid for benefits, upon what principle can he be required to renounce them? If, for illustration, plaintiff had taken a policy in some accident and casualty company, could he be required to give up his right of action against the railroad company on accepting benefits from the insurance company? I think not. And the fact that the railroad company has entered into the insurance business does not affect the question in any way whatever. In respect to this contract defendant is an insurance company, and, having received the premium demanded of plaintiff, the latter is fully entitled to the benefits which he received, independently of any question affecting his relations to the railroad company as an employé. Having paid for them, plaintiff is as much entitled to the benefits received by him under the contract of insurance as to his monthly wages for services rendered to the railroad company. It was long ago wisely held that an employer cannot relieve himself from responsibility for his negligent acts by any provision in the contract of employment, and so it has come to pass that the company could not make the receipt of wages a waiver of this sort of action. No more can it be said that payment and receipt of benefits under a contract of insurance, such as is alleged in the answer, should bar the plaintiff's action. I am amazed to find that in several courts of unquestioned dignity and authority the defense here made has been fully sustained. *Clements v. Railway Co.* [1894] App. Cas. 482; *Johnson v. Railroad Co.* (Pa. Sup.) 29 Atl. 854; *Leas v. Pennsylvania Co.* (Ind. App.) 37 N. E. 423. I can only say that I agree with none of them. The reason of the thing stands altogether on the other side. The demurrer to the third answer will be sustained.

---

UNITED STATES v. CANDLER.

(District Court, W. D. North Carolina. November 14, 1894.)

1. **LARCENY—EVIDENCE—IDENTIFICATION OF MONEY IN POSSESSION OF ACCUSED.**  
Coin or bank notes found in the possession of a defendant soon after a larceny has been committed must be clearly identified as the property stolen, in order to give rise to a legal presumption of guilt; mere general resemblance in kind and amount is only a fact which the jury may consider, in connection with other proved facts, as some evidence of guilt. *State v. James*, 72 N. C. 482; *State v. Freeman*, 89 N. C. 469.
2. **CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE.**  
In a case founded entirely upon circumstantial evidence, the jury must consider all the independent coincident facts and circumstances shown in

evidence, and find that they are consistent with each other, and point to the guilt of defendant beyond a reasonable doubt, before a verdict of guilty can be properly rendered. *U. S. v. Searcey*, 26 Fed. 435.

3. SAME—TESTIMONY OF UNIMPEACHED WITNESS.

A jury may well consider the improbability of positive statements made by an unimpeached witness, when there are facts and circumstances in evidence tending to lessen the probability that such testimony is true. *Quock Ting v. U. S.*, 11 Sup. Ct. 733, 851, 140 U. S. 417.

4. SAME — CONDUCT OF TRIAL — COMMENT BY PROSECUTION ON DEFENDANT'S FAILURE TO CALL WITNESS.

When the prosecution relies upon facts and circumstances as making out a prima facie case of guilt, the district attorney may properly comment upon the fact that defendant had a witness present in court who was not introduced, if it appears in evidence that such witness had probable knowledge of the truth or falsity of the facts and circumstances relied upon to make out such prima facie case. *Graves v. U. S.*, 14 Sup. Ct. 40, 150 U. S. 118; *Goodman v. Sapp*, 9 S. E. 483, 102 N. C. 477.

(Syllabus by the Court.)

Indictment for breaking and entering a post office, and committing a larceny therein.

R. B. Glenn, Dist. Atty., and D. A. Covington, Asst. Dist Atty., for the United States.

V. S. Lusk, S. J. Pemberton, and J. M. Gudger, for defendant.

DICK, District Judge (charging jury). This trial has evidently excited much public interest. The evidence and the circumstances attending the trial are well calculated to give rise to such public interest. The defendant is a boy 15 years of age, and he was attended during the trial by his father, mother, sister, and other relatives, who are persons of high character in the community. The case has been well and ably managed by counsel on both sides, in the examination of the witnesses, and in their arguments before you,—and it is one that requires your careful and impartial consideration. That entry was made into the post office at the time stated, and that money and stamps were taken therefrom, are facts which are not controverted. The evidence shows only two ways by which entry into the post office could have been made,—by a key, or by the transom above the back door of the building. Miss Sherrill, the post-mistress, and her brother who acted as her assistant, were the only persons who had possession of the key. She testified that on the evening before the night when the post office was robbed she examined her money drawer, and found that she had a \$10 gold coin, a \$5 bank bill, and some change in silver and coppers, amounting in all to about \$25. She also had a number of 10-cent and 2-cent postage stamps. At 6 o'clock in the evening she locked the door, and carried the key to her home, and placed it in a trunk in her mother's room. On the next morning her brother went to the post office, and soon came back, and informed her that the office had been robbed. She found the drawer out on the floor, with lock broken, and her money gone, and some of the 10-cent stamps. On the inside of the room a chair had been placed close to the door. On the outside an old window shutter was leaning against the door, which had marks of dirt made by footsteps. The three panes of glass had been



taken from the transom, and placed above unbroken. The size of the panes of glass was about 10 or 12 inches. The door was about 3 feet wide, and she thought that the defendant could have easily passed through the transom. She saw the defendant that night at church about 9 o'clock, and he went home with her brother, and remained all night, and went off the next morning before she could see him. The defendant had never stayed at her mother's house before that time. Her testimony was substantially sustained by the testimony of her brother. He further said that defendant, on the morning after the robbery, went with him on his way to the post office, but turned aside to go to an unfinished church building close by. He also said that at the back door of the post office he found several tracks made by a No. 6 shoe, and he placed his own foot in the track, and there was a good fit. He also gave his opinion as to the size of the transom, and thought that defendant could have passed through. There is no evidence, ascertained by actual measurement, as to the exact size of the transom, and no experiment was made to find whether a 15-year old boy could have passed through the opening.

As this indictment is founded entirely upon circumstantial evidence, you should consider every attendant circumstance calculated to throw light upon the subject of investigation, and determine whether the independent coincident facts and circumstances shown in evidence are consistent with each other, and point to guilt of defendant beyond a reasonable doubt.

Had the defendant any knowledge of things in the post office? I remember no direct and specific evidence upon that point. As to the tracks on the outside, there is no direct evidence tending to show that defendant made them. His foot was not measured, and the evidence clearly shows that he usually wore No. 7 shoes. The evidence shows that on the day after the robbery the defendant was arrested at Murphy, and on search he was found in possession of a \$10 gold piece and some silver change and coppers, amounting to about \$25, but no \$5 bank bill or stamps. If any of the coin had been marked so that it could have been strictly identified as the property stolen, such fact would have given rise to a strong presumption of guilt. As the coin found upon his person was like the ordinary circulating currency of the country, incapable of strict identity, no presumption of law arises, but the fact is a circumstance which may be considered in connection with other circumstances as evidence of guilt. The entry was made on the night of 2d April, while religious services were being conducted at a church close by, and in full view of the back door of the post office, and there was a large crowd inside and outside of the church. There is evidence that defendant was at the church, and talked with Henry Connor at the door, and asked him to go down town with him. Another witness testified that defendant came partly into the door of the church, looked around, and went out, and was absent half an hour, and then returned, and remained until the services were ended. It was insisted by counsel for defense that the entry could not have been made at that time, for the light which the evidence shows was used by the

robber would have been clearly visible to the large crowd attending the church. Upon this point you may consider whether a light seen in the post office at that early hour in the night would have been calculated to excite any surprise in the persons seeing it.

It is further insisted by counsel for defendant that, if defendant was the robber, he would not have gone to the home of the post-mistress with her brother, and remained all night with the money on his person. The evidence shows that on the next morning the defendant left young Sherrill, and went into the unfinished church, and he assigned no reason for so doing, and such a circumstance might excite a conjecture that he went there to get the money which he had concealed the previous night. I will now call your attention to the testimony of Henry Connor. He testified before the commissioner, on the preliminary investigation, that on the morning after the robbery defendant came to his house, and asked him for the loan of a tobacco poke to put his money in. That he had some money tied up in a handkerchief, and the bulk was about the size of an inkstand, and he told witness that he had borrowed the money. On his examination before you he testified to another material fact, which he did not state before the commissioner,—although the prosecution was conducted by an earnest and skillful lawyer. He now says that on Sunday evening, the day before the robbery was committed, the defendant told him that he (defendant) intended to break into the post office to get money. You may well consider the probability of such a story, after being so long withheld from disclosure. Is it probable that, without any motive, the defendant would have told of his intention to commit a robbery, when he knew that his plan could so easily be frustrated by the witness making disclosure? If he had asked witness to participate in the robbery, then there would be some show of probability; but no such request is shown in evidence. There is certainly some improbability of the truth of the statement shown by the circumstances that witness did not remember so important a fact three days after the occurrence, when he was examined before the commissioner, and the citizens of the community and the officers of the law were so eager and desirous of finding the guilty offender.

I will now call your attention to the testimony of Joseph Connor. He was not a witness before the commissioner at Dillsboro, although he lived close by, and was present at the preliminary trial. More than two months after such trial Deputy Marshal Sherrill carried Joseph Connor before Commissioner Davies, when and where he made an affidavit, in which he stated that on the morning after the robbery defendant came to his sawmill, about a mile from Dillsboro, and showed him some money tied up in a handkerchief, and showed an envelope which, he said, contained postage stamps. He asked defendant where he got the money. After some dispute, defendant said to witness, "I snaked it last night." When this affidavit was made the deputy marshal told witness to keep the matter a secret. It is also in evidence that about the time the affidavit was made witness told Mr. Dills that he knew nothing against defendant as to Dillsboro post office robbery. As the commissioner had heard the

matter, and bound over the defendant to the district court, his jurisdiction had ceased, and the affidavit was extrajudicial, and is not admissible in evidence as a valid affidavit; but it may be used as a declaration of witness, for the purpose of supporting his testimony given on this trial. The secrecy observed by witness at the request of the deputy marshal who carried him before the commissioner, together with his declaration to witness Dills just after affidavit was made, that he knew nothing against defendant, is calculated to excite some suspicion as to the propriety of the motives of witness. You may also consider the probability of his statement that on the morning after the robbery the defendant voluntarily, and without any motive, showed him money and stamps, and told him, "He snaked it last night"; and that witness, although he knew of the arrest of defendant for the robbery committed on the previous night, did not disclose so material a fact on the preliminary trial. You may well consider the improbability of positive statements made by an unimpeached witness when there are facts and circumstances in evidence tending to lessen the probability that such testimony is true.

There is another fact relied upon by the prosecution as tending to show an evil mind and purpose on the part of the defendant. The railway agent at Dillsboro testified that a day or two before the post office was robbed the defendant came into his office, and inquired "if a man could ride on the railway cars with a stolen ticket," and also asked him where and how he kept the money of his office. You may well consider what were the motives of defendant in making such inquiries. Was it his purpose to steal from such office, and from the person of whom he made the inquiries? or were the questions prompted by the idle curiosity of a boy who could see the open manner in which tickets were kept, and who also saw the agent frequently receiving money?

On the day after the robbery the defendant was arrested at Murphy by the town marshal, under the authority of a telegram from his father. The defendant was searched, and on his person were found a \$10 gold piece and some silver change and coppers in a tobacco poke, amounting to about \$25, but no \$5 bank bill or stamps were obtained. Defendant said he had found money tied up in a handkerchief near post office. It is material for you to inquire the reason that induced defendant to leave Dillsboro on the day after the robbery. If his conduct was induced by fear of an arrest, then it was a "flight" from justice, and is strong presumptive evidence of guilt. If his going to Murphy was the carrying out of a long predetermined purpose to visit his brother in Atlanta, and the execution of this purpose was hastened by the flight with his sister on the previous day, and the severe blow which he received from his mother, then his journey was not a flight, and furnishes no presumption of guilt.

The evidence further shows that when defendant was in custody, and was on his return to Dillsboro, he told the deputy marshal that he found the money that he had on his person when arrested by the town marshal at Murphy. The fact that defendant had on his person on the day after the robbery, money resembling that which had

been stolen from the post office, is a very material circumstance indicating guilt, calling for some probable and reasonable explanation on his part. He has endeavored to furnish such explanation by the testimony of his mother and sister. His mother testified that her son, the defendant, had been in Asheville with his brother for several months, and returned home in February, a day or two after the death of her little daughter. She soon after saw the defendant with a \$10 gold piece, and some silver change, in all about \$25, which he told her he had obtained in Asheville. He kept his money hidden in the barn, and asked her not to tell his father, as he would not let him go to Atlanta to visit his brother. She also stated that on the evening before the robbery defendant got into a fight with his sister, and had pulled her by the hair, when she (mother) struck him a severe blow on the head with a shoe, which produced considerable bleeding; and he left home in a very angry mood, and did not return until late next morning, when he requested her to prepare his clothes, as he was going to Atlanta that day. She prepared his clothes; examined those that were taken off, and saw considerable blood upon them. Defendant then went off to take the railway cars to Murphy, on his way to Atlanta. The sister, in her examination as a witness, confirmed the testimony of her mother in all respects, and further testified that at morning and evening, every day for three weeks, in March, her brother, the defendant, went with her to the barn when she milked the cows; that he went into the barn every time, and counted his money, and sometimes added some silver change or coppers; and she saw the money in the barn a few days before the robbery of the post office. The money in the possession of defendant, as shown by the mother and sister, has a more exact similitude to the money found on his person in Murphy than that of the articles stolen from post office, which consisted of a gold coin, bank bill, silver change, coppers, and stamps. If you believe the testimony of the mother and sister as to his previous possession of the money by them described, then a very strong circumstance tending to show guilt has been reasonably accounted for. The tracks at the back door of post office do not point to defendant as the robber, as the size did not correspond with shoes of defendant. The tobacco poke containing the money on his person when arrested at Murphy was not shown to be the identical poke given him by the witness Henry Connor. The strongest uncontradicted testimony tending to show guilt is that of the Connor boys, which I have already sufficiently called to your attention. There is evidence tending to show that there was a very active prosecution on the part of the friends of Miss Sherrill, the postmistress, and that some of the very material circumstances relied upon were not disclosed until this trial began. Counsel for prosecution commented on the fact that Dr. Candler, the father of defendant, was in court during the trial, and was not offered as witness to explain proved circumstances which indicated the guilt of defendant. If it had been shown in evidence that Dr. Candler probably had knowledge of the truth or falsity of the circumstances relied upon by the prosecution as making a prima facie case of guilt, then his failure to testify might properly be commented on as some

evidence to strengthen such *prima facie* case. But the evidence tends to show that Dr. Candler had no knowledge about such circumstances, or the purposes of defendant, as he was kept in the dark on the subject at the request of defendant. The fact that he sent the telegram that caused the arrest of his son at Murphy tends to show that he had no knowledge that his son had money, and intended to go to Atlanta. It is obligatory upon the prosecution to prove, beyond a reasonable doubt, the guilt of defendant before a verdict of guilty can be rendered by you. If the evidence fully satisfies you of such guilt, then you should so return your verdict, and leave matters of mercy and sympathy to the court. If, however, the evidence does not satisfy you, beyond a reasonable doubt, as to the guilt of defendant, then you should return a verdict of not guilty.

---

### In re COMMISSIONERS OF CIRCUIT COURT.

(Circuit Court, W. D. North Carolina. December 29, 1894.)

#### 1. UNITED STATES COMMISSIONERS—REMOVAL.

While commissioners of the circuit court have no fixed tenure of office, and the appointing court has power to remove them at pleasure, the exercise of this power should be governed by a sound legal discretion, and, if there are charges against a commissioner, full opportunity should be given him for a hearing.

#### 2. SAME.

A district attorney made an application for the removal of all the commissioners of the circuit court within the district, with a view to a reorganization of that body of officers, alleging as grounds a waste of public money by institution of frequent trivial prosecutions, multiplication of proceedings to increase fees, and other similar misconduct, generally prevailing among them. It appeared that some abuses existed, but that these were not wholly the fault of the commissioners, and were not intolerable. *Held*, that the court would deny the motion for general removal of all commissioners, without prejudice to proceedings by the district attorney to remove any particular commissioner for sufficient cause.

This was a motion made by the district attorney for the removal of all the commissioners of the circuit court within the Western district of North Carolina.

Robert B. Glenn, U. S. Atty., for the motion.

DICK, District Judge. The motion which I am called upon to consider and determine was made in the circuit court at Asheville at last November term, and was continued for final hearing at this term of the circuit court at Charlotte. The motion is for the removal from office all the commissioners of the circuit court in this district, with a view to the reorganization of that body of public officers so as to remedy many existing evils, and insure a more cautious, prudent, economical, and rightful discharge of important official duties in the administration of justice. From the argument of the district attorney in open court, and from frequent conferences with him, I understand his reasons and views in support of his motion to be as follows:

First. In many counties there are two or more commissioners of the circuit court, and long experience has shown that their concurrent jurisdiction

in the same locality has caused an unseemly rivalry in business between such officers, which has resulted in many improper warrants and frivolous prosecutions, causing enormous and unnecessary costs to the government. Second. That frequent examinations of the written proceedings of many of the commissioners, returned to court, have clearly shown that they are too eager to make per diems and fees, and are otherwise not qualified to discharge, with correctness, efficiency, and justice, the important duties of their responsible position. Third. That for several of the past terms of the district courts the dockets and trials show that numerous trivial and frivolous prosecutions have been returned by commissioners to court, which would not have been instituted if they had exercised an intelligent, wise, and judicious discretion in the examination of evidence and the issuing of warrants. Fourth. That an application for a rule of court upon individual commissioners to show cause why they should not be removed from office would consume much of the time of the court, cause much expense and delay, and would fail to accomplish the objects of the pending motion in affording a speedy and effectual remedy for the evils existing in the present condition of affairs; and that the granting of this motion for general removal would not unjustly and injuriously reflect upon the personal character of the commissioners, as the expressed purpose of the motion is not intended as a special censure and condemnation of any person, but the manifest object is to make, with facility a new and better arrangement, that will insure the fair, just, and efficient enforcement of the law, prevent trivial and frivolous prosecutions in the courts, save enormous costs to the government, and protect many citizens from unjust vexation, inconvenience, and expense.

In making this motion the district attorney referred to and relied upon, as a precedent, the action of this court 20 years ago in making a general order removing all the commissioners of the district, and directing new commissions to be issued to all of the old commissioners whose previous conduct had shown them to be competent, judicious, and efficient in the discharge of their official duties. When this motion was first made, it was readily entertained by the court, as the proceedings in all the district courts of this district showed probable and reasonable grounds of complaint against many of the commissioners for the number of trivial and frivolous cases which they had returned for investigation before the grand jury and for trial in court. Upon subsequent examination of the written testimony of witnesses, sent up by the commissioners, it appeared that many of the cases that seemed to be trivial and frivolous on the trial before the jury were made so by the witnesses giving testimony widely different from that which they had given before the commissioner on the preliminary investigation. From observation in the courts, and from information received from the district attorney and many other reliable sources, I am satisfied that some commissioners have been too ready and willing in issuing warrants upon the application of deputy marshals who had been eager and diligent in hunting up petty cases founded upon information derived from professional neighborhood witnesses. In most of such cases the defendants were guilty of a violation of law, but the offenses were too petty to require prosecution, and the selfish or malicious motives of the informants were too clearly manifest to receive encouragement from the officers of justice. Those petty crimes of illicitly retailing spirituous liquors are so numerous in many sections of the country that if a general indictment of all the residents were allowable, and the existing proof could be obtained, three-fourths would be found

guilty. As long as the manufacture and traffic of spirituous liquors are allowed by law upon the payment of revenue taxes, there will be illicit manufacture and sale to evade such taxes, and secretly and cheaply gratify the strong appetites of men for drink; and many sections of the country, by night and by day, on week days and Sundays, will be infested with secret dealers and purchasers engaged in concealing, removing, selling, and consuming blockade liquor, to the great detriment of the community. No reasonable number of the most diligent and faithful revenue officers and deputy marshals could prevent such illicit traffic, or bring to justice one-fourth of the offenders. The prosecutions of illicit retailers in the United States courts result in no substantial moral and social benefits to communities, and the expenses of the government are a hundred fold more than the special taxes received from legitimate dealers, who alone can derive protection and profit from a strict and diligent enforcement of the law against illicit dealers. It is thus clearly apparent that such prosecutions greatly diminish, rather than increase, the revenues of the government; and I am strongly of the opinion that all questions of morals and good order in society involved in the illicit traffic in liquors are not contemplated in national revenue laws, and should be regulated by state laws, to be enforced in the state courts. I am of opinion that the evil of numerous and petty prosecutions which have recently crowded the dockets of the court will be greatly checked, if not entirely prevented, by the rule of court, made at last Asheville term, prohibiting commissioners from issuing warrants for illicit retailing of liquors until they submit in writing the evidence in each case to the district attorney, and receive his order and direction to institute proceedings.

If I was of opinion that I had the judicial power, I would readily make a rule of court prohibiting commissioners from issuing warrants against any retail dealer, unless he carries on the business of a "retail liquor dealer" in violation of the express provision of section 3242, Rev. St. U. S. The evident purpose of that statute when enacted was to prohibit persons who had not paid a special tax from engaging, in the usual manner, in the regular business of retail liquor dealing. But a subsequent statute (section 3244) enlarges the provision of the previous statute, and includes "every person who sells or offers for sale" spirituous liquors in less quantities than five wine gallons at the same time. The remedy for preventing numerous and petty prosecutions under this statute must be provided by congress, and not by courts that are required to observe and enforce existing laws. With the views which I now entertain, and under present circumstances, I will not follow the precedent of this court referred to by the district attorney. The condition of affairs at that time was far worse than it is now, and no such sweeping and extreme remedy is now required. When that ruling of the court was made, I was reliably informed that some of the United States judges in other districts had peremptorily removed many commissioners without issuing against them formal rules to show cause why they should not be removed from office. I am also informed that there are some

eminent lawyers who are now of opinion that United States judges, who are authorized to appoint commissioners of the circuit courts without any definite term of office, can remove them at pleasure, and may often do so properly without affording them any opportunity of explanation and defense, upon the ground that the best interests of the public service require prompt action. After careful thought and examination of authorities, I entertain different views as to judicial power and duty, as will be shown in a subsequent part of this opinion.

The removal of the present commissioners, and new appointments, will not remedy the evils complained of, so long as there are numerous and active deputy marshals in each county eagerly seeking out willing witnesses, hunting up cases, and making constant and urgent applications to commissioners to issue warrants. A large majority of the present commissioners are men of high personal character, and in most instances were appointed upon the application of the best citizens and the recommendation of district attorneys, and they have honestly exercised the powers conferred upon them by law, in accordance with the best opinion which they could form from the evidence and the circumstances of the cases before them. Were I to allow the present motion, and remove such commissioners from office, it would certainly be the exercise of an arbitrary power, depriving them of vested rights, and condemning their official acts without affording them an opportunity of explanation and defense, contrary to the principles of natural justice and the general practice of the courts of this country and of England. *Ex parte Robinson*, 19 Wall. 505, and numerous other cases in state and federal courts. In *Re Eaves*, 30 Fed. 21, this court heard able and elaborate arguments upon the legal questions now under consideration, and used the following language in the opinion delivered in that case:

"Commissioners of the circuit court are officers appointed by the court, and authorized by law to exercise important judicial and ministerial functions in aid of the circuit and district courts in the administration of justice. They are appointed by the circuit court, but their powers are expressly conferred upon them by law, and they are not strictly officers of such courts, and subject to their supervisory control. *Spear*, Fed. Jud. 377, and cases cited. In this district rules of court have been formulated and adopted for the guidance and assistance of commissioners in the performance of their difficult and important duties, but do not interfere with the exercise of their judicial discretion in hearing cases before them. No special mode of procedure for removal has been prescribed by statute, and the precedents of the common law may properly be followed. Any mode of procedure would accomplish the ends of justice, if the respondent has reasonable notice of the charges against him, and is afforded full opportunity for explanation and defense. While the appointing court has the power to remove commissioners at pleasure, such discretion should be a sound and legal one, and such power should never be capriciously or arbitrarily exercised. Commissioners can materially assist the court in the administration of public justice, and by long experience they become more familiar with the forms of legal procedure, and more discreet and efficient in the performance of their important official duties. As no tenure of office is defined by law, they may well presume that they will be retained so long as they are discreet and efficient, and conduct themselves with propriety. It is all important to good government and the public interests that an officer who exercises important judicial functions should be free in thought and independent in judgment when he acts in the administration of



justice and the enforcement of the law. The course of justice would be impeded, and the efficiency of the commissioner would be greatly impaired, if his freedom of action was restrained by continual apprehensions of removal from office on account of honest official mistakes and errors of judgment, or by judicial caprice, or by the clamor of individuals excited by personal prejudices and hostility. As a security for the independence and impartiality of judicial officers, there is a general rule—of great antiquity in the common law, and now fully recognized and observed in every enlightened system of jurisprudence—that renders judges of courts of general and superior jurisdiction exempt from liability to civil actions and indictments for their judicial acts, and affords the same immunity to judicial officers of limited and inferior authority, when they act within the scope of their jurisdiction, with integrity and without malice or corruption."

Randall v. Brigham, 7 Wall. 523; Bradley v. Fisher, 13 Wall. 335.

There is much force in the argument of the district attorney as to the inexpediency of having two or more commissioners in the same county. They were appointed for the convenience of the people, and for the speedy and economical enforcement of the criminal law. By rules of court they are restricted in the performance of their official duties to the county in which they reside. In some instances their intercourse has not been friendly and harmonious, and their diverse interests in making fees have induced unseemly efforts in hunting up cases, and thus given rise to many petty and frivolous prosecutions. Where both commissioners are alike blamable, there is sufficient cause for the court to promptly remove both from office. But a competent and faithful commissioner should not be removed when he has in no way participated in the misconduct of his unworthy associate. The principles of common justice require that he should be fairly heard by the court before his official conduct is condemned by a peremptory removal from office. For the reasons above stated, the pending motion is disallowed, but this action of the court is by no means intended to prevent or discourage the district attorney from making application for the removal of any one or more of the commissioners for corruption, incompetency, inefficiency, bad moral character, want of public respect, or any other sufficient cause of removal.

(January 5, 1895.)

SIMONTON, Circuit Judge (concurring). Concurring in the order of the district judge in this case, it may be well that I should add a word or two. The law authorizing the appointment of commissioners of the circuit court is found in section 627 of the Revised Statutes of the United States:

"Each circuit court may appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary who shall be called 'commissioners of the circuit courts,' and shall exercise the powers which are or may be expressly conferred by law upon commissioners of circuit courts."

The power of appointment is wholly with the court, and it can appoint so many discreet persons as it may deem necessary. There is no fixed tenure of the office. "It is held at the will of the appointing power and the incumbent, and the former may remove the latter at pleasure." *Ex parte Hennen*, 13 Pet. 230; *U. S. v. Avery, Deady*,

204, Fed. Cas. No. 14,481. Such is the general rule. But in the exercise of this power of removal courts should not be governed by caprice, but should exercise a sound legal discretion, removing the officer for cause. Commissioners are officers of the court, clothed with large powers and grave responsibilities. Necessarily, they are exposed, from the nature of their duties, to hostile criticism, and they are entitled to the support of the court. Above all, they should be assured that the faithful performance of duty will be recognized and rewarded by continuance in office. This assurance cannot be given if there be sudden and capricious removal without reasons. So, if there be charges against a commissioner, full opportunity should be given him for a hearing; otherwise faithfulness in office may lead to private attacks on him and his removal. See *In re Eaves*, 30 Fed. 21. Indeed, as the learned judge who presides over this district, in his well-considered and instructive opinion in the case just quoted, has given the views of the court on this question, every commissioner in this Western district has the right to expect support if he conducts himself faithfully, and full notice of any charge to the contrary.

---

THE LOTTA.

ROXBURY v. THE LOTTA.

(District Court, S. D. New York. November 28, 1894.)

1. MARITIME LIEN — REPAIRS — WRONGFUL DIVERSION OF CHECK IN PAYMENT DISREGARDED.

An agent for two different lines of steamers wrongfully directed a check from one line to be applied by a material man in payment of a claim against the other line. On discovery of the fact several weeks afterwards, the credit was transferred to the proper company. *Held*, that the original lien was not affected by the temporary wrongful credit, or by the receipt in payment given thereon.

2. STATE RECEIVER—SUBSEQUENT LIBEL—ARREST BEFORE RECEIVER'S POSSESSION.

After the appointment and qualification of a receiver appointed by the state court, a libel was filed to enforce a lien for repairs, and the vessel was arrested by the marshal before any person representing the receiver had taken actual possession of the vessel, or given notice of the receivership to the master thereof, or to any person on board, and before either had notice of the receivership. *Held*, that the arrest by the marshal was valid.

This was a libel by Theodore H. Roxbury against the steamboat Lotta for work done and materials furnished.

Wilcox, Adams & Green, for libellant.

Goodrich, Deady & Goodrich, for claimants.

BROWN, District Judge. The above libel was filed to recover the amount of lien on the steamboat Lotta for paint and painting supplied her in March and April, 1894. The defenses were: First, that the Lotta was in charge of a receiver before the arrest by the marshal, and could not be held; second, that \$300 of the amount claimed had been paid and previously applied by the libellant in payment of the bill.

As respects the claim of payment of \$300, the evidence shows that a check for that amount had been received by the libelant from one Jansen, who was acting as agent of several steamship lines, including the respondent's, and also that of the Knickerbocker Steamship Company, for whom the libelant was also accustomed to do work, and against whom the libelant had a considerable bill then due and payable; that the check which Jansen turned over to the libelant was drawn by the Knickerbocker Company payable to Jansen, and was indorsed by him to the libelant; that Jansen directed the libelant to apply it to his account against the Lotta; and that the libelant accordingly did so; that this check was in fact given by the Knickerbocker Company to Jansen in order to pay its own indebtedness to the libelant on account of his work upon the company's steamers; and that it was diverted by Jansen to the Lotta's credit without authority; and that the Knickerbocker Company required of the libelant to credit the company with the amount, as soon as it learned of the diversion, which was not until Jansen's death, several weeks after; and that the libelant had changed its application accordingly. As the check was, according to the proofs, plainly misapplied, and as no rights or interests can be prejudiced by a restoration according to the just rights of the parties, I find the misapplication should be disregarded; and that the credit of this \$300 made to the account of the Lotta, and afterwards rightly transferred to the credit of the Knickerbocker Company, has no legal effect on the libelant's lien against the Lotta.

As respects the arrest by the marshal, the proofs on the trial established more clearly what appeared by the affidavits on the motion to discharge the attachment; which on hearing was denied. These proofs leave no doubt that though the master of the Elaine, the sister vessel of the Lotta, had received notice of the appointment of the receiver two days before the marshal's arrest of the Lotta, no such notice of the appointment of the receiver, or of any claim of the receiver to the vessel, had ever been given to the master of the Lotta; that there was no knowledge of this appointment either by him, or by the marshal, at the time when the marshal arrested and took possession of the Lotta at New Baltimore on the 18th of September; and that neither the receiver, nor any one representing the receiver, was on board the Lotta, nor had the master attorned to him, or had any knowledge of him. Mr. McKenzie, who had been requested by the receiver to act for him in the management of the property as he had previously acted, had had no communication with the master of the Lotta, nor had he been on board the vessel, nor had any one in his behalf. Up to the time of the arrest of the Lotta by the marshal, the receiver had, therefore, never acquired any kind of possession of the Lotta, actually or constructively. Until that had been done, the vessel was obviously as amenable to the admiralty process in the hands of the marshal as to the order of the state court in favor of the receiver.

Without reference, therefore, to the other questions referred to in the decision of the motion, I must allow a decree in favor of the libelant for \$339, with interest and costs.

## WESTINGHOUSE ELECTRIC &amp; MANUF'G CO. v. STANLEY.

(Circuit Court, D. Massachusetts. January 22, 1895.)

No. 350.

**EQUITY PLEADING—SUFFICIENCY OF PLEA—SUIT FOR INFRINGEMENT OF PATENT.**

A plea to a bill for infringement alleged that complainants, before securing the patent, "became and were fully advised" that the alleged inventor could not carry back his invention beyond a given date, and that an examiner in the patent office had found, "as was the fact," that the invention had been described in previous publications. *Held*, that the plea was bad, because it failed to allege directly that the inventor could not carry back his invention beyond the date named, and that the invention had been described in previous publications, but was couched in such language that a traverse would only deny that complainants "were advised," etc., and that the "examiner found," etc.

This was a bill by the Westinghouse Electric & Manufacturing Company against William Stanley, Jr., for infringement of a patent. Heard on a plea to the bill.

H. S. MacKaye, for complainant.

Samuel A. Duncan, for respondent.

CARPENTER, District Judge. This is a bill in equity to enjoin an alleged infringement of letters patent No. 469,809, issued March 1, 1892, to the respondent, for improvements in systems of electrical distribution. The respondent has filed a plea, which is now set down for hearing, and has been argued, in which he alleges that prior to the application for the patent the respondent had assigned the invention to the complainant, and that the application was prosecuted by the complainant; "that the assignment aforesaid was made without any special consideration therefor, but in pursuance of the provisions of a general contract entered into by and between this defendant and one George Westinghouse, Jr., under date of May 20, 1884, whereby this defendant obligated himself to assign to the said Westinghouse, or to such company as the said Westinghouse might organize (the Westinghouse Electric Company being the company contemplated by such contract), not only the patents relating to electrical engineering which he had already taken out in the United States, and the right to patent in the United States certain electrical inventions for which applications were then pending, but also the right for the United States in such inventions in electrical engineering as this defendant might thereafter make during the continuance of such contract, it being specially provided in such contract that the assignment of such future inventions—among which the invention covered by letters patent No. 469,809 is included—was to be without other or additional consideration,—that is, other than the general consideration named in said contract"; that an interference was declared between the application and the patent No. 368,936, "which had been granted on the same invention to one Marmaduke M. M. Slaterry, under date of July 31, 1888"; that preliminary statements were filed by both parties, "and that by the said preliminary statement and the amendment thereto, as well as by the

various conferences in connection therewith which this defendant had with the attorneys and the officers of the said company, the said company and the officers thereof became and were fully advised that this defendant's date of invention could not be carried further back than the month of September, 1885, and in like manner, by the duly-verified preliminary statement filed in the said interference by the said Slattery, the said company became and was fully advised that the said Slattery could not carry his date of invention further back than the month of June, 1886"; that thereafter the Westinghouse Electric Company sent to Glasgow to negotiate with one Rankin Kennedy for the purchase of an invention claimed to have been made by said Rankin Kennedy, and that the said invention was the same as that described and claimed by the respondent in the aforesaid application; that the Westinghouse Company did, in fact, buy said invention, and filed an application, wholly at its own expense, for a United States patent therefor; that on or about January 2, 1889, and before said Kennedy's application had been acted on by the patent office examiner, the Westinghouse Electric Company called the attention of said examiner to certain publications of said Kennedy, published in London in 1883, with the object in view of establishing "for the said Kennedy an earlier date of invention than either this defendant or the said Slattery could prove in the said interference"; that afterwards, and when the examiner had rejected the Kennedy application, as anticipated by Slattery, "the said company, through its attorney, while not denying that the invention of the Kennedy application was the same as that of the Slattery patent on which it had been rejected, insisted that the invention was described in the said articles published by the said Kennedy in the year 1883, and therefore at a date which was earlier than any date which either the said Slattery or this defendant could assert or maintain; that on a review of the said articles the examiner having the matter in charge found officially, as was the fact, that the invention was fully described in the said articles, and that thereupon the examiner receded from his rejection of the said application, and allowed the same, the application going to a patent on the 16th day of July, 1889"; that the Westinghouse Electric Company, and subsequently complainant herein, took full charge of the prosecution of the interference above mentioned, and paid all expenses; that said interference was decided in favor of defendant's application, and the decision was confirmed on appeal by the commissioner; "that in rendering his decision to this effect the said commissioner of patents found upon the evidence in the whole case, as was the fact, that this defendant had not made the invention in question prior to the month of September, 1885, which was subsequent to the date at which it appeared by the facts then in possession of the patent office that the same invention had been made by the aforesaid Rankin Kennedy, and thereupon, in remanding the case to the examiner for further proceedings, in accordance with the established practice under the statute in such cases made and provided, the commissioner directed the examiner to consider carefully the aforesaid articles of

Rankin Kennedy, published in the year 1883, as well as various other printed publications published prior to the year 1885, with view to determining whether they did not anticipate whatever otherwise was patentable in the claims contained in the said application filed in the name of this defendant"; that it was thereupon, "as this defendant is informed and believes," the duty of the examiner to refuse Stanley's assignee a patent on the ground of anticipation by said references, but that nevertheless the examiner, in contravention of law, and ignoring his duty in the premises, did pass the Stanley application to issue; and that the complainant, by reason of the acts and knowledge aforesaid, was estopped from taking the patent, and that the prosecution of the application "with the full knowledge and belief \* \* \* that the said Kennedy, and not this defendant, was the earlier inventor or discoverer of the said invention, was in violation of the statute, and contrary to equity, and that the patent thus obtained was wrongfully and fraudulently obtained, and was and is wholly null and void, and cannot be respected by a court of equity."

The question is as to the sufficiency of this plea. The allegation as to the consideration for the contract by which the invention was sold to the complainant does not seem to me to present any defense. It is, in effect, an allegation that the invention was sold to the complainant for a consideration. But the main contention of the argument for the respondent is that the plea is good, because it alleges that "the invention of the patent in suit was not made by Stanley until September, 1885, and yet the same invention had been described in printed publications in the year 1883." The sufficient answer to this argument is that the plea does not so allege with the directness and in the manner which is required in a plea. The allegation is that the company "became and were fully advised" that the Stanley invention dated no further back than September, 1885, and that the examiner found, "as was the fact," that the invention had been described in prior publications. There are not distinct allegations that the invention of Stanley was made not earlier than 1883, and that the invention had been earlier described. A traverse of the plea would only deny that the company was advised, and that the examiner found as stated in the plea. In other words, in order to reach the trial of the question whether the invention had been before described, and whether, accordingly, the patent is void, the respondent must deny the inferences, and not the allegations, of the plea. There is no single definitely stated issue, and so, as it seems to me, the plea is bad, and must be overruled.

---

SANTA ANA WATER CO. v. TOWN OF SAN BUENAVENTURA et al.

(Circuit Court, S. D. California. January 14, 1895.)

No. 461.

1. MUNICIPAL CORPORATIONS—OFFICERS—VACANCIES.

The charter of the town of S. provided that its officers should consist of a board of five trustees, elected by popular vote, and a treasurer, clerk,

and others, who should be appointed by the trustees, and should perform various duties appropriate to their offices. The charter was silent as to whether the clerk and other officers should be appointed from the board of trustees or outside that body. A general act, applicable to the town, declared the causes which should create a vacancy in office, not including incompatibility of offices or acceptance of another office. *Held*, that the appointment to and acceptance of the offices of clerk and treasurer of the town by members of the board of trustees did not vacate their offices as trustees.

**2. SAME—FRAUD—TRUSTEES DEALING WITH THEMSELVES.**

A contract was made between the trustees of a town and A. and two associates for the supply of the town with water, three out of five trustees being present and participating in the making of the contract. One of these three trustees was jointly interested with A. and his associates in the subject-matter of the contract. *Held*, that such contract, both by the common law and by the statute of California prohibiting a trustee from contracting with himself (Pol. Code, §§ 920-922), was absolutely void.

**3. SAME—RATIFICATION BY LEGISLATURE.**

After the passage of the ordinance by which such contract was made, the legislature passed an act approving and ratifying the same, the fraud, however, not being disclosed to the legislature at the time. *Held*, that though the legislature could cure irregularities, and confirm proceedings which, without confirmation, would be void, because unauthorized, it did not, by the passage of the act referred to, ratify the undisclosed fraud.

This was a suit by the Santa Ana Water Company against the town of San Buenaventura and others for the enforcement of a contract. A demurrer to the bill was overruled. 56 Fed. 339. The defendants answered, and the cause is now heard on the pleadings and proofs.

Lamme & Wilde, for complainant.

W. E. Shepherd and George J. Denis, for defendants.

ROSS, District Judge. When this case was before the court on demurrer to the bill, it was held that the contract entered into January 4, 1869, between the defendant corporation and Jose De Arnaz, Victor Ustassauategui, and Francisco Molleda, in so far as it reserved to those parties the "unrestrained right to establish such rates for the supply of water to private persons as they may deem expedient, provided that such rates be general," and subject, also, to the implied condition that the rates be reasonable, was a valid contract in the hands of Arnaz and his associates, and passed by assignment to the complainant corporation. The facts upon which those rulings were based were admitted by the demurrer filed by the defendants to the bill. Subsequently, defendants answered the bill, and, upon the issues thus joined, proofs were taken, and the case has been heard on its merits. Except in respect to two affirmative defenses, the proofs establish the same facts as formed the basis of the rulings upon demurrer; and as I am satisfied of the correctness of the conclusions then reached, and with the reasons given in support of them, it is not necessary to go over that ground again. The case on demurrer will be found reported in 56 Fed. 339.

The affirmative defenses referred to are the following: The board of trustees of the defendant corporation, under the law creating it, consisted of five members, but three of whom—Tico, Chateneauf,

and Escandon—were present and authorized the execution of the contract in question. Tico had previously been elected clerk of the town, and accepted the position, and Chateneauf had been elected, and accepted the position of, treasurer thereof, each of whom, the defendants contend, thereby vacated his office as trustee, which, if true, left only one member of the board of trustees—Escandon—taking part in the execution of the contract on the part of the town. The answer also alleges that Chateneauf had a direct pecuniary interest with Arnaz, Ustassaustegui, and Molleda at the time of the making of the contract, and that other trustees had such adverse interests at the time of its subsequent attempted ratification which rendered their acts on behalf of the town in respect to the contract void and of no effect.

In respect to the first of these defenses, it is contended on behalf of the defendants that there is such incompatibility between the office of trustee and clerk and trustee and treasurer of the town as rendered the acceptance by Tico of the clerkship a vacation of his office of trustee, and a like vacancy of Chateneauf's office of trustee by his acceptance of the position of treasurer. As pointed out in the former opinion herein, the defendant corporation is a municipal corporation, created by an act of the legislature of the state of California entitled "An act to incorporate the town of San Buena Ventura," approved March 10, 1866 (St. 1866, p. 216), and was thereby invested with all the rights and privileges conferred by, and was made subject to all liabilities, restrictions, and provisions of, an act entitled "An act to provide for the incorporation of towns," approved April 19, 1856 (St. 1856, p. 198), so far as the provisions of that act may be consistent with the provisions of that of March 10, 1866. It is provided by the act creating the defendant corporation that its officers shall consist of a board of five trustees, —a treasurer, a clerk (who shall be ex officio assessor), a marshal (who shall be ex officio collector), an attorney, and a surveyor; and with the exception of the first board of trustees, designated by the act itself, it provides that they shall be elected by the qualified electors of the town, and shall hold their office for the term of two years, and until their successors are elected and qualified. It is also provided that the treasurer, clerk, marshal, collector, attorney, and surveyor shall be appointed by the trustees, and shall hold their office for two years, unless sooner removed for misconduct or neglect of official duties. The seventh section of the act makes it the duty of the clerk to keep the books, papers, and documents of the board belonging to the town, to attend all meetings of the board of trustees, and keep a record of all its proceedings, sign all warrants issued by order of the board, and keep an accurate account in a suitable book of all such warrants, their number and date, and assess all taxes levied by the board of trustees. By the eighth section it is declared that the treasurer shall take charge of all moneys of the town, pay all warrants, which shall first be signed by the clerk and countersigned by the president, and keep a correct account of all moneys received and paid out by him, and make



due report thereof once a month to the board. By the eleventh section it is provided that the trustees shall elect one of their number president of the board, and that the president chosen shall act as town recorder. Jurisdiction over certain offenses committed within the corporate limits is committed to him, and he is authorized to receive in such cases the same fees as were then allowed by the laws of the state to justices of the peace. The fifteenth section of the act provides: "The compensation of the board of trustees shall be one dollar per annum. The officers appointed by the board of trustees shall receive for their services such sums as the board may direct."

It will be observed that, while the act creating the defendant corporation provides that the trustees shall appoint a clerk and treasurer, it is silent as to whether such appointments shall be made from their own number or from without the board. No special provision is made therein regarding vacancies in the office of trustee, but the general act for the incorporation of towns of April 19, 1856, the provisions of which, except where inconsistent, are expressly made applicable to the defendant corporation by the act creating it, provides what shall cause a vacancy in the office of trustee; that is to say, removal from the town, absence therefrom for 30 days after election, and, if bond is required, neglect to file such bond within 10 days after election. St. 1856, p. 198. And the act of the legislature of the state of April 22, 1863, regarding offices and officers (Hitt. Gen. Laws, p. 693), declared what should constitute a vacancy in office, among which causes are not enumerated incompatibility of offices or acceptance of another office. This statutory enumeration of causes constituting a vacancy in office has been held by the supreme court of the state to be exclusive (*Rosborough v. Boardman*, 67 Cal. 118, 7 Pac. 261, and cases there cited), and settles the question in relation to the alleged vacancies in the office of trustee of the town of San Buenaventura at the time of the making of the contract in question against the contention of defendants, regardless of any other consideration; for it cannot be doubted that the qualifications prescribed by the state for those who shall be eligible to office under it, or under any of its subordinate subdivisions, or as to what shall constitute a vacancy in any of such offices, are conclusive upon the federal courts.

A more serious question is that raised by the allegations of the answer to the effect that Chateneauf had a direct pecuniary interest with Arnaz, Ustassaugui, and Molleda at the time of the making of the contract in question; and that on October 28, 1872, when an ordinance was adopted by the board of trustees of the town purporting to ratify and confirm the contract and its subsequent assignment to the then existing complainant corporation, McKeeby and Molleda were members of the board of trustees; that their votes were essential to the adoption of the ordinance; that they voted for it, and thus passed it; and that they were, at the same time, holders of stock in the water company. The evidence shows that but three of the five members of the board of trustees—namely, Tico, Chateneauf,

and Escandon—participated on the part of the town in making the contract. It further shows that Chateneauf, at the same time, held for Escandon, who was the president of the board, an equal interest with Arnaz, Ustassauategui, and Molleda in the subject-matter of the contract. Such being the facts, I am of the opinion that the contract was absolutely void, and not merely voidable. The common law, on grounds of public policy, prohibits a trustee from contracting with himself. So does the statute of California. Hitt. Gen. Laws, p. 699; Pol. Code, §§ 920-922. The state statute referred to contains the further provision that every such contract may be avoided by any party interested therein, except the officer or officers making the contract or having an interest in it; and it is contended for the complainant that the effect of this provision of the statute is to remove from such contracts the character of absolute nullity, and make them voidable merely. A similar statute of New York was held by the commission of appeals of that state to be merely declaratory of the common law so far as it goes, in the case entitled *Smith v. City of Albany* (61 N. Y. 444). And such is evidently the view taken by the supreme court of California of the California statute; for in *Wilber v. Lynde*, 49 Cal. 290, where certain trustees of a corporation executed to themselves, on behalf of the corporation, its promissory notes, the supreme court of California held their action contrary to public policy and absolutely void, saying that the case came fully within the doctrine of the preceding case entitled *San Diego v. San Diego & L. A. R. Co.* (44 Cal. 106). In that case two of the three members of the board of trustees of the city of San Diego, assuming to proceed under an act of the legislature of the state authorizing the president and trustees of the city to donate and convey to the railroad company such parcels of the pueblo lands of the city, not exceeding in amount 5,000 acres, as they might deem advisable, and upon such terms and conditions as they might determine, passed a resolution granting to the railroad company 5,000 acres of the city lands. One of the two trustees at whose instance the resolution was passed was at the time a stockholder in and a director of the railroad company. The court said:

"We do not doubt that a majority of the trustees might execute the power, but the question is whether Sherman, who was a stockholder and director of the railroad company, could be one of that majority. When he entered upon the duties of trustee, his relations to the city became those of an agent to his principal, or of a trustee to his *cestui que trust*, and, while holding the office, he could do nothing inconsistent with those relations. This is clear upon principle, and rests upon abundant authority. The general principle is that no man can faithfully serve two masters whose interests are or may be in conflict. The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity. 'It may be regarded,' says Parsons, 'as a prevailing principle of the law, that an agent must not put himself during his agency in a position which is adverse to that of his principal; for even if the honesty of the agent is unquestioned, and if his impartiality between his own interest and his principal's might be relied upon, yet the principal has in fact bargained for the exercise of all the skill, ability, and industry of the agent, and he is entitled to demand the exertion of all this in his own favor.' 1 Pars. Cont. 74. This principle has found expression in a large number of cases, involving a great variety of

circumstances. And it applies equally whether one deals with himself, acting as sole trustee, or with a board of trustees of which he is a member, or with the directors of a corporation of whom he is one."

A similar ruling was made by the same court in the more recent case of *Davis v. Mining Co.*, 55 Cal. 359. The principle governing such cases is applicable alike to all officers and trustees of public and private corporations. 1 Dill. Mun. Corp. § 444. To permit a trustee to convey the interests of his *cestui que trust* to another, himself thereby securing an undisclosed interest with that other, would be to sanction a violation of the plainest principles of honesty and fair dealing. Such, according to the evidence in this case, was the transaction surrounding and entering into the contract in question, and it was for that reason void *ab initio*. If it be conceded that a contract so made admitted of ratification, precisely the same reasons which rendered the contract itself a nullity rendered ineffectual the attempted ratification and confirmation of it by the town ordinance of October 28, 1872; for the evidence shows that two of the four trustees voting for that ordinance—namely, McKeeby and Molleda—were, at the time, holders of stock in the complainant water company. That ordinance, by an act of the legislature of the state of California, entitled "An act to re-incorporate and extend the limits of the town of San Buenaventura, state of California, and also to change the name of Canyada street in said town to that of Ventura avenue," approved March 29, 1876 (St. 1875-76, p. 534), was approved and ratified. And prior to that, to wit, on the 29th of March, 1870, a similar act was passed by the legislature ratifying and confirming, in general terms, all ordinances, acts, and proceedings of the board of trustees of the town. While the legislature may cure irregularities, and confirm proceedings which without the confirmation would be void because unauthorized (*Mattingly v. District of Columbia*, 97 U. S. 690), I do not think it can be properly held that the legislature, by the acts referred to, ratified and confirmed a fraud not disclosed to it. The application of the doctrine of ratification always largely depends upon the circumstances of the case. In speaking of the application of the doctrines of ratification and estoppel, it is said in *Morawetz on Private Corporations* (section 631a):

"The application of these doctrines necessarily depends in each case upon all the peculiar circumstances. The equity of the case must be determined. It is necessary to consider the character of the act with which it is sought to charge the corporation, the importance of the act, and the degree of publicity which was given to it. The good faith or bad faith of the parties, and their business relations, are also important considerations."

Whether the ordinance in question violated those provisions of the constitution of the United States declaring that no person shall be deprived of his property without due process of law, and securing every person the equal protection of the laws, need not now be determined; since, under the provisions of the state constitution and state statute pursuant to which it was enacted, its functions had ceased long prior to the final submission of this case, the chief object of which evidently was to procure a judicial determination

of complainant's alleged rights under the contract of January 4, 1869. Inasmuch, however, as the defendant trustees are required to fix the rates annually in the month of February, it is perhaps not out of place to call attention to the case of *Spring Valley Water-works v. City of San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046, in which the supreme court of California, in considering that provision of the state constitution relating to the fixing of water rates, held that the governing body of the municipality has not the right to fix rates arbitrarily, without investigation; and that, while not bound to give notice to a water company of its intention to fix such rates, it is nevertheless in duty bound to make proper efforts to obtain all information necessary to enable it to act intelligently and fairly in fixing the rates, and a failure to do so may defeat its action; that, when the constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation; and attention also to those decisions of the federal courts in which it is held that the fixing of any such unreasonable rates as amount to a taking of private property without due process of law, or as operate to deprive a party of the equal protection of the laws, are contrary to the provisions of the constitution of the United States, and, in appropriate proceedings, will be declared invalid. *Reagan v. Trust Co.*, 154 U. S. 412, 14 Sup. Ct. 1047; *Ames v. Railway Co.*, 64 Fed. 165, and cases there cited.

From the views above expressed, it results that the bill must be dismissed, at complainant's cost; and it is so ordered.

---

CARTER v. THOMPSON et al.

(Circuit Court, D. Montana. November 19, 1894.)

1. PUBLIC LANDS—TOWN-SITE PATENT—OFFER AT AUCTION.

Offer of public lands for sale at auction is not a condition precedent to their being patented for a town site.

2. SAME—ATTACKING PATENT.

A patent for a town site cannot be attacked by one whose rights, if any, in the land, attached after issue of the patent, on the ground that the land was theretofore known to be mineral land, but it can be assailed only in a direct proceeding by the United States.

3. PLACER MINING RIGHTS—QUIETING TITLE.

One having a placer mining right, which can only be acquired in public land, can maintain suit to quiet title, if at all, only as to his limited interest.

Suit by J. A. Carter against J. D. Thompson and others to quiet title to mining property. Heard on demurrers to the bill.

J. A. Carter, for complainant.

Toole & Wallace, Sanders & Sanders, McConnell, Clayberg & Gunn, Massena Bullard, H. G. McIntire, and George B. Foote, for defendants.

KNOWLES, District Judge. In this case complainant commenced an action to quiet title. He sets forth that he located the premises

in his complaint described as a placer mining claim. The manner of making, and the steps taken in making, this location are set forth particularly. There is no doubt, therefore, but the only title he has to said premises is derived from this location. The title of the defendants is also set forth in these words: "For the only claim or interest they or either of them have, in privity with the government of the United States, is asserted by them, and each of them, under and by virtue of a pretended entry of and patent to the Helena town site in said Lewis and Clarke county, a copy of which said patent is hereunto attached, and marked 'Exhibit B,' and made a part hereof." The patent shows a grant of the premises in dispute, with other lands, to one Miers F. Truett, probate judge of Lewis and Clarke county, Mont. T., in trust for the several use and benefit of the occupants of the town site of Helena, according to their respective interests, etc. In the bill there is an allegation that the premises in dispute are mineral land, and known to be such at the time of and prior to the application to enter said land under the town-site law. The location of the claim under which complainant asserts title was made on the 7th day of September, 1893. The town-site patent was issued June 15, 1872. The claim seems to be made that this patent was issued before the land was offered for sale at public auction. Complainant has not noticed the difference between the statutes which provide for the pre-emption of public lands, and the one providing for the sale of such lands for town-site purposes, and the statute for the private sale of land. In the case of *Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, the supreme court points out "that sale, pre-emption, and homestead are three different modes of acquiring an interest in public lands." There may be added to this list the acquiring an interest in public lands by the proper officers in trust for town-site purposes. Public lands could be pre-empted or obtained as a homestead or for town-site purposes without the land having been offered for sale at public auction. Public lands could not be acquired at private sale until such an offer was made. So that the authorities cited upon that point have no bearing. It seems to be claimed that, as the lands were known to be mineral before the application or issuing of the patent, therefore it is void. The question as to whether the land was mineral or not was one upon which the land department passed in issuing the patent to Miers F. Truett, the probate judge. In speaking of the functions of the land department in the case of *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389, the supreme court said: "Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation." In the case of *Davis' Adm'r v. Weibbold*, 139 U. S. 525, 11 Sup. Ct. 628, the supreme court, in speaking of the effect of an exception in grants of mineral lands, said, as to the effect of a patent: "The grant or patent, when issued, would thus be held to carry with it the determination of the proper

authorities that the land patented was not subject to the exception stated." In the case of *Barden v. Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, the supreme court held that it was within the province of the land department to inquire into the character of lands, when issuing a patent therefor, as to whether it was mineral or not; and, if lands were determined to be nonmineral, this determination would be conclusive, in the absence of fraud, imposition, or mistake. The court says upon this point: "Their judgment in such cases is, like that of other special tribunals, upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment." The conclusion is that the land granted to Miers F. Truett, in trust for the Helena town site, must be classed as nonmineral. It was so determined by the land department. This determination cannot be attacked in a collateral proceeding. This was so held in the case of *Barden v. Railroad Co.*, *supra*. If any fraud was practiced, or any mistake of law or fact occurred, in issuing the patent to Truett to the Helena town site, complainant cannot take advantage of this. He had no rights at that time to be affected by either the fraud or mistake. His rights, if any, accrued, according to his own showing, 21 years after the issuing of such patent. The supreme court has fully decided this matter in the cases of *Vance v. Burbank*, 101 U. S. 514; *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. 782. The only way this patent can be set aside or annulled is by a direct proceeding instituted by the United States for some fraud practiced on it, or on account of some mistake of fact or law occurring when the patent was issued. Complainant, therefore, by his own showing, presents facts to the court which show that he is not entitled to recover in this case.

There is another point that I have not discussed in this case. The complainant has only a placer mining right. This may be only a license to work the ground located or it may amount to an easement. This I do not decide. Whatever the right is, it can only be acquired in public land, not in land that is already patented. *Davis' Adm'r v. Weibbold*, *supra*. But, admit that complainant has this license or easement, with only such a title can he institute proceedings to annul a patent of the United States to this ground? I think not. I do not think he has sufficient interest in the land to justify him in maintaining such an action as this. He has only a very limited interest in the land, if any, and only to the extent his interest is interfered with can he maintain a suit to remove a cloud therefrom or to quiet a title thereto. If only a license, as some authorities maintain, he would have no such interest, for he would have no title to be quieted. The demurrers in this case are sustained, and the bill dismissed, at complainant's costs.

CENTRAL TRUST CO. OF NEW YORK v. EAST TENNESSEE, V. & G.  
RY. CO. et al. (MEREDITH, Intervener).

(Circuit Court, N. D. Georgia. November 6, 1894.)

No. 507.

RAILROADS—RIGHTS OF PASSENGERS—SIGNATURE ON TICKET.

Plaintiff purchased a round-trip ticket at M., in the state of Louisiana, from that place to T., in the state of Georgia, entitling him to passage over several connecting railroads. The ticket contained a contract, which was signed by plaintiff, stipulating, among other things, that, on the day of his return from T., plaintiff would identify himself, by his signature on the ticket, before the agent of the railroad at that place, who would witness the same; that, if not so signed and witnessed, the ticket should be void; that no agent should have power to modify the contract; and that plaintiff would not hold any of the railroads liable on account of any statement, not in accordance with the contract, made by any agent. On the day of his return from T., plaintiff offered to identify himself before the agent, and requested him to sign the ticket, but the agent told him it was unnecessary, and refused to sign the ticket. Plaintiff traveled part of the way, on his return, without objection, but was ejected from the train by the conductor on one of the railroads forming the line, because his ticket was not signed and witnessed as required by its terms, plaintiff being unable and refusing to pay his fare. *Held* that, the contract between the railroad and plaintiff being express and its terms not having been complied with, the conductor had a right to expel plaintiff from the train, and no right of action accrued to plaintiff in consequence.

This was a suit by the Central Trust Company of New York against the East Tennessee, Virginia & Georgia Railway Company for the foreclosure of a mortgage. M. L. Meredith filed an intervening petition praying for an allowance of damages against the receivers appointed in the suit. The petition was referred to a special master, to whose report the intervener filed exceptions.

The only question urged before the court is the one discussed by the special master in his report, and that is whether this case is controlled by the case of *Mosher v. Railway Co.*, 127 U. S. 390, 8 Sup. Ct. 1324. The question at issue will clearly and fully appear from the report (dated August 24, 1894) of the special master (Benjamin H. Hill), which is as follows:

"To the honorable the judges of said court: This is an action for damages brought by M. L. Meredith against the receivers of the East Tennessee, Virginia & Georgia Railway Company, and by an order passed by this court on March 26th, 1894, the same was referred to me as special master 'to hear and report to the court both the law and facts.' In pursuance of said order, and after due summons, I have taken the testimony and heard argument of counsel, and now submit the following report:

"I find the following to be the facts: On the 3d day of August, 1892, the intervener, M. L. Meredith, purchased at Monroe, in the state of Louisiana, from the agent of the Cincinnati, New Orleans & Texas Pacific Railroad Company, what is commonly known as a 'round-trip ticket,' from said last-mentioned place, to wit, Monroe, via Chattanooga and Atlanta, to Tallulah, in the state of Georgia, said ticket being good to return until the 31st day of October thereafter. The coupons on said ticket, both going and returning, were good for passage over the East Tennessee, Virginia & Georgia Railway Company's road, then being operated by the receivers of this court between Atlanta and Chattanooga. At the time intervener purchased said ticket, he entered into a special contract with the several roads over whose lines the ticket entitled him to be carried upon certain terms and conditions, of which those material to be here stated were as follows: '(6) I further agree that on the day of my departure, returning, I will identify myself as the original purchaser of this ticket by my signature on the

back of this contract, and by other means, if necessary, in the presence of the authorized agent of the B. R. & A. R. R. [meaning the Blue Ridge & Atlantic] at the point to which the ticket was sold, who will witness the same, and that this ticket shall be void if these conditions are not fully complied with. (7) That I, the original purchaser, hereby agree to sign my name, and otherwise identify myself as such, whenever called upon to do so by any conductor or agent of the line or lines over which this ticket reads.' (12) That I will not hold any of the lines named in this ticket liable for damages on account of any statement, not in accordance with this contract, made by any employé of said lines. (13) And it is especially agreed and understood by me that no agent or employé of any of the lines named in this ticket has the power to alter, modify, or waive, in any manner, any of the conditions named in this contract.' The contract containing these conditions was signed by the plaintiff, in the presence of the agent of the first-named railroad, at Monroe, La. The plaintiff traveled on said ticket to Tallulah, in the state of Georgia, and, on the date of his return or departure from Tallulah, he went before the agent of the Blue Ridge & Atlantic Railroad Company for the purpose of signing the return part of the ticket, and having the agent to witness his signature; in other words, to comply with the sixth condition of the contract set out above. In response to his request to the agent to so witness his signature, he was informed by him that it was 'unnecessary to do so; that the form was antiquated, and it would do no good to sign it; and that, if any conductor put me [him] off on that ticket, the railroad company would be liable in damages.' This statement of the agent was satisfactory to the plaintiff, and he thereupon commenced his return trip to Monroe, La. He traveled over the Blue Ridge and R. & D. Railroad Co. to Atlanta, Ga., on said ticket; the conductors of the roads either not noticing that the requirements of the sixth condition of the contract had not been complied with, or, if so noticing, making no point on the same. On the railway of the East Tennessee, Virginia & Georgia, operated by the above-mentioned receivers, a few miles out from Atlanta, the conductor demanded of the plaintiff his ticket, and the plaintiff produced the one in question. The conductor declined to receive the same, on the ground that the sixth condition of the contract had not been complied with by the plaintiff, and demanded that he pay his fare. The plaintiff explained to the conductor why he had not complied with said condition, stating that he had been informed by the agent of the Blue Ridge & Atlantic Railroad Company at Tallulah that it was not necessary now to do so, and that the agent had declined to identify him and to witness his signature, as provided by said condition of the contract. This statement did not satisfy the conductor, and he demanded that the plaintiff pay his fare. The plaintiff had no money to do so with, and the conductor informed him that he would be compelled, under the rules of the company, to put him off the train at the next station, and required him to pay his fare from Atlanta to said station. When said station, which was Nick-a-Jack, was reached, the conductor collected from the passenger his fare from Atlanta to said station, and the plaintiff thereupon obeyed the order of the conductor, and got off the train. There is no allegation or evidence that the manner of the conductor in expelling the plaintiff from the train was offensive or insulting, or otherwise objectionable; the fact of expulsion being alone complained of. The plaintiff, after being expelled from the train, returned to Atlanta on the next train, when, after employing a lawyer to bring suit against the receivers, he proceeded to Gainesville, from which point he telegraphed to his home in Monroe, La., for money to buy another ticket to his home, which he did buy. It was also shown that the agent at Tallulah had declined to witness signatures of parties holding similar tickets, making the same statement to them, that it was not necessary to do so, and the passengers traveled upon them. It was also shown that a similar ticket held by a woman was presented to a conductor of one of the lines named in said ticket, unsigned and unwitnessed, who declined to receive the same, but compelled the passenger to pay fare, and that, on the fact being presented to the authorities operating the railway, the money of such passenger was refunded.



"These are all the facts proven before me, and the question for my decision is, do they make a case of liability, under the law applicable thereto? It is contended by counsel representing the receivers that they do not: (1) Because the conductor of the East Tennessee, Virginia & Georgia Railway Company had the legal right to expel the passenger from the train, under the facts. (2) That, if the intervener has any remedy, it is not for being expelled, but for a breach of the implied contract made with the defendants that the agent at Tallulah would identify him and stamp his ticket. (3) That the road whose agent failed to discharge his duty in identifying and stamping is the one liable, and not the road whose conductor put the passenger off the train. (4) That in no event can there be any recovery for damages, except compensatory damages. (5) Exemplary damages cannot be recovered against the receivers in their official capacity.

"As to the first proposition. Did the conductor of the East Tennessee, Virginia & Georgia Railway Company have the right to expel the passenger from the train, under the facts? The master is of opinion that he did have such right, and his opinion is based upon the decision of the supreme court of the United States in the case of *Mosher v. Railway Co.*, 127 U. S. 390, 8 Sup. Ct. 1324. This decision of the supreme court, it would appear, is conclusive on this point of the case, unless the facts make a different case than that decided by the supreme court, and the master thinks, in principle, there is no difference. The contract between the passenger and railroads was expressed that the ticket, to be good for the return passage, must be signed by the passenger at Tallulah, before the agent of the Blue Ridge & Atlantic Railroad Company at that place, and be witnessed by him. When this ticket was presented to the conductor of the defendants, and he found that this condition of the contract had not been complied with, he had no authority to receive the ticket from the passenger, waive any of its conditions, or to permit him to travel on the train unless he paid fare. 'It would be inconsistent alike with the expressed terms of the contract of the parties,' quoting from the above decision, 'and with a proper performance of the duties of the conductor in examining the tickets of other passengers, and in conducting his train with due regard to speed and safety, that he should undertake to determine from oral statements of the passengers, or other evidence, facts alleged to have taken place before the beginning of the return trip, and as to which the contract on the face of the ticket made the stamp of the agent at Hot Springs the only and conclusive proof.' This case was first decided by Judge Brewer in the circuit court, who, in a very able opinion, reviews the question of law presented by the facts, which opinion was affirmed by the supreme court above cited. 23 Fed. 326. In this opinion the court says: 'It certainly would introduce a very uncertain rule of procedure if the conductor could not rest upon the face of the ticket which was presented to him; if he was bound to act as a judicial tribunal, and take the testimony, and inquire into the excuses or reasons for the nonperfection of the ticket which was presented to him. The party took the ticket, upon the face of which was an express stipulation that before it should be good for return passage the holder should be identified by the agent at Hot Springs, and he should stamp the ticket as therein provided. Can the court cast upon the conductor the duty of entering upon a judicial investigation? Of course, the conductor could not, at the instant, secure counter testimony, and he would be bound to take the statement of the party as to the facts of the case, independent of the express language of the ticket. I do not think the conductor is bound to do anything of the kind. I think he has a right to rely upon the contract as expressed in the ticket.' *Id.* Also *Railway Co. v. Bennett*, 1 C. C. A. 544, 50 Fed. 501, a strong case; *Hutch. Carr.* § 580b, and cases cited in notes. This is the only decision by the United States supreme court exactly in point, and is so clearly in point that the master relies upon it as conclusive of the proposition that the conductor had a legal right to expel from the car the intervener, under the facts proven, unless there is some additional fact or facts which differentiates this case from the case decided by the supreme court.

"It is true the supreme court of Georgia, in the case of *Head v. Railway Co.*, 79 Ga. 358, 7 S. E. 217, seems to present a contrary view of the law,

the second headnote being as follows: 'If the purchaser of a round-trip ticket, after paying for and receiving it, performs the stipulations of the contract on his part, or offers to, in proper time and manner, the company is bound to recognize and honor the ticket when and wherever it is presented, notwithstanding any mistakes or omission by its agents in signing or stamping the same.' The ticket in the Head Case contains almost the same conditions as the one in the present case. The principle of law announced by the court in the headnote is somewhat broader than the facts of the case, but, in any event, as the plaintiff's right to recover in this case does not depend upon the construction of any statute of the state of Georgia, but only upon his common-law right in an action on the case for damages, the decision of the supreme court of the United States would control, where there was any conflict between the two courts. The seventh condition of the contract quoted above, by which the ticket is to be void unless the plaintiff identifies himself whenever called upon to do so by the conductor, is evidently intended as an additional precaution against the transfer of the ticket either in going or returning, and not as an alternative or substitute for the previous condition of the validity of the ticket for the return trip.

"The able counsel for the plaintiff endeavors to show that there is an essential difference between the present case and the Case of Mosher, in 127 U. S., 8 Sup. Ct.; but the master does not think there is any substantial difference in the facts of the two cases, and that the principle of law announced by the supreme court is controlling, as applicable to the facts in either case.

"Counsel for plaintiff also insists that the statement of the agent at Tallulah that the sixth condition of the contract was no longer necessary, in connection with the fact that passengers on similar tickets, unwitnessed and unstamped, had been permitted to pass over defendants' road, and that the fare of one passenger on one of the connecting lines whose ticket was unwitnessed, and from whom the conductor had demanded the fare, had been refunded, furnished evidence that the condition had been abrogated; and that, as the defendant presented no contradictory evidence on this point, the master ought to accept the fact as proven, and that the expulsion of the plaintiff was wrongful, as either the conductor knew that the condition had been abrogated, and, notwithstanding his knowledge, wrongfully expelled the passenger, or that the receivers operating the road were at fault in not informing the conductor of such abrogation.

"It is also insisted that the agent at Tallulah was the agent of the defendants, and that his declaration made to the passenger was in the line and scope of his agency, and was binding upon his principal. Accepting all these statements as having been made by the agent at Tallulah, and conceding that he was the agent of the defendants for the purpose of identifying the holder of the ticket and stamping the same, yet the master does not think that his declarations, even when aided by the other facts proven, are sufficient to show that this special contract made in writing by the plaintiff with the defendants was in fact abrogated. The declarations of the agent at Tallulah are clearly inconsistent with the express stipulation contained in the sixth condition of the contract, and if, on account of such declarations, any damage has resulted to the plaintiff, he has, by the twelfth condition of the contract, expressly agreed that he would not hold the defendants liable therefor; and by the thirteenth condition of the contract he has also agreed that no agent or employé of any of the lines named in the ticket has any power to alter, modify, or waive, in any manner, any of the conditions named in the contract."

In this opinion the master only passes upon the petition presented to him and the facts proven in support of the allegations of said petition. He does not deem it necessary to decide the question made by the defendants, that the plaintiff may have a remedy in other forms of action, nor is the question as to whether punitive damages can be recovered against the receivers decided. On the case as presented to the master, he reports in favor of the defendants. All of the evidence is identified and approved by the signature of the master written thereon.

Hall & Hammond, for intervenor.

Dorsey, Brewster & Howell, for defendants.

NEWMAN, District Judge (after stating the facts). In my opinion, the conclusions of the special master in this case, as above set forth, are correct. The decision of the supreme court in the case of Mosher v. Railway Co., 127 U. S. 390, 8 Sup. Ct. 1324, is conclusive of the question at issue here. There can be no distinction in principle between that case and the case at bar. The decision of the supreme court is clearly based on the ground that the agent of the Hot Springs Railway Company at Hot Springs was not the agent of the defendant company in that case, which necessarily decides and controls the question here, and determines that the agent of the Blue Ridge & Atlantic Railroad Company at Tallulah Falls was not the agent of the receivers of the East Tennessee, Virginia & Georgia Railroad Company. The terms of the contract signed by the intervenor, by which it was agreed that the ticket should not be good for return passage unless the holder identified himself in the presence of the agent at the point named, are substantially the same as those signed by the plaintiff in the Mosher Case, *supra*, and the views expressed by the supreme court apply to and govern the facts of this case so fully that further discussion of the matter would be superfluous. The report of the special master is confirmed, and the exceptions overruled.

---

CLYDE et al. v. RICHMOND & D. R. CO. (HISSONG, Intervener).

CENTRAL TRUST CO. v. SAME.

(Circuit Court, N. D. Georgia. September 20, 1894.)

1. RAILROAD FORECLOSURE—ANCILLARY SUITS—DUTY OF COURT.

Suit was brought in the United States circuit court in Virginia for the foreclosure of a mortgage upon a railroad belonging to a Virginia corporation, and ancillary suits were brought in the circuit courts in several other states through which the road ran, including Alabama and Georgia, and the same receivers were appointed in all the suits, and took possession of the railroad property. H., a resident of Alabama, who held a judgment against the railroad company for \$1,000, obtained in that state before the commencement of the foreclosure proceedings, filed an intervening petition in the ancillary suit pending in Georgia, asking for judgment against the railroad company upon his Alabama judgment. *Held* that, the duty of each court, where ancillary proceedings are pending, being only to consider and dispose of rights and liens peculiar to its jurisdiction, and to the property particularly within its charge, the circuit court in Georgia would not undertake to pass upon the claim of H., which arose in another jurisdiction, and was a lien only upon the property within that jurisdiction.

2. JURISDICTION OF UNITED STATES COURT—INTERVENING PETITION.

*Held*, further, that the circuit court had no jurisdiction, upon an intervening petition in a foreclosure suit, to render a general judgment which it would be without jurisdiction to render, in an independent suit, both because of the smallness of the amount in controversy and the residence of the parties.

These were two suits by William P. Clyde and others and the Central Trust Company, respectively, against the Richmond & Danville Railroad Company for the foreclosure of mortgages. John S. Hissong filed an intervening petition praying for judgment upon a judgment obtained by him against the defendant in Alabama. The petition was referred to a master, who filed his report granting the prayer. The defendant excepts to the master's report.

C. T. Ladson, for intervener.

Jackson & Leftwich, for defendant.

NEWMAN, District Judge. The intervention of John S. Hissong in the above-stated case was filed on May 14, 1894, in the clerk's office of this court, and on the same day the intervention was allowed, and referred to W. D. Ellis, Esq., special master, to determine all questions of law and fact therein, and report to the court. This intervention is filed both in the case of the Central Trust Company of New York against the Richmond & Danville Railroad Company, and in the case of Clyde et al. v. The Richmond & Danville Railroad Company. In the first-named case, the bill is brought by William P. Clyde and others on behalf of themselves and other creditors and stockholders, and on this bill, in June, 1892, F. W. Huidekoper and Reuben Foster were appointed receivers. On the 29th day of July, under a bill filed by the Central Trust Company of New York against the Richmond & Danville Railroad Company, Samuel Spencer, F. W. Huidekoper, and Reuben Foster were appointed receivers. This bill of the Central Trust Company was brought for the purpose of foreclosing a mortgage against the defendant corporation. The order appointing Spencer, Huidekoper, and Foster receivers under the Central Trust Company bill provided that Huidekoper and Foster, receivers under the Clyde bill, should, on the 1st day of August, 1893, turn over to the three receivers appointed under the Central Trust Company bill all the property of the Richmond & Danville Railroad Company in their possession and under their control. On the 20th day of July, 1893, Spencer, Huidekoper, and Foster were, under a bill filed by the Central Trust Company of New York against the Georgia Pacific Railway Company, appointed receivers of all the property and assets of that company, so that after that date the property of the Georgia Pacific Railway Company, which had been, prior to the receivership, operated by the Richmond & Danville Railroad Company, was controlled by the same receivers under a separate bill against the Georgia Pacific Railway Company which was filed originally in the circuit court for this district. The intervening petition shows that John S. Hissong, who is a citizen of the state of Alabama, obtained a judgment in the circuit court of Jefferson county, Ala., on the 20th day of April, 1891, against the Richmond & Danville Railroad Company for the sum of \$1,000, for which he prays judgment as an intervening petitioner in the case named against the Richmond & Danville Railroad Company. The petition was referred formally, and in connection with a number of other petitions, to the special master, as stated, without considera-

tion of the merits of the same, as no demurrer or objection was interposed prior to the reference. Before the special master, the Richmond & Danville Railroad Company put in a special appearance by counsel, and objected to the jurisdiction of this court and the special master, on the ground that this court had no jurisdiction to enter judgment against the Richmond & Danville Railroad Company without a formal suit on a foreign judgment and due service of process, and upon the further ground that no lien is sought against the trust assets of the defendant in the hands of the court. Upon the presentation of an exemplification of the record in the Alabama court to the special master he found that the same was in due form, and that the intervener was entitled to have judgment against the defendant in his favor, with interest thereon at 7 per cent. per annum from the 22d day of September, 1891, to the date of his finding, for the sum of \$1,000. On the filing of the report of the special master, counsel for the Richmond & Danville Railroad Company, again specially appearing, renewed the objections urged before the special master, and upon that ground excepted to the report of the special master.

The question raised is somewhat novel and peculiar. The original bill in this case of Clyde and others against the Richmond & Danville Railroad Company was filed in the circuit court for the Eastern district of Virginia, and ancillary bills, or what were called "original bills,"—but were bills in aid of the first suit in Virginia,—were filed in the circuit courts of the various states through which the line of the Richmond & Danville Railroad Company ran, which were North Carolina, South Carolina, Georgia, Alabama, and Mississippi. The primary litigation as to the Richmond & Danville Railroad Company, however, is all in Virginia. The bill filed in this district, while it was called, as stated, an "original bill," was really subordinate to the Virginia proceeding. It was filed here for the purpose of obtaining the aid of this court in preserving the assets of the defendant corporation so far as the same were in the jurisdiction of this court; and while this court has not questioned its right to pass upon and determine the rights of creditors here, claiming an interest in or asserting a lien against the property of the corporation in this district, it has not gone further than that. The petitioner, Hisson, obtained a judgment in the state courts of Alabama prior to the time that the property was placed, by order of the circuit court of Virginia and the other circuit courts, in the hands of receivers. The lien of his judgment was confined to property in the state of Alabama. A bill of the same character as the one filed in this district, as has been stated, was filed in Alabama, and no reason appears why petitioner could not as well present his claim of the right to share in the assets of the Richmond & Danville Railroad Company to the circuit court in Alabama as to the circuit court here. Some reason might exist for his taking his claim to the circuit court of Virginia to assert his right to participate in the property where the principal assets of the defendant are being administered, but it is difficult to see by

what right he can take his claim from one ancillary jurisdiction to another ancillary jurisdiction for the purpose of having his rights determined. If this be true, then a very peculiar and a very unsatisfactory condition of things will exist. A North Carolina judgment creditor could go to Mississippi, or a South Carolina judgment creditor could go to Alabama, and so on from one to another of the various states in which these ancillary proceedings are pending. The duty of each court, where the various proceedings are pending other than in Virginia, would seem to be to consider and dispose of right and lien peculiar to its jurisdiction, and as to or connected with the property within its peculiar control. Where a continuous line of railway runs through several districts, and the court in each district in appropriate proceedings recognizes the same receivers for the railway, neither court, with the proper regard for the comity of courts, will go beyond its own jurisdiction, and interfere with the management of the property in another jurisdiction. Nor will any one court undertake to pass upon the claim of those whose rights and lien would seem to be dependent upon and peculiar to another jurisdiction.

But there is another objection to this proceeding and the prayer of this petition, which seems to be fatal. The petitioner asks for a judgment against the Richmond & Danville Railroad Company. To be effectual for any purpose, it must amount to a general Georgia judgment against the defendant corporation, and such, I understand, it is claimed to be, if the report of the special master is confirmed. The assets of the Richmond & Danville Railroad Company within this jurisdiction have been in the hands of this court, under the character of proceedings named, for some time; that is, in the hands of receivers of the court, for the benefit of those interested therein. At the time of the sequestration of this property by the courts of the various states before mentioned the petitioner had a good Alabama judgment, with such lien and rank as it might give him against the property of the Richmond & Danville Railroad Company. Now he comes into this court, and asks by his petition, not that his rights by virtue of his judgment lien may be ascertained and determined as against the property of the defendant in the hands of the courts, but he asks for a judgment against the defendant,—a new judgment, which, as stated, is claimed to be, and will be, if anything, a general judgment. The defendant is a Virginia corporation, the petitioner a citizen of Alabama. Neither the defendant nor the petitioner resides in this state, so that no suit could be brought originally in this court between the parties, even if the necessary jurisdictional amount was involved; and it is not. So that the court in an original proceeding would have jurisdiction neither of the parties nor of the subject-matter. Expressing it differently, the petitioner comes into court by intervention, in a proceeding to administer such assets in accordance with the rights of these interested therein, and under cover of this intervening petition obtains a general judgment in a court which could have no jurisdiction of the case otherwise. The rule well established in practice,

and recognized by the supreme court in *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, and other cases, is that ancillary proceedings and original dependent bills as well as interventions will be entertained, notwithstanding the necessary diverse citizenship does not exist, provided the subject-matter of the ancillary proceeding or intervention is so connected with the original proceeding of which the court has acquired jurisdiction as to make it proper and necessary for the determination of the rights of the parties to do so. This does not affect the case as presented here, however. It is controlled on other grounds.

Necessarily, the purpose and scope of the intervening petitions in receivership cases are the ascertainment and adjudication of rights connected with the property in the hands of the court. Such interventions may come in various shapes, but they look to the one result. Numerous petitions by way of intervention have been allowed in this cause where the claims were against the defendant corporation. These petitions have all gone, as a rule, to the special master appointed in this case. Suits for damages have been, by consent usually, so referred, and the special master directed to hear evidence, and report the amount which the petitioner was entitled to recover, if anything. All these interventions, however, had the one ultimate object of participating in the distribution of the property of the defendant corporation, if a sufficient amount should be realized to justify such participation; and for that purpose, if the claim is unliquidated, it would be necessary, of course, to ascertain its amount. The character of this petition, however, is different from any presented, so far as the attention of the court has been specially called to them. The petitioner elected his forum for suit originally in the state court of Alabama, and obtained his judgment. As to his right to participate in the assets of the defendant in the hands of the court by coming into this equity cause, he must be content to abide by the lien of that judgment, and such rights as he may have by virtue thereof. This, of course, interferes in no way with his right to bring suit against the defendant in a court of competent jurisdiction on his judgment, and to have such rights as that judgment will give him determined; but he is not entitled to do this by intervention in the equity cause in this jurisdiction. Of course, a case might exist where property on which a creditor had a judgment lien had been removed from the jurisdiction in which his lien had attached into another jurisdiction, and it would be necessary for him to follow it up for the purpose of having his rights enforced; but no such case as that is made, or even intimated, here. The proceeding is manifestly wrong, and the report of the special master allowing the intervenor judgment against the Richmond & Danville Railroad Company is clearly erroneous. This conclusion is reached upon both grounds which have been discussed. In the first place, the petitioner has sought the wrong jurisdiction. He should have either remained in Alabama, and presented his claim to the circuit court of that state, or, if he left that district, he should have gone to the court of primary jurisdiction in this case, namely, the circuit

court of Virginia. Any other course than this would lead to the most inextricable confusion in the disposition of cases of this sort. In the next place the petitioner has received at the hands of the special master a general judgment against defendant, which he could not in any way obtain in the circuit court here. Because the court holds in its hands the assets of a Virginia corporation is no reason why it should entertain an original suit against that corporation by a citizen of Alabama seeking a general judgment against it. The exceptions to report of the special master will be sustained, and the intervening petition dismissed.

THOMSON-HOUSTON ELECTRIC CO. v. CAPITOL ELECTRIC CO.  
(READ, Intervener).

(Circuit Court of Appeals, Sixth Circuit. December 4, 1894.)

No. 147.

1. PRINCIPAL AND AGENT—FRAUD OF AGENT—NOTICE TO PRINCIPAL.

D., as agent of R., held \$50,000 of her money to invest. He was also treasurer of the C. Co., and, as such, held certain bonds of that company, apportioned by vote of the company among the stockholders, without consideration, and deliverable to them on payment of their stock notes, including \$6,000 of such bonds attached to a stock note of his own. D., a few days before his note matured, wrongfully, and without the consent of any officer of the company, took the bonds from his note, and caused one M., an irresponsible person, in consideration of a payment to him of \$25, to make a note to D., "trustee," for \$3,200, and attach \$4,000 of the bonds to it as collateral, upon which note D. advanced, ostensibly to M., but really to himself, \$3,200 of R.'s money, with which he paid his stock note. D. afterwards, in settling his account with R., turned over to her the note, without indorsement, and the bonds attached to it as collateral. *Held*, that R. was not chargeable with notice of the facts which D. knew as to the issue of the bonds, since, though her agent, he was, in this transaction, engaged in an attempt to deceive and defraud her, for his own advantage.

2. BONDS—BONA FIDE HOLDER—COLLATERAL SECURITY.

*Held*, further, that R. was a bona fide holder of the bonds, for value, that she held the legal title thereto, and that she was entitled to the security of the mortgage by which the bonds were secured, to the extent of the principal and interest of the note, notwithstanding any equities of the company arising out of their illegal issue.

3. COLLATERAL SECURITY—TITLE.

The pledgee of negotiable paper indorsed to him (or delivered to him, if it be payable to bearer) before maturity, and without notice to him of any defect of title, as collateral security for the loan of money, is entitled to hold such paper, to the extent of his loan, with the same immunities as an ordinary holder of commercial paper taken by purchase in good faith, for value, and before maturity; and it is not material whether the evidence of the principal debt be in negotiable form or not.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

This was a suit by the Thomson-Houston Electric Company against the Capitol Electric Company for the foreclosure of a mortgage. Martha M. Read filed an intervening petition praying that she might be decreed to be entitled to the security of the mortgage as to four



bonds held by her. The circuit court dismissed the petition. 56 Fed. 849. The intervenor appeals.

The original bill in this cause was filed to foreclose a mortgage given by the Capitol Electric Company to secure an issue of \$100,000 of negotiable bonds, payable to bearer. Martha M. Read, the appellant, intervened, and filed her petition praying the court to decree that four of these bonds, of the par value of \$1,000 each, held by her, entitled her to the security of the mortgage, foreclosure of which was being sought. She averred that she did not own the bonds absolutely, but held them as collateral security for the payment of a note for \$3,200, signed by one W. W. Morrow, dated July 1, 1890, payable one year from date, to A. Dahlgren, as trustee, which she, as the real owner, had held since the time of its execution. She prayed that her debt might be recognized and allowed, and that she be paid and satisfied out of the assets of the defendant company, together with her reasonable attorney's fees. Her petition was answered by H. M. Doak, the receiver in the cause, appointed by the court and empowered to bring and defend all suits arising out of the settlement of the affairs of the electric company, who averred that the bonds had been put into circulation without the authority of the defendant company, through the fraud of one Dahlgren, an agent of the petitioner, and that she was, therefore, charged with knowledge of their invalidity. The answer further set up that the note which the bonds were pledged to secure was never indorsed to the petitioner, that she, therefore, was not the owner of the legal title either of the note or the bonds, and that all the defenses which could be pleaded by the company against the bonds in the hands of A. Dahlgren were available against the claim of the petitioner. There was no substantial dispute in regard to the facts. A. Dahlgren was the nephew and agent of Mrs. Read, the petitioner, in Nashville. She had given him \$50,000 of her money, to lend it on security. He was the secretary and treasurer and general manager of the defendant, the Capitol Electric Company, which was a corporation chartered under the laws of Tennessee, for the purpose of furnishing electric light and power. In the course of the business of the company, a valid mortgage upon its property of every kind was executed to secure a proposed issue of \$100,000 of bonds. Fifty thousand dollars of the bonds were used to buy additional property required in the corporate business; the other bonds of the issue, by resolution of January 26, 1890, were distributed without consideration among the stockholders, in proportion to their stock. Dahlgren had subscribed for \$15,000 of the original capital stock, and was entitled, under the resolution, to receive \$15,000 of the first mortgage bonds when his subscription should be fully paid. By another resolution of April 12, 1890, the secretary apportioned the bonds according to the holding of the stockholders, and attached them, as collateral security, to the notes of the stockholders given for subscriptions. Under this resolution, Dahlgren received \$9,000 of the bonds on account of his paid-up subscription, and \$6,000 more of them were attached to his stock note as collateral security. About the 1st of July, 1891, he wrongfully, and without the consent or knowledge of any other officer of the corporation, detached the bonds from his subscription notes, and used them in the manner now to be described. One of his subscription stock notes to the company became due about on the 3d of July, for \$2,250. He had no money of his own with which to pay it, but he had money of Mrs. Read in his possession. He wished to take her money, and pledge for its repayment \$4,000 of the bonds then attached to his stock notes. He did not wish to have his name appear in the transaction as the real borrower. He procured one W. W. Morrow, a traveling salesman in straitened circumstances, by payment to him of \$25, to execute the following note and instrument of pledge:

"\$3,200.00.

Nashville, Tenn., July 1, 1890.

"One year after date, I promise to pay to the order of A. Dahlgren, trustee, thirty-two hundred dollars, at the First National Bank, for value received, with interest from date.

W. W. Morrow."

The foregoing note is indorsed:

"The within note is secured by the pledge and deposit of the following securities, to wit, four bonds of the Capitol Electric Company for \$1,000 each, Nos. 81, 82, 83, 84; and the First National Bank, or its assigns, may, after the maturity of this note, sell the same for cash or on time, as it or they may deem best, without notice to other party, and appropriate proceeds to the payment of said note; and, in the event of the above-named securities being more than the amount of this note, the same shall be held to cover any other of my indebtedness to the bank, if the latter shall so select; and, should suit be brought on this paper, I agree to pay an attorney's fee, and all other costs of collection.

W. W. Morrow."

The circumstances show that this transaction was completed about the time that Dahlgren used the money of Mrs. Read to pay his note due the defendant the Capitol Electric Company. On August 25th, Dahlgren transmitted to Mrs. Read an account current of his agency or trusteeship covering the period from February 8 to August 20, 1890. In this letter he inclosed the Morrow note, and in the account charged her with the money paid out on the same. The circuit court held that Mrs. Read was not charged with the knowledge of A. Dahlgren as to the wrongful issue of the bonds, because in the transaction he was engaged in an attempt to deceive and mislead her for his own purposes. But the circuit court further held that, as she was only the equitable owner of the note which the bonds were pledged to secure, she had only an equitable title to the bonds, and could not, therefore, enjoy the advantages of a bona fide purchaser for value; that she took the bonds subject to all the equities growing out of their issue; and, as they were admitted to be invalid except in the hands of a bona fide purchaser for value, her petition was dismissed. This is an appeal from the decree dismissing the petition.

Granbery & Marks, for appellant.

Vertrees & Vertrees, for defendants.

Before TAFT, Circuit Judge, and BARR and SEVERENS, District Judges.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

We do not think that, under the circumstances of this case, Mrs. Read can be charged with notice of the facts which Dahlgren knew concerning the issue of these bonds. As a general rule, the principal is held to know all that his agent knows in any transaction in which the agent acts for him. *The Distilled Spirits*, 11 Wall. 356. This rule is said to be "based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty." Such a presumption cannot be indulged, however, where the facts to be communicated by the agent to the principal would convict the agent of an attempt to deceive and defraud the principal. The truth is that where an agent, though ostensibly acting in the business of the principal, is really committing a fraud, for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it. In *Allen v. Railroad Co.*, 150 Mass. 206, 22 N. E. 917, the plaintiff bought shares of stock in the defendant railway through a broker who was treasurer of the company. He fraudulently filled a blank certificate, and delivered it to her. It was sought to impute to her the broker's knowledge of the invalidity of

the certificate, in an action by her for damages for refusal to transfer the stock. The court held that this could not be done, because the legal effect of the fraudulent act of the broker was to cheat his principal. See, also, *Kennedy v. Green*, 3 Mylne & K. 699; *Espin v. Pemberton*, 3 De Gex & J. 547; *Rolland v. Hart*, 6 Ch. App. 678; *Cave v. Cave*, 15 Ch. Div. 639; *Kettlewell v. Watson*, 21 Ch. Div. 685, 707; *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282; *Dillaway v. Butler*, 135 Mass. 479; *De Kay v. Water Co.*, 38 N. J. Eq. 158; *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758. Counsel for appellee attempt to distinguish the case at bar from the cases cited by contending that Mrs. Read is seeking to reap the fruits of the fraud committed by Dahlgren, and, if she will have the benefit of his act, she must take it with the burden of his knowledge. If it were true that Dahlgren had used the bonds fraudulently issued for the benefit of Mrs. Read, it would certainly follow that in an action to recover on them she would be charged with knowledge of the methods by which Dahlgren obtained possession of them. But there is nothing in the case to show this to be the fact. It appears that before Dahlgren used the money of Mrs. Read he had drawn the Morrow note, and had abstracted the bonds. His own letter, which is admitted as evidence by consent, shows that he intended the execution of the note and the delivery of the bonds to be contemporaneous with his use of Mrs. Read's money. He paid his stock note on July 3d, and Morrow's note was dated July 1st. When he abstracted the bonds, therefore, he was not taking them for Mrs. Read; he was taking them for himself, so that he might use them to obtain money from Mrs. Read. He was not abstracting them for the benefit of Mrs. Read, any more than for the benefit of any stranger to whom he might have sold them for value. In the delivering of these bonds to Mrs. Read, Dahlgren was actually dealing with her as a purchaser from him, and not as her agent. The case of *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 17 N. E. 496, has no application. There the treasurer of two corporations was a defaulter in both positions. The defalcations were of long standing. To avoid discovery at the annual settlement of one company, he drew checks of the other and deposited them in the bank account of the one. On subsequent discovery, the question was whether the company whose bank account had been swelled by the checks of the other could retain the deposits as payment to it by its treasurer of his debt. It was held that this could not be done, because the money had been received by it through the sole agency of the man who knew it to be stolen, and could not, therefore, be received without the burden of his knowledge. The corporation parted with nothing for the checks or money received by it. The transaction was one in which the agent was not securing anything from his principal. The benefit secured by the theft moved solely to the principal. There was no adversary relation between the agent and the principal at all. The agent was acting throughout for the benefit of his principal in an attempt to recoup for it an existing loss, and thereby to conceal his own previous thefts.

The second question is whether Mrs. Read is a bona fide holder of these bonds for value. She holds them, under the contract of pledge contained in the indorsement upon the Morrow note, as security for its payment, with the right to sell the same, and appropriate the proceeds to that purpose. The first inquiry must be whether she has, as against Morrow and Dahlgren, any right to hold and use the bonds. As the note was not indorsed, she would have to bring suit on it against Morrow in the name of A. Dahlgren, trustee. Morrow could hardly plead want of consideration, in view of the fact that he received \$25 for signing the note, and the circumstances were such that he must have known that Dahlgren expected to use the note to lead some one into believing that it was a real transaction. In other words, he participated with Dahlgren in the scheme to deceive Mrs. Read, and procure from her money on the faith that the note represented a real note, and not a sham. It would seem to be a case for applying the doctrine of estoppel against Morrow. In this view, there is a real debt represented by the Morrow note, upon which Mrs. Read, as the holder of bonds, has the right to apply their proceeds. But let us concede that Morrow could escape personal liability on the note because of want of consideration; still, Mrs. Read could hold the bonds as against him or Dahlgren, and apply them to pay her advances on the note. She could file a bill in equity against them both, and obtain a decretal order of sale and application of the proceeds to repay her. Daniel, Neg. Inst. § 833. Could Morrow be heard to object to this relief? Clearly not, for he never owned the bonds. Could Dahlgren object, even if the bonds were valid and had been his lawful property? Clearly not. His conduct would estop him from claiming any title to them against Mrs. Read, who had parted with money to him on the faith of the bonds. It seems manifest, therefore, that Mrs. Read is a holder of these bonds for value from him from whom she received them. The bonds are payable to bearer. The legal title passes by delivery. It follows that Mrs. Read, who holds them, has the legal title. She acquired them before their maturity. It is conceded that she had no knowledge of the fraud in the issue of the bonds, and was an innocent purchaser. There are thus united in her title to the bonds the essential elements which constitute a bona fide purchaser of negotiable paper according to the law merchant, and the defendant company cannot be permitted to defeat her action on the ground that the bonds were wrongfully put in circulation.

The learned circuit judge in the court below reached a different conclusion. The reasoning upon which he reached it was as follows: Mrs. Read only acquired title to the collateral by virtue of the note which it secured. She took only an equitable title to the note. Therefore, she could take no better title to the collateral, which is only incident to the note. If this be true, then it would follow that if, instead of bonds, the collateral had been promissory notes of the defendant company, duly indorsed to Mrs. Read, she still would have only an equitable title to those notes, though her title would be established by express indorsement; for one who holds bonds payable to bearer has as complete a legal title as he who holds a promissory

note by indorsement. The necessary sequence is that one cannot have the legal title to a negotiable collateral security held to secure a debt, the evidence of which confers upon the holder only the equitable right to its payment. With deference, such a proposition cannot be supported. It is as much as to say that an absolute deed of land made to secure an obligation held by the grantee by equitable title does not confer the legal title to the land on the grantee. No authorities are cited by the circuit judge or by counsel to sustain this view. It is worked out only as the converse of the principle laid down in *Carpenter v. Longan*, 16 Wall. 271, where it was held that a mortgage was such an incident to the note which it was given by the maker to secure that it passed, without assignment, to the bona fide indorsee of the note for value, as free from equities as the note itself. The learned judge seems to infer from this case that the character of the title, whether legal or equitable, by which the collateral is held, depends solely on the title by which the principal obligation is held. We cannot agree with him. The supreme court, in effect, held that as the note was negotiable in form, and likely to come into the hands of an indorsee for value, who could enforce payment without regard to the equities of the maker, the contract of the mortgage, reasonably construed, was that the mortgaged land could be used to pay the note even when payment should be thus enforced. The mortgage had no existence without the note. An assignment of it without the note was void, while an indorsement of the note carried the equitable title to the mortgage without assignment. The holding was, not that the mortgage was negotiable, but only that its obligation prevented the making of any defense to it not available against the note. The case also shows, what was well established before, that the transfer of the principal debt or obligation carries with it, in equity, the collateral originally pledged to secure it. But it does not establish that, because the principal debt is negotiably indorsed, the collateral does not also need indorsement to pass the legal title. Where, as is the case at bar, the collateral is the obligation of a third person not a party to the principal obligation, if the equitable defenses of the third person are to be destroyed, the note to which he is a party must be duly indorsed to a bona fide holder for value. He cannot be otherwise deprived of his equitable defenses. He is not affected by the fact that his obligation has become the mere incident, as security of another debt. Why should he be? He is only interested in the principal debt to the extent that it furnishes to the holder of his obligation the right to say that he holds it for value. It will not do to say, therefore, that the title to the principal debt and the collateral must always be both equitable or both legal. If they are both in the form of negotiable paper, the title in which each is held depends on the indorsement of each, and on nothing else. Of course, the right to hold the collateral at all depends on the existence of a debt. If nothing is owed by any one on the principal debt, the holder of the collateral becomes only the trustee for him who has the equity of redemption in the collateral. But so long as there is a debt to which the collateral may properly be applied, the character of the title to

the collateral or to the principal debt is determined by the same rules that would govern if the two obligations were not related to each other. We can cite no authorities upon the point, because no such case seems ever to have been considered before. We can only reason on general principles. It is well settled that the pledge of negotiable paper duly indorsed for the payment of a debt is a negotiation of it for value in due course. Thus, Senator Daniel, in his work on Negotiable Instruments, says (section 834):

"Where the bill or note of a third party payable to order is indorsed as collateral security for a debt contracted at the time of such indorsement, the indorsee is the bona fide holder for value in the usual course of business, and is entitled to protection against equities, offsets, and other defenses available between antecedent parties: provided, of course, that the bill or note transferred as collateral security is itself at the time not overdue. And the same principle applies where the collateral note is payable to bearer, and is transferred to the creditor by delivery."

Nothing is here said, and the industry of counsel has not furnished a single case, to modify the application of this principle where the principal debt is in the form of an unindorsed negotiable note, or an assigned nonnegotiable obligation. The learned circuit judge conceded that if this had been a mere advance of money, either by Morrow or Dahlgren, on the faith of the bonds as security, Mrs. Read would have been a bona fide holder for value; but he said that, in the case as it was, Mrs. Read was obliged to trace her title to the bonds through the Morrow note, of which she was only equitable owner, and, as she was not a bona fide purchaser of that against Morrow and Dahlgren, she could not claim to be such with reference to the bonds. The error in this reasoning, as we conceive, is in saying that Mrs. Read traces her title through the Morrow note. Her title to the bonds depends on the delivery of them to her, her possession of them, and the fact that the bonds are payable to bearer. The use of the Morrow note is not to prove or trace title. It is only to show that she acquired for value the title which the delivery, the form of the bond, and her possession establish. Substitute for the bonds a collateral negotiable note duly indorsed to Mrs. Read by Morrow and Dahlgren, trustee. Her title she would trace through Dahlgren, trustee, and Morrow, by the indorsement on the collateral note, not by the assignment of the principal note. The principal note she would have to use to show the consideration for which she acquired the collateral note, but not to show her title. Her title to the bonds is established in exactly the same way. The actual tradition or delivery by Dahlgren to her of the bonds payable to bearer conferred upon her the same kind of title, in every way as complete and legal, as the express indorsement of them by Dahlgren to her would have done.

The decree of the circuit court is reversed, and remanded, with instructions to enter a decree allowing Mrs. Read's claim under the mortgage for the principal and interest of the bonds held by her, and for distribution on the same until the principal and interest of the Morrow note are paid.

SEVERENS, District Judge (concurring). The judges who sat on the former hearing of this cause having differed in opinion, a reargu-

ment was ordered. The cause was again argued before the same judges and myself. As I understand, their difference in opinion no longer continues. The point presented for decision is an interesting one. Its disposition in the court below, where it was carefully considered, and the doubt it has encountered here, where a different conclusion has been reached, show that it is one of some difficulty. The facts are contained in the statement preceding the opinion of the presiding judge. I concur in that opinion, but think it right to state with somewhat more fullness, in some respects, the reasons for my concurrence.

The question to be determined is whether the petitioner, Mrs. Read, is a bona fide holder for value of the four bonds which she holds, in such manner as to entitle her to recover notwithstanding the equities of the defendant company. The defendants say she is not, and allege two reasons for that conclusion: First, because she is affected by the knowledge of the fraudulent abstraction of the bonds possessed by Dahlgren, her agent, who was the principal participant therein; and, second, because, there having been no indorsement of the Morrow note by Dahlgren to Mrs. Read, she is not the legal holder thereof in the commercial sense, but only an assignee, and therefore chargeable with the knowledge of her assignor; that her right to the bonds pledged can rise to no higher plane than her right in the principal obligation, and that it follows she cannot be a bona fide holder, without notice, of the bonds themselves.

As to the first ground, the judge who heard the case in the court below and my associates have all agreed that, in the circumstances of this case, Mrs. Read is not chargeable with the knowledge possessed by Dahlgren. I feel bound to confess, with great deference to their judgments, that this question seems to me more difficult than the other one, to be presently considered; but I am inclined to agree with their view. Dahlgren had deserted his place as agent of Mrs. Read, and had taken up a position opposed to her. There could be no presumption of information of the principal through a channel which was closed, and there are no grounds for an estoppel. True, he also deserted his place as agent for the company, and the company would not be chargeable with his misappropriation of their bonds by reason of his agency. But the bonds were in fact in his possession by the act of the company, and he had the power, though not the right, to put them off upon purchasers. They had once been issued by the company, and had never been paid or canceled, and on paying for his stock they were enforceable by Dahlgren, subject, perhaps, to participation with other creditors, if there were such. Assuming that Dahlgren's relation to the company gave him no more right as against the company to dispose of the bonds than a mere stranger would have, who had access to the bonds by permission of the company, still it would remain that the abstraction and negotiation of the bonds to a bona fide purchaser for value would give a good title to the purchaser in either case. In the present case, therefore, I do not think Dahlgren was acting as the agent of either of the supposed principals, but, having possession of the bonds in-

trusted to him by the defendant company, made the manual abstraction and tradition of them which brought them to the hands of an innocent holder.

Secondly. Is Mrs. Read chargeable with notice because the Morrow note was not indorsed to her, but was assigned, merely? The condition of things was this: Morrow had made his note to Dahlgren, as trustee, or order, for \$3,200. To that note he had attached a pledge of those four bonds, payable to bearer at a future date. To make the pledge effectual, Dahlgren must be supposed to have delivered the bonds to Morrow. Dahlgren took \$3,200 of Mrs. Read's money, reported it to her as loaned to Morrow, and handed her the Morrow note, without indorsement, and also the pledged bonds, which were payable to bearer, and required no indorsement. To Mrs. Read, however, the transaction was by the conduct of Dahlgren and Morrow made to wear the appearance of an advancement by way of loan to Morrow of \$3,200, and the taking of his note for her benefit, though nominally to her trustee, for that amount, with a transfer to her of the bonds as collateral security for the payment of the note. The maker of the note must be treated as under an estoppel to deny that he received the money, or that he was liable therefor on the note. He knew that he was making a note to some person's benefit, for whom the trustee took the bare title. He knew that what was being done necessarily implied that the \$3,200 was in the payee's hands as trustee, and so really belonged to the person whose trustee he was. He knew, also, that the owner of the money would suppose that the \$3,200 had been delivered to him, Morrow. Indeed, he could not but understand that the purpose of producing that belief was the prime object of the thing he was doing. He knew he did not get that money, but that Dahlgren was paying him \$25 for performing his part in putting up the false appearances to the owner of the money. Those appearances were relied upon, as it was expected they would be. It seems to me a perfectly clear case in which to say that Mrs. Read could have brought suit in a court of law against Morrow upon his note in the name of the trustee, that the court would have protected her right to prosecute the suit to a recovery against any interference by Dahlgren, and that Morrow would have been estopped to deny his liability. It is said that she had merely an equitable interest in the note, and this is technically true. It was, however, but a shade off from a strictly legal interest, and the difference is of no substantial importance in the present case.

The fact which is important is that Mrs. Read parted with her money, and received the Morrow note (whether acquiring the legal title therein by indorsement, or only an equitable title by transfer, is a matter of absolute indifference), and received also the four bonds in pledge as collateral security. She became the holder of the bonds as security for her debt. Whatever other means she may have had for its recovery, she undoubtedly had the right to resort to the bonds. She had parted with her money; for its payment she had received, as collateral security, the bonds, before they were due,



and without any notice of anything wrong in their transfer. On that state of facts, I take it to be entirely well settled that she is not affected by the equities of any prior holder of the bonds. See the last proposition affirmed in *Goodman v. Simonds*, 20 How. 343. In that case the collateral note sued on was pledged, not to secure negotiable paper, but a debt found due from the pledgor upon a settlement between him and his creditor. It was held that the latter was entitled to recover, notwithstanding the equities between the pledgor and the maker. The doctrine was also affirmed by each of the three justices who delivered opinions in *Brooklyn, etc., R. Co. v. National Bank*, 102 U. S. 16, which was a suit upon collateral negotiable paper pledged to secure an antecedent debt having no quality of negotiability, and where the suit to recover upon the collateral was sustained against the equities of the maker. And see, also, *Pugh v. Durfee*, 1 Blatchf. 412, Fed. Cas. No. 11,460; *Bank v. Chapin*, 8 Metc. (Mass.) 40; *Stoddard v. Kimball*, 6 Cush. 469; *Bank v. Vanderhorst*, 32 N. Y. 553; *Curtis v. Mohr*, 18 Wis. 645. These cases vindicate the right of the holder of the collateral notes to recover, without regard to the character of the debt they were pledged to secure, and show that the real question is whether there is a consideration for the pledge. The bonds are payable to bearer. The actual delivery of them from hand to hand transfers the title to them as absolutely as successive indorsements would have done, had they been payable to order. The proposition that the petitioner's right in respect to the bonds is to be measured by the character of her right in the note they were given to secure, is not sustainable. The bonds are independent securities. The legal title was vested in Mrs. Read. She could recover thereon to the full amount of the bonds, if the maker had no defense against the pledgor, in which case the pledgee would stand as trustee for the securities to the pledgor in respect to the surplus; or, if the maker had a defense against the pledgor, then her right of recovery would be limited to her own debt. And that, as I think, must be the result in this case. This was held in *Bank v. Chapin*, and *Stoddard v. Kimball*, above cited, and is stated to be the general rule in *Daniel on Negotiable Instruments* (section 832a, 3d Ed.).

What I think is the error from which the opposite conclusion is deduced consists in applying the rule which is applicable to nonnegotiable securities to those which are negotiable. In the former case the only quality of negotiability is that which is imparted to them from the nature of the principal debt. In the latter case they stand on their own footing, and retain the attributes of negotiability, though only pledged for a mere debt, which is not negotiable at all. They do not take their character from the debt secured. It is enough that the debt is created or continued, or duties are assumed in regard to the paper pledged, to constitute one a holder for value. If he takes it without notice of any defect, and before its maturity, he may recover according to his interest. As I understand it, this is the well-settled doctrine of commercial law. Among many cases to that effect is that of *Bank v. Vanderhorst*, above cited, in the New

York court of appeals, where it was expressly decided that parties receiving negotiable paper as collateral security are entitled to be protected as bona fide holders to the same extent and under the same circumstances as parties who become owners of such paper. The suggestion that Morrow pledged the bonds to Dahlgren only for the payment of the note to him or his indorsee, stands upon too narrow ground. Morrow knew, not only from the face of the note, but from the nature of the transaction, that Dahlgren was a mere agent for another who was furnishing the money, and that the principal could compel him to turn over the note, with the securities, to the principal. And Morrow must be held to have contemplated that Dahlgren might do this. When, therefore, he pledged the bonds in security for the note, he must have intended them to be security in the hands of the person entitled to reduce the note to possession, and to intend the transfer to that person for that purpose. The pledge was, in substance, to pay the money represented by the note, and whoever might be or become the owner in law or equity of the debt would, if he was also the legal holder of the bonds, without notice of any defect therein, be entitled to enforce them without regard to any equities which might exist between the original parties. It follows that, in my opinion, the decree should be reversed, and the cause remanded, with directions to enter a decree for the petitioner that she share in the fund in proportion to the amount due upon the bonds, with interest, to the extent of the amount due her upon the Morrow note.

---

## LLOYD et al. v. CHESAPEAKE, O. &amp; S. W. R. CO.

(Circuit Court, D. Kentucky. January 19, 1895.)

## 1. EQUITY—PRACTICE—SECOND RECEIVERSHIP.

Where a suit has been brought against a railroad company by a judgment creditor, and receivers have been appointed in that suit, and another suit is brought by the trustees of a mortgage for foreclosure, independent receivers should not be appointed in the latter suit, but the proper practice is to extend the receivership in the first suit to the second, and to consolidate the two suits.

## 2. RAILROAD FORECLOSURE—RECEIVERS—PAYMENT OF INTEREST.

H. brought suit against the C. R. Co., and obtained the appointment of receivers to impound its earnings for the benefit of claims held by him. The trustees of a second mortgage began suit against the railroad company for foreclosure, and petitioned the court to direct the receivers to pay the interest on bonds secured by a first mortgage, in order to prevent a foreclosure of that mortgage. This application was resisted by the first mortgage bondholders, claiming a right to have default suffered, and to be placed in a position to foreclose; and also by U., as trustee, holding a large amount of second mortgage bonds, but holding them in the interest of H. and two other railroad companies, who held a much larger amount of first mortgage bonds, and were also seeking to control and reorganize the C. R. Co. It appeared that the earnings of the road were amply sufficient to pay the interest on the first mortgage, besides operating expenses, and that it was greatly to the interest of the holders of the second mortgage bonds not more largely interested in the first mortgage, and to that of the other creditors of the road subsequent to the first mortgage, that a foreclosure of that mortgage should be prevented. *Held*, that the

receivers should be directed to pay the interest on the first mortgage bonds, and, if necessary, to borrow money to anticipate income for that purpose.

This was a suit by Joseph P. Lloyd and James B. Hawes, trustees, against the Chesapeake, Ohio & Southwestern Railroad Company for the foreclosure of a second mortgage. Plaintiffs move for directions to the receivers in possession of the road to pay interest on the first mortgage bonds.

December 28, 1893, C. P. Huntington, upon a bill and amended bill filed by him against the Chesapeake, Ohio & Southwestern Railroad Company, obtained appointment of receivers. The claims asserted by him were a judgment, certain equipment notes, and a majority of the second mortgage bonds. At this time there was no default in interest on the first mortgage bonds. In December, 1894, the receivers were directed to pay the interest which fell due on the first mortgage bonds February 1, 1894. Subsequently application was made to direct the receivers to pay the interest on the first mortgage bonds which fell due August 1, 1894, as by failure to pay interest for six months the holders of a majority of these bonds could precipitate their maturity. January 17, 1895, the trustees in the second mortgage filed an original bill, and on January 19, 1895, on notice to all parties in interest in this and the other cause, asked for an independent receivership, and that the receivers should be directed to borrow enough money to pay the interest which fell due on the first mortgage August 1, 1894.

George W. Norton was, on his own application, made a party complainant, as representing a large number of the second mortgage bonds.

Gibson & Marshall and Tracy, Boardman & Platt, for complainants, Lloyd and Hawes, trustees second mortgage.

Humphrey & Davie, for G. W. Norton, intervener.

Bullitt & Shield and Pirtle & Trabue, for defendants Pardee and Horsey, trustees first mortgage.

W. O. Harris, for defendant United States Trust Co., trustee.

Helm & Bruce, for defendant L. & N. R. Co.

Chas. S. Grubbs, for defendant receivers.

LURTON, Circuit Judge (orally). The first question arises upon the bill of foreclosure filed by Joseph P. Lloyd and James B. Hawes, trustees under a second mortgage made by the Chesapeake, Ohio & Southwestern Railroad Company. I think there ought not to be an independent receivership under this bill. That would require the discharge of the receivers heretofore appointed, and the winding up of that receivership, for there could not be two independent receiverships of the same property. The proper practice is to extend the receivership already in existence to this second foreclosure suit, and that the two cases be consolidated, and heard together. A decree to this effect will therefore be drawn.

The next question is, to my mind, a very simple one. It is presented by the petition of the trustees under the second mortgage, asking that the interest which fell due on the first mortgage bonds August 1, 1894, be paid by the receivers. An application of like character was made by the same trustees some few days since, but before they had filed their foreclosure bill, which application I will consider along with the one made since the filing of their bill, against the Chesapeake, Ohio & Southwestern Railroad Company. On the

former argument it was insisted that the original bill of Huntington was not a general creditors' bill, but was a bill for no other object than the application of surplus income to the discharge of his judgment debt. It was also insisted that his supplemental and amended bill did not impound the earnings for the benefit of the second mortgage bondholders, and that, therefore, they had no standing in that cause from which to insist upon the application of surplus earnings in payment of interest upon the first mortgage bonds. That question I took under consideration. Before deciding it, the difficulty thus suggested had been removed by the foreclosure bill which has since been filed by the second mortgage trustees. I had then, as I have now, a very strong impression that under the original and supplemental bills of Huntington the earnings were not impressed or impounded exclusively in favor of any one class of creditors, and that the effect of Huntington's amended bill was to obtain a receiver upon the bill filed by him in his character as a general unsecured creditor, as a large holder of second mortgage bonds, and as the owner of several claims for supplies and material furnished alleged to be entitled to a preference over both mortgages. It is unnecessary to now decide as to the correctness of that impression, for any order which I shall make respecting the payment of the interest in default on the first mortgage bonds will be confined to the application of the future earning of the property while in the hands of the receivers under both bills.

The parties applying for a direction to the receivers to pay the August interest upon the first mortgage bonds are the trustees under the second mortgage, and George W. Norton, a holder of second mortgage bonds, who has been permitted to intervene. The ground upon which the application is made is this: That in the mortgage securing the first series of bonds issued by the Chesapeake, Ohio & Southwestern Railroad Company there is a provision whereby the maturity of these bonds may be precipitated if interest shall continue in default for a period of six months. An installment of interest fell due August 1, 1894, which, if not paid by the 1st day of February, 1895, may result in maturing the six millions of bonds known as the "First Mortgage Bonds." The petitioner trustees applying for this order represent that the vital interests of the second mortgage bondholders and other creditors subordinate to the first mortgage require that the maturity of the first mortgage bonds shall be avoided by an immediate payment of the interest now in default. The trustees under the first mortgage were made parties defendant to Huntington's original bill. No relief was sought against them, and, indeed, none could have been had. The railroad company was not in default with respect to either the principal or interest secured under the first mortgage. The first mortgagees were, therefore, not necessary parties, and only proper parties for the purpose of ascertaining the amount of their debt and the extent of their lien. Neither Huntington's bill nor that of the trustees of the second mortgage seeks to sell the property clear of the first mortgage, but, upon the contrary, the object all along has been to bring the prop-

erty to a foreclosure sale subject to the first mortgage. Nevertheless, the trustees under the first mortgage have very strenuously objected to the application of either the past-due or future earnings to the payment of the interest due on these first mortgage bonds. The United States Trust Company, likewise a defendant to the original bill, by intervention has joined in the objection to the payment of this interest. The attitude of that trust company seems very extraordinary in view of the fact that it holds in trust something more than two millions of the second mortgage bonds. It seems very remarkable that the holder of a majority of the second mortgage bonds should oppose the payment of interest upon the first mortgage bonds. Its attitude is, however, fully explained by an examination of the terms of the trust under which it holds the second mortgage bonds mentioned. From that deed of trust, which has been exhibited here by the counsel representing that trust company, it appears that C. P. Huntington sold to the Illinois Central Railroad Company a large majority of the second mortgage bonds and a controlling interest in the stock of the Chesapeake, Ohio & Southwestern Railroad Company; that at the same time he sold to that company his judgment for over \$80,000 against the said Chesapeake, Ohio & Southwestern Railroad Company, and a number of claims asserted to be entitled to priority over both mortgages, aggregating altogether some two millions of dollars. It further appears that thereafter the Illinois Central Railroad Company contracted to sell all these interests to the Louisville & Nashville Railroad Company, and that, pending the completion of this latter sale, all these claims were transferred in trust to the United States Trust Company; and that a committee called a "reorganization committee" was created by these two railroad companies, which committee consisted of two representatives of the Illinois Central Railroad Company, two representatives of the Louisville & Nashville Railroad Company, and another, the representative of C. P. Huntington. By a telegram from the United States Trust Company to the counsel representing it in this cause, Judge W. O. Harris, and which has been read to the court by its counsel, it appears that the trust company wishes this court to understand that its action in resisting the application of the trustees under the second mortgage for the payment of the interest in default on the first mortgage has been dictated by the majority of the reorganization committee aforesaid. Indeed, it further appears, by an admission made at the bar by Mr. Trabue, that the Illinois Central Railroad Company is now the holder and owner of five-sixths of the entire issue of the first mortgage bonds. From these facts it is very apparent to the court that the resistance of the trustees under the first mortgage, and of the United States Trust Company, trustee under the reorganization trust, to the payment of the defaulted interest on the first mortgage bonds, has been dictated by the supposed interests of the Illinois Central Railroad Company. It is justly to be inferred that the interest of the Illinois Central Railroad Company in bringing about a maturity of the first mortgage bonds is greater than its interest as the owner

of second mortgage bonds; and that the United States Trust Company, as trustee, holding the securities belonging to the Illinois Central Railroad Company, is dominated by the interests of the Illinois Central Railroad Company. It is an indisputable fact that to prevent a maturity of the principal of the first mortgage bonds is a matter of vital interest to the creditors of the railroad company whose claims are subordinate to that of the first mortgage bonds. Those interests are the active interests represented both by the Huntington bill and the bill filed by the trustees of the second mortgage. These interests have procured the appointment of a receiver, and these interests have impounded the earnings. During the time that this road has been in the hands of receivers more than \$200,000 of claims entitled to preference have been paid. The interest on the first mortgage bonds which matured in February, 1894, has been paid. The operating expenses have been made, and the road has been kept in reasonably good repair. The receivers' reports show that for several months past the net earnings have steadily increased, and that the earnings over and above operating expenses are now estimated at \$800,000 per annum. In view of the great business depression which has prevailed during this receivership, the earnings of this property have been remarkably large, and the net earnings clearly indicate great economy and wise management by the receivers, Gen. John Echols and St. John Boyle. This large surplus over operating expenses must, of course, be first applied to necessary repairs and betterments, and to the payment of the rentals upon the Cecilia branch. After this has been done, there will remain a sum more than sufficient to keep down the interest upon the first mortgage bonds. These facts demonstrate to my mind that the interests which have obtained this receivership have a real and substantial value, and that this property, if sold subject to the first mortgage bonds, will produce a sum abundantly sufficient to demand the utmost exertion of the court to preserve subordinate interests from the fatal consequences of a maturity of so large a debt as that evidenced by the first mortgage bonds.

It has been argued that the surplus earnings, after paying operating expenses, should be applied in discharge of the pending claims which are, by reason of their character, entitled to priority over the entire bonded indebtedness of the debtor railroad company. There are two answers to this: First. That each and every one of the claims asserted as preferential claims are litigated. Second. If it be assumed that these claims shall be established, and that they shall be held as claims entitled to preference over both the first and second mortgage, they can only be paid by making default in the interest due upon the first mortgage bonds. The result would be that, if the entire earnings of the road are applied to discharge claims entitled to preference over the first mortgage, it would be at the expense of the accumulation of interest upon the first mortgage. What the first mortgagees would gain by having claims paid which are ahead of them they would lose by an accumulation of interest upon their bonds. Thus it seems to me that the first mortgage bondholders are not interested; that it is the same thing to

them, upon the assumption that this property is worth no more than the principal of their debt, whether the surplus earnings be applied to the payment of preferential claims or to the payment of interest as it matures upon their bonds. What they would gain in one direction they lose in another. But for the first mortgage bondholders it has been argued that by an application of the earnings to the payment of their interest they would lose the right to foreclose their mortgage. This argument seems to me utterly barren of equity. Their debt is not due, and they have no right of foreclosure so long as interest is not in default. To say that by applying earnings to the payment of their interest, and thereby preventing foreclosure, is to work an injury to them, is an indefensible position. The first mortgagee is not an actor in this litigation. The debtor railroad company, by paying the interest as it matures, can prevent a foreclosure of the first mortgage. That company makes no objection to the application of the earnings in the hands of the receivers to the payment of the unquestioned debt due from it, and an undoubted first lien upon its property. Holders of second mortgage bonds have no ground whatever to object to the payment of that interest, because that interest is, in any event, to be paid before they can receive anything from the corpus of the property. But on this record and upon these pleadings I must assume that the trustees under the second mortgage are fully and honestly representing the best interests of their second mortgage bondholders. The class of creditors entitled to be regarded as second mortgage bondholders are truly and fully represented by the application of the trustees to apply the surplus earnings to the discharge of a debt prior in lien to their own, especially when a failure to pay off a comparatively insignificant amount of interest will operate to precipitate the maturity of six millions of debt. The claims which are pending, and which insist that they are entitled to priority over both the mortgages, are not and cannot be affected, although their claims shall be sustained as preferential claims. If they are not paid out of the earnings, they are entitled to be paid out of the corpus. They therefore have no substantial interest in supporting an objection to the application of future earnings to prevent a default on the first mortgage bonds.

General creditors, having no security for their debts, have a very deep interest in preventing a maturity of the first mortgage. If the first mortgage shall be foreclosed, preferential claims must be first paid; the first mortgage bonds must next be paid; the second mortgage bonds then paid, and the surplus only would be applicable to the payment of such unsecured claims. It seems to me, therefore, that the only interest which is to be in any degree affected by the application of future earnings to the payment of past-due interest on the first mortgage bonds is that of the second mortgage bondholders themselves. Their trustees, who are entitled to represent them, regard it of vital importance that that interest shall be paid. In that opinion the court fully concurs, and would regard them as grossly derelict in the discharge of their duty, on the facts as they appear in this case, if they so far failed to appreciate the

situation as to stand idly by and permit the interest upon the first mortgage bonds to go unpaid. When Huntington, as the owner of a majority of the second mortgage bonds, and of a large amount of defaulted interest thereon, filed a bill for the benefit of himself and all others in a like situation, he at once assumed a fiduciary relation with respect to other holders of bonds of that class, and would not be permitted to use a security intended for the common benefit of himself and associates as to do injury to them that he might profit by reason of a greater interest in another class of securities. What I have said as to Huntington applies equally to the United States Trust Company, the present holder in trust of Huntington's bonds and other securities upon which his suit was filed. It stands in his shoes, as do the Illinois Central Railroad Company and the Louisville & Nashville Railroad Company, each of whom has a contingent interest in the bonds and other securities originally owned by complainant Huntington, and now held, under the reorganization trust, by the United States Trust Company. The unity of the interests of all the second mortgage bondholders involves a unity of obligation by each, with respect to their common security. *Jackson v. Ludeling*, 21 Wall. 622.

It is not now proper to pass upon the question as to the conduct of the trust company, under the trust to it, in submitting its conduct with respect to the bonds and other securities held by it, and its attitude in this litigation, to the domination of one of the interests represented by it. Whether it should not, with respect to the emergency now threatening the second mortgage bondholders, exercise its own judgment with an eye single to the interests of the second mortgage bondholders as a class, and not suffer its action to be dictated by one of the beneficiaries under the trust, especially when that beneficiary is much more largely interested in an antagonistic class of securities, is a question which I will not now pass upon. The duty of the trust company is quite complicated, and presented embarrassments not ordinary. It is sufficient for me to say that when that trust company undertakes to speak as a holder of a majority of these subordinate bonds, it does so, by its own confession, under coercion. "The voice is Jacob's voice, but the hands are the hands of Esau." It does not pretend that it is to the interest of the second mortgage bondholders as a class that the maturity of the first mortgage shall be precipitated, and that the interest of the second mortgagees in this property shall be thereafter held subject to the power of the prior and larger interest to foreclose at its will unless redeemed by the second mortgagee. I cannot accept its objection as of any moment when considering the rights and interests of the second mortgagees. There is a class of second mortgage bondholders—a minority it is true, yet aggregating more than a million in value—whose interests in the second mortgage are identical with its own. Acquiring its bonds after suit had been instituted on them for the benefit of all other holders of such bonds, its voice should not be potential when it confesses that its action is dominated by a majority of the reorganization committee of the mortgagee desiring to precipi-



tate maturity of an adverse security. That large minority have, through G. W. Norton, been permitted to intervene and become co-complainants with the trustees in their foreclosure bill.

But it is said that the court has no power to authorize the borrowing of money by the receivers to meet interest. It seems to me that if the court has the right to use earnings to pay off the indisputable debt of the Chesapeake, Ohio & Southwestern Railroad Company, it has equally the right to anticipate earnings in a crisis like that now presented. The receivers in open court have stated that the surplus earnings of the next four months will be sufficient, after paying operating expenses, to meet the interest which must be paid by the 1st day of February if the maturity of the first mortgage bonds is to be prevented. In view of the fact that the question has been made by general creditors that the surplus earnings, under Huntington's bill, are properly applicable only to the payment of Huntington's judgment and other debts of like class which have since intervened, I ought not, on this application, to appropriate such earnings, as against the objection of that class of creditors, to the payment of this interest. While, as I have already said, a very strong impression that the bill of Mr. Huntington as amended is to be treated as a bill impounding the earnings for the benefit of second mortgage bondholders as well as general unsecured creditors, I do not deem it necessary or proper for me to now decide this question. Since the filing of the foreclosure bill by the trustees of the second mortgage there can be no further contention that future earnings are to be regarded as exclusively impounded for the benefit of general creditors. These trustees themselves consent that these future earnings, instead of being applied to the payment of the principal or interest of the bonds represented by them, shall be applied to the preservation of the general interests of the second mortgage bondholders by preventing a maturity of the first mortgage. These trustees also agree that the peril to the interests represented by them is so great that they are willing that money borrowed to avert this threatened evil shall be paid out of the corpus of the property before the claims of the second mortgage. I do not think that the duty of preserving the property in charge of the receivers is limited to a mere preservation of the physical structure of the railroad. If the earnings were insufficient to pay off taxes which were a prior lien upon the property, or to pay off mechanics' liens, the enforcement of which would result in a serious disintegration of the road, or to pay off any other claim which was entitled to preference, and which was so situated that for its satisfaction the property might be brought to a premature sale, the court could not only use the earnings in the hands of the receivers, but could charge the property, and every interest in the property, with receivers' certificates, issued for the purpose of avoiding consequences quite as serious in their ultimate effect to subordinate interests as would be the destruction of a bridge. I am convinced that, where large financial interests are secured by a lien of a subordinate character, and a foreclosure of this subordinate lien is sought, subject to prior incumbrances, it is within the scope and dis-

cretion of a court of equity, in preserving this subordinate interest, to pay off any just liability of an insolvent railroad company out of the earnings, and, if the earnings are insufficient, that it may authorize the borrowing of money secured by a charge and burden upon the subordinate interests to be thus benefited by the loan. These views I hold very firmly. If they be sound, my duty, under these circumstances, and upon this record, is to see to it that these great subordinate interests are not destroyed as the consequence of an unnecessary precipitancy of the maturity of the first mortgage bonds. Under such circumstances I am convinced that the power of this court to pledge the future surplus earnings of the property and the property interests of the creditors subordinate to the first mortgage is as clear as would be the duty to borrow money to rebuild a bridge, or to prevent the sacrifice of a valuable lease. *Miltenberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140; *Kneeland v. Luce*, 141 U. S. 508, 12 Sup. Ct. 32; *Park v. Railroad Co.*, 64 Fed. 190. I shall therefore direct the receivers to pay the interest which fell due August 1, 1894, out of the future earnings of the property in their hands, and that they be authorized to borrow a sufficient sum upon receiver's certificates, maturing in not less than three nor more than six months, for the payment of which the future income of the road after paying rentals, necessary repairs, and other operating expenses, will be pledged, and that these certificates shall be a lien upon the corpus of the property, subordinate, however, to the lien of the first mortgage bondholders, and to every other claim which shall be ultimately held entitled to priority of satisfaction out of the corpus over the first mortgage bonds. The consent of the trustees under the second mortgage that these certificates shall be a charge superior to their own lien operates, in the absence of fraud or corruption, to bind every bondholder of that class. *Kneeland v. Luce*, above cited.

---

DAVIS v. CHATTANOOGA UNION RY. CO. et al.

FARMERS' LOAN & TRUST CO. v. SAME.

(Circuit Court, S. D. Tennessee, E. D. January 1, 1895.)

ATTORNEYS—PROFESSIONAL CONDUCT—REPRESENTING DIFFERENT INTERESTS—DISCLOSING RELATIONS.

D., as owner of bonds secured by a mortgage given by a railroad company, filed a bill to foreclose it, making the trustee in the mortgage a defendant. Thereafter, the trustee filed a bill to foreclose; being represented by T., its New York counsel, and W., as local counsel. A receiver was appointed under the first bill, whose receivership was extended to the second bill, and the two suits were consolidated. Thereafter, C. & B., law partners, were engaged by T. as local counsel for the trustee. Prior thereto, they had filed intervening claims,—one for J. & Co., for \$500, and one for J., for \$60,000, for \$1,500 of which priority was claimed over the mortgages. The intervention for J. also alleged that the railroad was occupying, as part of its right of way, three lots belonging to J.; that negotiations therefor were pending with the receiver; and that the price had been agreed on,—and tendering deeds conditioned on the approval of the court and the receiver. They had also filed a cross bill for a depot

company claiming rent from the railroad. All the proof on the claims of J. and J. & Co. had been taken and submitted to a master. When the foreclosure bills were filed, C. & B. were defending damage suits against the railroad, and afterwards continued their defense; being retained for such purpose by the receiver, through his general counsel, under an order directing the receiver to defend such suits. C. & B. were retained by T. as counsel for the trustee, as follows: T. telegraphed them, asking if there was any reason why they could not represent the trustee, as the illness of W. made it necessary to retain other local counsel. B., who did all the correspondence and business for the firm in the matter, telegraphed that he knew of no such reason, and followed it with a letter, in which he said that they desired to state the situation a little more fully; that T., of course, understood the D. case, and what had taken place in it; that they had been rendering W. such assistance as he had asked for since bringing his bill, which they believed was the only one of the two suits properly brought; that neither J. nor the railroad objected to foreclosure under such bill; that, this being so, it seemed to them that they were free to take hold of the case with T., where it was left by W.; that they had filed in the cases a claim for J., which was a general claim, except about \$1,500; that D.'s bill sought to sell the depot company's property, but T.'s bill, as they understood, was only for sale of the railroad's property; that these were the facts, and, if T. saw no difficulty, they were ready for his service, but for him to feel free to select some one else, if he thought best. T. answered that he saw no impropriety in allowing J. priority for \$1,500, or a little more, if necessary, provided the facts justified it, and, as the balance of J.'s claim did not ask priority, he saw no antagonism between their position as counsel for J. and as counsel for the trustee. *Held*, that while it would have been better, had B. more fully stated the circumstances (as is shown by complaint being made of his not doing so), and stated the pendency of the sale of the lots, the claim of the depot company, and that they were defending the damage suits, it appeared that they had not done so because they assumed that T. was familiar with the litigation, and that they might well regard the negotiations as to the lots, and the defense of the damage suits, as not hostile to the mortgage creditors, and that not having anticipated proceeding further with the claim of the depot company, and in fact not having done so, and nothing further having been done with regard to the purchase of the lots, or the claim of J., except to confirm the report of the referee with reference to such claim, leaving open the question of any priority, and all the claims of J. having been transferred to other counsel, there was nothing reflecting on the professional character or honor of C. & B.

Foreclosure suits by W. S. Davis against the Chattanooga Union Railway Company and others, and by the Farmers' Loan & Trust Company against such railroad company and others. Heard on such part of the petition of H. W. Bartol and others as charged C. D. Clark and Foster V. Brown, doing business as attorneys under the firm name of Clark & Brown, with unprofessional conduct.

McAdoo & Barr, for petitioners.

William Henry De Witt and Geo. W. Easley, for respondents.

Before LURTON, Circuit Judge, and KEY, District Judge.

LURTON, Circuit Judge (orally). No more delicate duty is ever imposed upon the court than an inquiry into the conduct of counsel. The court and the bar, in common with every right-thinking citizen, recognize the very great importance of the exercise of the utmost good faith in the relations which exist between client and attorney.

The petitioners, H. W. Bartol and others, holders of bonds secured

by one of the mortgages executed by the Union Railway Company, for the foreclosure of which a decree has heretofore been entered in this cause, have intervened by petition, and, by consent of all parties, have been suffered to become defendants, with leave to defend any claim or charge sought to be asserted in these consolidated causes, in any way affecting the interests of the creditors secured by the mortgages. The matters sought to be questioned by Bartol and his intervening associates have not been passed upon in any final decree; and by consent of counsel, entered of record, every matter and thing affecting the interests of the petitioners have been opened for exception and further proof. Nothing therefore remains for the consideration of the court, at this hearing, except so much of the Bartol petition as imputes to Messrs. Clark & Brown, local solicitors for the Farmers' Loan & Trust Company, unprofessional conduct, and a betrayal of the interests of the said Farmers' Loan & Trust Company, in favor of certain other clients alleged to have been represented by them.

The Bartol petition contains the following statement and application to the court:

"Said allowance to said Clark & Brown is a gross fraud upon their rights, which no court of conscience would countenance, and that the conduct of said Clark & Brown, as shown by the record in this case, constitutes a breach of professional ethics, which cannot be too severely condemned, and which, your petitioners respectfully represent, merits the judicial notice of this honorable court."

In view of this application to the court, this court, at a former day, made the following order:

"It appearing to the court that on the 18th day of October, 1894, H. W. Bartol and others filed their petition in this cause, wherein various charges are made, reflecting upon the good faith and professional conduct of C. D. Clark and Foster V. Brown, practicing attorneys and solicitors of this court, and invoking the order of the court in respect thereto, and said solicitors appearing in open court, and moving that an order be made, setting said petition in this cause for hearing, particularly as to the matters aforesaid, it is, on said motion, ordered by the court that this cause and said petition, so far as the matters therein alleged affect said solicitors, be, and the same are hereby, set down for hearing on Monday, the 31st day of December, 1894, on the pleadings and such proof as the parties, or any of them, may adduce on the hearing; and either party may take proof at the office of the clerk of this court at any time, Sunday excepted, before the 31st day of December, 1894, and proof so taken, and the record in the case, may be used in evidence on the hearing. The clerk of this court will immediately furnish J. H. Barr, Esq., of the firm of Barr & McAdoo, the resident solicitors for the petitioners, with a copy of this order."

The charge thus made, affecting the professional honor of Messrs. Clark & Brown, is a very grave one, and the petition seeks to support it by averments which are matters of record. It must, in considering this very grave charge, be first noticed that Messrs. Clark & Brown were first retained to represent the interests of the trustee in the several mortgages sought to be foreclosed, not earlier than the 3d day of September, 1892. At that time the attitude of the pleadings was substantially this: Some time before, one Davis, claiming to be the owner of a large amount of defaulted coupons, secured

by one of the mortgages executed by the defendant railway company, filed a bill for the purpose of foreclosing the said mortgage. Subsequently, Gen. Samuel Thomas, for whose use Davis originally sued, filed an amended bill, claiming to be the owner of a considerable amount of the bonds secured in one or more of the said mortgages. The Farmers' Loan & Trust Company, as trustee in the mortgage sought to be foreclosed by Davis and Thomas, was made a defendant thereto. At a later date, the Farmers' Loan & Trust Company filed an original, independent bill to foreclose one of the mortgages under which it was trustee. That bill was filed by the local New York counsel of the trustee, Messrs. Turner, McClure & Rolston, who had associated with them as local counsel, Mr. William M. Baxter, of Knoxville. Under the Davis and Thomas bill, a receiver had been appointed, and placed in charge of the Union Railway Company's property; and when, subsequently, the Farmers' Loan & Trust Company filed its foreclosure bill, the receivership under the original bill was extended to this bill. The two suits were consolidated, and ordered to be heard together. Messrs. Clark & Brown, partners in the practice of law, and solicitors, residing at Chattanooga, had, before their employment by the Farmers' Loan & Trust Company, filed three intervening claims: (1) A claim for James & Co., for about \$500. (2) A claim for C. E. James. This latter claim aggregated about \$60,000. The petition set up that something more than \$1,500 of this claim was entitled to priority over the mortgage creditors, by application of the three-months rule, giving preference for supplies and materials furnished within three months prior to the appointment of the receiver. The same intervention for Mr. James alleged that the Union Railway Company and its successor, the Chattanooga Union Railway Company, were occupying three lots or parcels of ground belonging to said James, as a part of their right of way, and that a portion of the property thus occupied by them was held by them under a lease. It is alleged that negotiations were pending with the receiver for the purchase of these said lots, and that the price had been agreed upon; and the petitioner tendered deeds conveying an absolute title to the entire three lots or parcels of land, conditioned upon the approval of the court and of the receiver, looking to the best interests of all the creditors. (3) Clark & Brown had also filed a cross bill for a corporation known as the Union Depot Company, which owned a depot and terminal facilities which had been theretofore used by the Union Railway Company, alleging that certain rents were due from the railway company to the depot company for use and occupancy of their depot and terminal facilities. Proof had been taken with respect to some of these claims, and the matter, with respect to the accounts of James & Co. and C. E. James, was pending before a master, upon a reference; but all the proof in regard to these two matters had been concluded, and the master was preparing his report thereon, when the sudden illness of William M. Baxter rendered it necessary that these parties should secure other counsel to aid them in the future conduct of the case, so far as the interests of the Farmers' Loan & Trust Company were concerned. (4)

At the time of the filing of the first foreclosure bill, Messrs. Clark & Brown, as counsel for the Chattanooga Union Railway Company, were engaged in defending a considerable number of damage suits pending in the state courts, in which about \$140,000 was sought to be recovered against said company. After the appointment of the receiver, they continued the defense of these cases, claiming to have been retained for that purpose by the receiver, through his general counsel, Judge Lewis Shepherd, under an order directing the receiver to defend such suits. On the 30th day of August, 1892, Messrs. Turner, McClure & Rolston sent a telegram to Messrs. Clark & Brown, asking if there was any reason why they could not represent the Farmers' Loan & Trust Company, Mr. Baxter's illness making it necessary that other local counsel should be retained. This was answered by a telegram and letter, the first saying that they knew of no reason why they could not represent the trustee. The telegram was followed by a letter, which was in the following words:

"Chattanooga, Tenn., Aug. 30th, 1892.

"Messrs. Turner, McClure & Rolston, New York City—Gentlemen: Your telegram is received, and we answer the same briefly. In addition to the answer, we desire to state the situation a little more fully. You, of course, understand the Davis case, and what has taken place in that. We have, as a fact, been rendering Mr. Baxter such assistance as he called on us for, since his bill was brought, which we believe is the only one of the two suits which is legally and properly brought. Neither James nor the Union Railway have offered any objection to foreclosure under your bill, and, as we understand, they do not desire to do so, but, on the contrary, are anxious to see the property brought to a sale thereunder; and, this being so, it seems to us that we are free to take up the litigation where we find it, as left by Mr. Baxter, and carry it to a termination with you, if you desire, and will be very glad indeed to serve you in this or any other particular. Now, we have filed in the two cases, or, rather, under the style of the two cases, a claim for James himself, which is a general debt, except about \$1,500, of which he claims ought to be allowed as operating expenses, because recently advanced by him to pay employes' wages, which, of course, will only be allowed by the court, or insisted upon by us, in case he brings himself within the rules which would entitle him to the same. You remember that, under Davis' amended bill, it is sought to sell the Union Depot property; but your bill, as we understand, is only for the sale of the Union Railway property. Now, these are the facts, and we put them before you; and, if you think there is no difficulty in our way, please say so, and we are ready for your service. If, however, there is anything in the situation, on account of which you think it best for some one else to represent you, please feel free to act accordingly, and without thinking for a moment that your action would be in any way unpleasant to us, assuring you it would not.

"Yours, truly,

Clark & Brown."

Now, that letter indicates that Clark & Brown assumed that the New York counsel were familiar with the state of the pleadings, and the situation of the case as it then stood. They say:

"You, of course, understand the Davis case, and what has taken place in that. We have, in fact, been rendering Mr. Baxter such assistance as he called upon us for, since his bill was brought, which, we believe, is the only one of the two suits which is legally and properly brought."

They then spoke of the fact that neither James nor the Union Railway Company objected to the foreclosure under the bill of the Farmers' Loan & Trust Company, and did not desire to do so, but

were anxious to see the property brought to a sale under it. They then added:

"This being so, it seems to us we are free to take up the litigation where we find it left by Mr. Baxter, and carry it on to a termination with you, if you desire, and will be very glad to serve you in this or any other particular."

But they stated further in this letter that they had filed a claim for James, which was a general debt, except about \$1,500, which he claimed ought to be allowed as operating expenses, because recently advanced by him to pay employes' wages, which, of course, would be allowed as a prior claim, in case James brought himself within the rules which would entitle him to the same. They conclude their letter as follows:

"Now, these are the facts, and we put them before you. If you think there is no difficulty in our way, please say so, and we are ready for your service. If, however, there is anything in the situation, on account of which you think it best for some one else to represent you, please feel free to act accordingly, without thinking for a moment that your action would be in any way unpleasant to us, assuring you that it would not."

The New York counsel of the Farmers' Loan & Trust Company wrote their reply to this letter September 1, 1892. This letter could not have been received earlier than September 3, 1892. The reply was as follows:

"We have received your letter of August 30th. We understand from it that you are acting for Mr. James in the claim, of which, perhaps, \$1,500 or more may be for money advanced or borrowed by him for operating expenses, etc., to pay employes' wages, but that you do not claim priority to the mortgage debt, except for the special money so advanced or borrowed. We see no impropriety in allowing the \$1,500, or a little more, if necessary, as operating expenses, with the lien prior to the mortgage, provided the facts are such as to justify it; and, as the balance of Mr James' claim does not ask priority, we do not see that there can be any antagonism between your position, as acting for Mr. James, and your position as acting for the Farmers' Loan & Trust Company. We are glad, therefore, to believe that there is nothing in your letter which militates against the position of your telegram to us."

Now, it will be observed that the letter of Clark & Brown does not go into all the details. It does not explicitly state that they had theretofore filed a petition for the Union Depot Company, setting up a claim against the Union Railway Company for rent. It does not state that Mr. James had or claimed title to several lots over which the railroad had been constructed, and was negotiating the sale of such lots to the receiver. Neither do they mention the fact that they had been representing the railway company in suits brought against it for damages for personal injuries. It is now asserted that the failure to state these details amounts to a failure to give full notice to the New York counsel, and is therefore such unprofessional conduct as merits the disapprobation of the court. The fact that such a question is now made shows that it would have been better, had Messrs. Clark & Brown, or Mr. Brown, (who seems to have conducted the correspondence and litigation,) more fully stated the circumstances affecting their attitude, by stating the pendency of the sale of the lots to the receiver, the claim of the Union Depot Company, and the fact that they represented the de-

fense in certain damage suits, with the same particularity that they stated the claims of their client, James. Had they done so, there would, perhaps, have never been any question, such as is now raised in this case. The reason Clark & Brown did not fully state these matters seems to us to be that they assumed that the New York counsel of the trust company were already familiar with the litigation to which their client was the principal party, and in which they had been represented locally by Mr. Baxter, and already knew the general attitude of the claims which had been filed in the case against the insolvent railway company. They seem to have regarded great detail of statement as unnecessary, under the circumstances. They doubtless regarded the negotiations between Mr. James and the receiver for the sale of the lots as a matter not in any degree hostile to the mortgage creditors. If the Union Railway Company had no title to these lots, and they were essential to the preservation of the railway as a unit, and Mr. James was negotiating with the receiver, who represented all the property interests and all the creditors of the insolvent corporation, and was the officer and agent of the court, it could hardly be regarded as a claim in any degree hostile to the mortgage creditors. And this, we assume, was the reason Clark & Brown said nothing about this matter.

Now, as to this claim of the Union Depot Company against the Union Railway Company, it is not mentioned in this petition. No complaint is made that Clark & Brown said nothing about the fact that they had at one time represented the Union Depot Company in a claim adverse to the Union Railway Company. That Clark & Brown said nothing about this pending claim is possibly due, in part, to the fact that they assumed that the New York counsel knew the state of the pleadings, or that they had been informed by Mr. Baxter of the pendency of that claim, and in part to the fact that they did not anticipate proceeding further with the claim. And so with respect to the fact that they were representing this railway company in these damage suits. They might well assume that, whatever the damage suits were, if they resulted in judgments, they would be preferred, under the Tennessee statutes, to the mortgage. This is the well-settled law in Tennessee, and is not controverted by any one. The inquiry was, "Are you in a situation to represent the Farmers' Loan & Trust Company?" So far as these pending damage suits were concerned, they were in such situation, for their defense of these suits was in the interest of the mortgagees. Now, taking these matters up one at a time: These claims of James & Co. and of James we shall treat together, as they were linked together in the mind of Mr. Brown when he wrote this letter, when he stated that about \$1,500 was claimed for James as a preference. C. E. James was the James of the firm of James & Co., and, when Mr. Brown mentioned the claim of James, he doubtless included the firm claim with the individual claim of James. Now, with respect to what they said about the James claims. We think they dealt with the utmost fairness. They gave to their correspondents full information with respect to their attitude towards the James claim;



and, with respect to so much of it as was asserted as a preference, the New York counsel thoroughly agreed that that claim and conflict could not prevent representation of the trustee in other matters. Of course, there was a conflict, so far as they were expected to represent the mortgage creditors, but that attitude often exists with counsel, where many claims are filed in one case, and no one supposes that there is anything unprofessional about it. It is the duty of counsel, in such case, to abandon one claim, or to inform their client of the conflict, and have a thorough understanding that, with respect to this conflict, one or the other must look to other representation. We think that was sufficiently explained to the New York counsel and trustee, and that not the least blame attaches to Mr. Brown on the subject of the claim of James or James & Co. That there was precisely \$1,500 was not stated in the letter of Clark & Brown. In response to the New York lawyers, they say that \$1,500, or a little more, might be allowed as operating expenses.

Now, that brings us to the claim in respect to the land. We have observed that it might have been better to have stated the character of that pending matter to the New York counsel. Yet, at the same time, we repeat that that could hardly be regarded as a claim conflicting with mortgage creditors; for, if the railroad company did not own that property, the question of whether they should own it was to be determined finally by the court. It would be a question for the receiver, in the first instance, representing all persons; and, in the second instance, it must be confirmed by the court, and the interests of all would be protected,—the receiver, in such matters, standing for the general interests of creditors.

Next, with respect to the claim of the Union Depot Company. Undoubtedly, if Clark & Brown expected to continue to prosecute that claim, and the loan and trust company was not aware of it, and if they had continued to prosecute it, there might be ground of complaint. But no subsequent step was ever taken by Clark & Brown, which operated to fasten any one of these claims upon the insolvent railway company or the fund. They did not, after their employment by the Farmers' Loan & Trust Company, do anything, except confirm the report with reference to the James claim, which report contained a recommendation of the receiver that these lots should be purchased. The decree confirming the report of the master in these matters was guarded to a degree that Clark & Brown were hardly called upon to exercise. They were justified in confirming so much of that report as gave a preference to the extent of about \$1,500, but instead of confirming it, and making it a first lien prior to the mortgages, they reserved the question of priority in the face of the decree; and to this day it has never been declared, nor have they sought to have it declared, a preferential claim, and, with reference to the purchase of these lots, it stands to-day as it stood then. The purchase has never been concluded. It has never been submitted to the court for its adoption, and no step was taken by them with a view to completing the sale to the receiver. This is, perhaps, explained by the facts testified to by Mr. Brown, Judge Shepherd,

and Receiver Chamberlain, that very shortly after this decree of confirmation of October 8, 1892, Mr. James transferred all his claims to Gen. Sam. Thomas, represented then and since by Judge Shepherd. Clark & Brown have never since represented Mr. James in any of these claims. Nor has Judge Shepherd, nor the assignee of these claims, nor any one else, sought yet to have the claims preferred to the mortgage, or to complete the purchase of the James lots. The deeds have not been delivered. The purchase money remains wholly unpaid, and the receiver's purchase unadopted. Now, if, at any subsequent date, there had been an effort made to confirm the sale of these lots, it would have been the duty of Clark & Brown to call the attention of their clients to it, so that they might decide whether this land should be bought or not; but no action has arisen with respect to it, and no occasion has arisen for calling this to the attention of their clients. No step was ever subsequently taken by Clark & Brown in the Union Depot matter. With respect to the Union Depot claim, the testimony of Mr. Brown is very positive that, about the time of their employment by the trustee, they abandoned that depot claim, and did so by the consent and direction of their client Mr. Erb. The defense of the damage suits by Clark & Brown did not in any way conflict with the mortgage creditors, but it was to their interest.

Now, it is argued that it is doubtful whether the receiver's counsel had sufficient authority to continue the services of Clark & Brown in the damage suits pending at the time the receiver was appointed. It strikes the court that it was wise to do so, as it is dangerous to take a case of that kind out of the hands of lawyers who have had charge of it from its beginning, and Judge Shepherd's known familiarity and large experience in this class of litigation is such that no one knew better than himself the impropriety of permitting Clark & Brown to retire from these cases. Whether that was true or not, the question as to whether Clark & Brown were entitled to a fee for the defense of the damage suits was a question they had a right to present, by filing their claim with the receiver, and they had a right to state the amount they claimed. It was the duty of the receiver to pass upon it. If he thought it was improper or excessive, it was his duty to resist it. They did file their claim, and they claimed compensation for services rendered before the appointment as well as after, stating the items and charges with great particularity. Now, with regard to the liability of the fund for services of counsel before appointment of receiver, Judge Jenkins, of the Eighth circuit,—one of the ablest of the circuit judges,—has held, as we learn, that counsel are within the six-months rule, and are entitled to same preference under some circumstances, especially if counsel have been engaged in defending claims entitled to priority. Whether or not this is the law, is not decided. It furnishes at least a strong reason for asserting a claim against the receiver. It was for the receiver to determine whether it should be contested or not. His failure to contest warrants no charge against Clark & Brown. The

claim is pending, and wholly unadjudicated. From the time of the employment of Clark & Brown as local counsel for the Farmers' Loan & Trust Company down to the filing of the Bartol petition, there was a very frequent and voluminous correspondence carried on between Messrs. Turner, McClure & Rolston, the New York counsel, and Clark & Brown, local counsel. That entire correspondence has been submitted for the inspection of the court, and has been thoroughly considered. There is nothing in it that in the slightest degree reflects upon the professional character or honor of Clark & Brown. It shows great diligence and energy in the management of the many questions which were presented in these pending foreclosure cases. It indicates, also, that they conferred with great freedom of detail as to all pending questions with the New York counsel. Much oral testimony has been heard with respect to the subsequent relations of Clark & Brown with the Union Depot Company, and the claims of James. The pleadings and the decrees of the court in the two pending cases have been thoroughly inspected. Every possible light has been thrown upon the conduct of the gentlemen accused of unprofessional conduct. So far as Mr. Clark is personally concerned, it is proper to remark that he had nothing to do with the management of these cases, or any of the claims at any time represented by this firm. The correspondence, as well as the management of these cases, has fallen upon the junior member of the firm, Mr. Brown. With respect to the management, and with respect to their entire conduct since the 3d day of September, 1892, we are glad to be able to say that they have faithfully and loyally and ably represented the interests of the Farmers' Loan & Trust Company. No act of commission or omission is discoverable, by which the interests of the trustee, or of the creditors represented by the trustee, have been injuriously affected. There was nothing whatever in the correspondence, the oral evidence, or in the pleadings and decrees of record, which in any degree reflects upon the professional character or honor of the firm of Clark & Brown, or either member thereof. No members of this bar have borne more spotless reputations than the two gentlemen, the subject of this very grave accusation; and it has given the court very great pleasure, after laborious investigation, to be able to say that they have passed the ordeal untainted and unspotted. So much of the petition, therefore, as reflects upon the professional character of these two gentlemen, and calls upon the court to take cognizance thereof, is dismissed, at the cost of petitioner Bartol and others.

KEY, District Judge. I concur fully with Judge LURTON. In addition, I will state that the litigation out of which these questions arise has all been conducted before me, as judge. The case has been hotly contested from the beginning, and the attorneys of all parties have ably and zealously maintained in open court the interests of their respective clients. No quarter has been asked or given, so far as I could see; but all the attorneys, in my opinion, have been

faithful to the interests of their clients. The cause has very often been before the court, and it has seemed to me that there has been more contention than necessary. I have never seen the slightest disposition on the part of any of the counsel in the case to compromise or surrender any interest or advantage of their clients.

---

## MORTON v. KNOX COUNTY.

(Circuit Court, E. D. Missouri, N. D. December 7, 1894.)

## 1. COUNTY WARRANTS—LIMITATION.

Rev. St. Mo. 1889, § 3195, providing that county warrants not presented for payment within five years of their date, or being presented within that time, and protested for want of funds, and not presented again within five years after funds are set apart for payment thereof, shall be barred, prescribes a special limitation for actions on such warrants, within section 6791, providing that the limitation of 10 years, prescribed by section 6774 for action on any writing for the payment of money, shall not extend to any action which shall be otherwise limited by special statute.

## 2. SAME—ACKNOWLEDGMENT OF DEBT.

The indorsement by a county treasurer on a county warrant of a refusal to pay for want of funds, as prescribed by Rev. St. Mo. § 3193, is an acknowledgment of the debt, within section 6793, providing that a written acknowledgment of a debt shall take it out of the operation of the statute of limitations.

This was an action by William H. Morton against Knox county upon a county warrant for the payment of \$4,497.41. The defendant, in its answer, set up the general statute of limitations. Plaintiff demurs to the answer.

W. C. Hollister and F. L. Schofield, for plaintiff.  
Chas. D. Stewart, for defendant.

PRIEST, District Judge. This is an action upon a county warrant of Knox county for the sum of \$4,497.41, issued on the 9th day of August, 1879, by order of the county court of said county, directed to the treasurer of that county, ordering him to pay to the plaintiff, or bearer, the sum above mentioned out of money in the treasury belonging to the M. & M. R. R. fund, and is duly signed by the president of the county court, and attested by the clerk of the county. This warrant was issued in payment of two separate judgments obtained by the plaintiff in the circuit court of Knox county for the aggregate sum of \$4,497.41, upon coupons attached to bonds subscribed by the county in aid of the M. & M. Railroad, and payable out of the special and limited fund authorized to be collected for that purpose. This warrant was presented to the treasurer of the county on the 12th day of August for payment, and was, in form authorized by statute (Rev. St. 1889, § 3193), protested for want of funds. Annually thereafter the warrant was presented, and like action taken by the treasurer, the last protest for want of funds being made October 12, 1894, just prior to the institution of this suit. The answer admits these several protests or refusals of payment by the treasurer of the county for want of funds, and pleads that

the action upon the warrant is barred by the statute of limitations of 10 years (Rev. St. 1889, § 6774); and again, that the warrant had not been presented for payment within 5 years after money had come into the hands of the county treasurer for the purpose of paying said warrants. These two pleas are challenged by a demurrer, and we will deal with them on the demurrer in the order in which they have been stated.

The statutes of Missouri prescribing the general period of limitations of personal actions (Rev. St. 1889, § 6774), provide that all actions upon any writing for the payment of money shall be commenced within 10 years. This statute recognizes, because of its generality, that there were and would be special acts of limitation more closely related to special subjects than to limitations, and hence provides (section 6791) that it shall not extend to any action which shall be otherwise limited by such statute. The complainant contends that section 3195, Rev. St. 1889, is such special statute, and as such affords the only limitation which can be enforced as against county warrants. Section 3195 is as follows:

"Whenever any warrant drawn on any county treasurer shall have remained in the possession of the county clerk for five years unclaimed or not called for by the person in whose favor it shall have been drawn, or his or her legal representative, the county court shall, by proper order enter of record, annul and cancel the same; and whenever any such warrant, being delivered, shall not be presented to the county treasurer for payment within five years after the date thereof, or being presented within that time and protested for want of funds to pay it, shall not be again presented for payment within five years after funds shall have been set apart for the payment thereof, such warrant shall be barred and shall not be paid; nor shall it be received in payment of any taxes or other dues."

On the part of the county it is contended that the section thus quoted is in the nature of a regulation for the government of the officers of the county rather than as a limitation to an action predicated upon county warrants; that there is neither a natural nor necessary repugnance between this statute and the general statute affecting limitations of actions; and that, therefore, section 3195 cannot, by implication, effect a repeal of the general statute. We are unable to give our sanction to this contention. The rules which control repeals by implication are not appropriate to the interpretation of this statute, but we should rather inquire whether it was the intention of the legislature to add a special limitation to a peculiar character of obligations. Indeed, we think, even if we were to disregard the express language of section 3195, and look alone to the legislation which formulated that section into its present terms, we should be constrained to hold that its purpose was to fix a special limitation to these warrants which are obligations *sui generis*. Prior to 1877, county courts, after auditing claims against the county, were empowered to issue warrants therefor, drawn upon the treasurer, signed by the president, and attested by the clerk. In 1877 the legislature passed an act (Sess. Acts 1877, p. 202) authorizing county courts, upon proper notice, to cancel all warrants in the hands of the county clerk which had not been called for by the payees within five years after they had been issued. The necessity

of this legislation is not apparent upon its face. It no doubt had its origin in much inconvenience occasioned by the neglect of parties to call for warrants allowed them upon demands against the county, for its provisions are directed against the rights of such parties, and confer an authority upon the county court, upon proper notice, to annul the warrants on account of such neglect to call for them. This section is in no wise a regulation of the ministerial duties of any county officer. In 1879, a further addition was made to the same idea, and it was incorporated in section 5398, Rev. St. 1879, in the form in which it now stands in Revised Statutes 1889. The addition made in 1879 was to the effect that:

"After the delivery of the warrant, if it shall not be presented to the county treasurer for payment within five years after its date, or being presented within that time and protested for want of funds to pay it, shall not be again presented for payment within five years after funds shall have been set apart for the payment of it, it shall then be barred and shall not be paid, nor shall it be received in payment of any taxes or other dues."

This was a still further limitation upon the right of the holder of the warrant to exact its payment. It was a limitation upon his right, and not a direction in any manner to the officers of the county, except that it prohibited the acceptance of the warrant in payment of taxes or dues to the county. The occasion for the amendments of 1879 ingrafted upon the original idea of 1877, finds its justification in an opinion of the supreme court of Missouri,—*Logan v. Barton Co. Court* (1876) 63 Mo. 349,—wherein the supreme court expressed a doubt whether the general statute of limitations would begin to run against a county warrant until funds had been provided for its payment in the hands of the treasurer; and wherein it further held, conceding that statute would apply even though no funds were set apart, yet the collector and treasurer, being authorized to receive such warrants in payment of state dues, being the agents of the county, might waive the operation of the statute of limitation. It was to meet the difficulties suggested by this decision that the amendment we have before referred to was doubtless formulated. Section 3195 thus fixes a definite and just period, conditioned upon the necessities, frequently arising, in which county funds are found for a limitation of the life of county warrants, and withdraws the power of the collector or treasurer to waive this limitation. When warrants should be presented for payment, and the treasury be barren of money with which to make the payment, it would be a manifest injustice, the debt in no wise being disputed, to require the owner of the warrant, in order to maintain its life, to bring suit against the county, and thus not only perplex him, and dishonor the credit of the county, but also to involve it in needless expense and litigation. Upon the other hand, if there were money in the treasury with which to pay the warrant, five years is thought to be ample time within which the creditor ought to be allowed to present his warrant and procure its payment. If this construction does not prevail, then there is an entire want of mutuality in the operation of the 10-year statute of limitation. If the owner of the warrant should not call for it until the expiration of 4 years after it had been author-

ized by the county court and in the hands of its clerk, and were to allow it to run for 5 years thereafter without presentation to the county treasurer, he would be barred by the very language of this section, and could not plead, as the only period of limitation of action, the general statute of 10 years. This want of reciprocal operation would be so manifestly unjust as to require us to search for some invincible reason apparent upon the face of the statute before we could give it judicial sanction. It would be unjust to say that it does not operate as a limitation when the county is sued, but does when it may be invoked to defeat the holder of the warrant. To that extent it is beyond doubt a substitution of a different period of limitation. But why indulge in this sort of argument when the statute upon its face, in unequivocal terms, affixes the limitation which it names as a bar to the warrant? The language of the statute is, "such warrant shall be barred and shall not be paid." What does this mean, unless it is a legal bar to the maintenance of an action upon it? It will not do to say that this language is a limitation upon the authority of an officer to receive it in payment of county taxes, for this phrase is followed immediately by an independent clause, in disjunctive form, prohibiting its receipt in payment of any taxes or other dues. We must give force, according to the usual canon of construction, to every phrase of a statute, if it be at all sensible or practical to do so. Nor are we authorized, in interpreting a statute, to say that phrases following each other are simply cumulative of the same thought, where their literal signification expresses different meanings and different ideas. It is true, section 3195 is lodged under an article entitled "County Treasurers and County Warrants," but it comprehends many other subjects than those which, for the purpose of collation, are supposed to be more appropriately arranged under that title. Among other things, that article provides for the authority of the county court to audit claims against the county, settlements with collectors, duty of the county court in relation to sixteenth sections of land, and so a variety of subjects are embraced. Limitations, except of a general character, are not usually found in the general provision relating to that title. They may be expressed in many different forms, and may be as a condition, or an elemental part of a new right or remedy, or even in imposing and defining the duties of public officers in the administration of official business. This precise question was before this court in the case of *U. S. v. Brown*, 41 Fed. 481, and my distinguished predecessor, Judge Thayer, there held that section 3195, and not section 6774, was the limitation that applied to county warrants.

But there is another reason why this defense cannot avail upon the petition and the admitted facts in the answer. This warrant was annually presented, from the time it was issued, to the county treasurer for payment. On each occasion its payment was refused solely for the want of funds, and such refusal stamped or written upon the back of the warrant. The general statute of limitations (section 6793) contains a provision in effect that a written acknowledgment of a debt shall take it out of the operation of the statute of limita-

tions. The indorsement made by the county treasurer upon this warrant is one he is authorized to make by the statute, and is, in effect, an acknowledgment in writing of the debt. The statute above quoted does not require a promise to pay, in addition to the acknowledgment, in order that the running of the statute may be checked; a simple acknowledgment of the obligation in any writing is sufficient for that purpose. In *Logan v. Barton Co. Court*, supra, the supreme court held that the treasurer and collector of the county were authorized to waive the running of the statute of limitation. That power is not withdrawn, but limited to a given period, by section 3195; hence the acknowledgment of the debt, having been made in a form authorized by law, by a person empowered by statute to make it, will take the warrant without the operation of the statute of limitation. This rule is abundantly sustained. *Chidsey v. Powell*, 91 Mo. 622, 4 S. W. 446. With respect to the plea of five years' limitation predicated upon the provisions of section 3195, it is sufficient to say that there is no allegation in the answer sufficient to meet the provisos contained in that section. The demurrer to the fourth and sixth defenses will be sustained.

---

KLEVER et al. v. SEAWALL et al.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1894.)

No. 150.

1. PRACTICE — FINAL JUDGMENT UPON ONE OF SEVERAL CAUSES OF ACTION — WRIT OF ERROR.

It does not affect the finality of a judgment that the cause of action upon which it was rendered was united, in the same petition, with other causes of action, which have not yet been finally adjudicated; and the time for suing out a writ of error upon such final judgment runs from its entry, without reference to the disposition of such other causes of action.

2. SAME—VACATING JUDGMENT AFTER THE TERM.

The circuit courts of the United States are without power to set aside a final judgment, for error of law, after the term at which it was entered, and when no motion for the purpose had been filed before the close of the term.

3. SAME—OCCUPYING CLAIMANT'S LAW OF OHIO.

Under the occupying claimant's law of Ohio (St. Ohio, §§ 5786-5795), providing that a person in possession of lands under a certain specified color of title shall not be evicted under an adverse title until compensated for improvements, and that the court rendering judgment against such an occupying claimant shall make an entry of the claim, provide for a trial of the questions of fact by a jury, and enter judgment in certain forms, according to the facts found, a claimant, in order to avail himself of the benefit of the act, must give notice of his claim before or at the time of entering judgment for the plaintiff, and is barred therefrom by the entry of a judgment for the recovery of the real estate before the interposition of his claim.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

This was an action by J. Hairston Seawall and others against J. M. Klever and Edmund Klever for the recovery of an undivided interest in certain lands, for mesne profits, and for partition. Judg-



ment was entered for the plaintiffs, by default, for the recovery of the land and the mesne profits, and for partition to be made by commission. After the term at which such judgment was entered, defendants moved to set it aside, and also made an application for the allowance of the value of improvements under the occupying claimant's law of Ohio. The court denied both motions. Defendants bring error.

The defendants in error, and plaintiffs below, filed their petition in the circuit court for the Southern district of Ohio, Eastern division, seeking to recover from J. M. Klever and Edmund Klever an undivided one-third of a tract of 100 acres in Fayette county, Ohio, in the said district and division. The petition was filed October 7, 1889. It made the necessary allegations of diverse citizenship of the plaintiffs and defendants, averred that the value of the one-third of the tract sued for exceeded \$2,000, and asked judgment for \$800, as damages for the unlawful detention. The defendants were duly served with summons. J. M. Klever filed an answer August 5, 1890, in which he averred that the one-third of the land described in the petition was of a less value than \$2,000, and that the court had no jurisdiction. He denied the title of the plaintiffs. He averred that the tract in question was not owned or possessed in common by himself and his codefendant, but that he himself owned 61 acres in severalty, and his brother and codefendant owned the remainder in severalty; and he therefore pleaded a misjoinder of causes of action. On January 10, 1891, the plaintiffs below, by leave of court, filed an amended petition, in which they repeated the averments of the original petition, increasing the amount claimed for damages and rents and profits to \$8,000; and, in addition to a prayer for possession of the land and a judgment for \$8,000, they added the following: "They also pray for the partition of said real estate, and that their undivided estate therein may be set off to them in severalty."

On February 10, 1891, the defendants filed the following motion: "And now come the defendants, and move the court to strike the amended petition of plaintiffs from the files: (1) Because said amended petition states and sets forth other and different causes of action than are set forth in the petition, and is not an amendment to the cause of action in the petition. (2) Said amended petition pretends to set forth a cause of action in equity, while said original petition is an action at law. (3) The amended petition sets forth several different causes of action not contained in the petition." This motion the court overruled February 21, 1891, by the following entry: "This cause came on to be heard on the motion of the defendants to strike the amended petition of the plaintiffs from the files on the grounds therein stated, was argued by counsel, and submitted to the court, on consideration whereof the court finds said motion not well taken, and doth overrule the same, to which defendants except. The defendants are hereby given 30 days in which to answer the amended petition." The defendants filed no answer, nor did they ask leave to refile the answer to the original petition as an answer to the amended petition within the 30 days allowed by the foregoing entry. Nothing whatever was done in the case by either party until December 16, 1891, when, upon the application of the plaintiffs, the court gave judgment by default against the defendants, James M. Klever and Edmund Klever. The court found that the said defendants had been duly served with process, and that they were in default for answer or demurrer to the amended petition, and that, from the evidence and exhibits, the allegations of the amended petition were true, and ordered and adjudged that the plaintiffs recover from the said defendants, and each of them, an equal undivided one-third part and interest in the real estate described in the amended petition, and the costs therein expended. The court then proceeded to order partition of the interest adjudged to the plaintiffs and the several interests found to belong to the defendants. In the event of its being impossible to divide the parts of the tract without manifest injury, the commissioners were ordered to value the same in money. It was further considered by the court that plaintiffs recover one-third of the rents and profits of the land from January 10, 1885, to be determined by a special master commissioner. The term of court at which this judgment was entered closed on

the day before the 1st Tuesday in June, 1892. A writ of partition issued on this judgment June 16, 1892, and was returned not served. On June 17, 1892, the time for executing the writ was extended from March 15, 1892, the date fixed in the judgment, until October 1, 1892. On June 19, 1892, an alias writ of partition issued. On August 27th, and before this writ was executed, defendants filed a motion to set aside the judgment rendered December 16, 1891. The motion was as follows: "Now come the defendants, and move the court to vacate and set aside the judgment and decree heretofore rendered and entered in this cause on the 16th day of December, 1891, for the following reason, to wit: Said judgment and decree was irregularly obtained, in this: (1) Said defendants were represented in said cause by counsel who had appeared and assisted in the hearing of a motion and demurrer, and had filed the answers of these defendants to the petition, which said answers were still pending and on file at the time said judgment and decree was taken, and the defenses therein set up unadjudicated by the court; and said judgment and decree was taken and entered without any notice to defendants or their said counsel, although counsel for plaintiffs were well aware and understood that these defendants were represented by counsel, and desired to and were making a defense herein. (2) Said judgment and decree was entered as on default while there were issues made up by the said answers of these defendants to the petition, which these defendants had the right to have tried by a jury. (3) Said judgment and decree was taken and entered as on default for answer while these defendants' said answers were on file and undisposed of. (4) Said judgment and decree was taken as on default for answer to the amended petition filed herein, while said amended petition contained no new matter except a prayer for the partition of said premises in case the title of plaintiffs should be found and established to the one-third part thereof, and the original petition had been and was then fully pleaded to by said answers of defendants, and the issues as to said title of plaintiffs fully made up. These defendants were wholly unaware of the rendition of said judgment and decree until on or about the ——— day of July, 1892." This motion was overruled, and the following bill of exceptions was taken, to show the evidence upon which the action of the court was based:

"Be it remembered that on the hearing of the motion to set aside the default and the said judgment of the court rendered thereon on the 16th day of December, 1891, the defendants tendered to the court answers putting in issue all the facts alleged in the amended petition, and offered evidence to show that said judgment was taken without having said cause noted for trial, and without notice to defendants, and that the defendants had no actual notice of said judgment having been taken until a few days prior to the 21st day of July, 1892, when the special master wrote to defendants' attorney of his intention to take testimony on the 21st day of July, 1892, as to rents and profits, which was done on said date. Also, Mills Gardner, attorney for the defendants, stated to the court, professionally, in explanation of the fact that no answer to the amended petition had been filed, that he, as attorney for the defendants, relied on the original answer of the defendants to the petition as putting in issue all the statements and allegations of the amended petition, and deemed no further answer on behalf of the defendants necessary for the putting in issue of the question of the ownership and right of possession of plaintiffs in and to the real estate described in the petition, and for those reasons he, on behalf of the defendants, filed no further answer, nothing of which so stated, however, he had communicated to the plaintiffs or their attorneys. That he, as attorney for said defendants, had no actual notice, knowledge, or information that said judgment was to be or had been taken till a few days prior to the 21st day of July, as aforesaid. It appeared to and was further found by the court that, by the rules of practice in the circuit court of the United States for the Southern district of Ohio, no cases can be or should be noted for trial except when at issue, and that no notice of any kind to the adverse party is required in taking default judgment. And this was all the evidence offered by either party. And the court having overruled said motion of the defendants, and refused to set aside default judgment, and permit defendants to plead further to said amended petition, the defendants duly excepted to said ruling and decision of the court at the time, and tender

this, their bill of exceptions, which is allowed, signed, sealed, and ordered to be made part of the record.

"[Seal.]

George R. Sage, U. S. District Judge,

"Sitting in and Holding the Circuit Court in the Above-Entitled Cause."

The commissioners made return of their doings on October 27, 1892. In their report they say, among other things: "As there had been no recent survey of the lands, we employed a competent surveyor, as by said decree we were authorized to do; and our partition is based on the amount of land in each of said tracts, as shown by said resurvey, the report of which is filed herewith. In respect of improvements, the buildings on the several tracts hereinafter partitioned and allotted are all set off to the respective defendants, but their value is taken into account in making partition." They then reported that, of the 67-acre tract in possession of James M. Klever, they set off to him 44.74 acres, and the remainder, or 22.37 acres, to the plaintiffs, and that the 25-acre tract in possession of Edmund Klever could not be subdivided without injury thereto, and they returned the value thereof. The special master reported October 31, 1892, that there was due the plaintiffs, as rents and profits from the 61-acre tract, \$536.85, and, from the 25-acre tract, \$291.76. On November 2, 1892, plaintiffs moved to confirm the reports of the commissioners in partition and the special master. On December 6, 1892, the defendants filed the following application. "And now come defendants, and still protesting against the former judgments and orders heretofore, and waiving and admitting nothing, say that for more than 60 years defendants and their grantors have been, by connected chain of title of record, in the belief that they were the owners thereof in fee simple, in undisturbed possession of said premises, and have made many lasting and valuable improvements thereon, and paid the taxes and kept up repairs, all of which defendants are justly entitled to have allowed and accounted for, and that the former order of said court as to rents and profits should be modified so as to take account of all of said improvements, taxes, repairs, etc., which these defendants pray may be made accordingly." On May 16, 1893, Judge Sage overruled the motion of the defendants to set aside the judgment (as already stated); denied the foregoing "application" (*Seawell v. Crawford*, 55 Fed. 729), and entered a judgment confirming the report of the commissioners in partition and of the special master, and ordering the 25-acre tract sold. Exceptions were taken to the action of the court, and a writ of error was sued out from this court to reverse the same.

The following errors were assigned: (1) The court erred in rendering and permitting to be entered the judgment and decree herein on the 1st day of December, 1891, as upon default. (2) The court erred in overruling the motion of defendants to set aside said alleged and pretended judgment entered on said 1st day of December, 1891, and in refusing to permit defendants to further answer and defend against said action. (3) The court erred in refusing to open up and set aside default judgment, if the same was properly entered, and in refusing to permit defendants to file their answer to the amended petition, if any further answer were necessary to put in issue the matters thereof. (4) The court erred in overruling the motion of the defendants to set aside the report of the commissioners in partition. (5) The court erred in overruling the motion of the defendants to set aside the report of the special master commissioner appointed herein to take account of rents and profits.

Mills Gardner and Humphrey Jones, for plaintiffs in error.

Matthews & Cleveland, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge (after stating the facts). Paragraph 6 of section 5019 of the Revised Statutes of Ohio provides that there may be united in one cause of action "claims to recover real property, with or without damages for the withholding thereof, the rents and

profits of the same, and the partition thereof." "The action for damages for withholding real property and for rents and profits," under the Ohio Code, is the same as the action of trespass for mesne profits at common law. *McKinney v. McKinney*, 8 Ohio St. 423, 428. The amended petition united three causes of action—First, a suit for recovery of the possession of land; second, an action for trespass for mesne profits; and, third, an action for partition. The judgment entered December 16, 1891, found for the plaintiffs on the first cause of action, and adjudged that they were entitled to the possession of the undivided one-third interest sued for, and awarded the costs on that issue. This was, so far as the first cause of action was concerned, a final judgment. Had the plaintiffs then chosen to ask for it, they might have had execution on the judgment, and the issuance of a writ of possession. A judgment is final when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined. *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 28, 2 Sup. Ct. 6. It cannot affect the finality of a judgment that the cause of action upon which it was rendered was united in the same petition with other causes of action which have not yet been finally adjudicated. As the judgment of December 16, 1891, adjudging title and right of possession in plaintiffs, was a final judgment, the time within which a writ of error could be brought to review it began to run from that date, and expired six months thereafter. The writ of error in this case was not sued out until August 28, 1893. We have no power, therefore, to review the correctness of that judgment, and the first assignment, which seeks to have us do so, cannot be sustained.

The second and third assignments of error are directed to the action of the circuit court in refusing to set aside the judgment of December 16, 1891. The entry denying the motion for this purpose was made May 16, 1893, so that, if that action of the circuit court was a final order to which error lies, the writ was sued out in due time. Defendants, by their motion, sought to have the judgment set aside, on the ground that the court had erred in holding the defendants in default for answer to the amended petition, when there was on file an answer of one of the defendants to the original petition, which was broad enough fully to make an issue with the averments under the first cause of action on which judgment was rendered. The motion was made nine months after the rendition of the judgment, and three months after the close of the term at which it was entered. The court is conceded to have had jurisdiction of the parties and the subject-matter. No fraud in procuring the judgment is alleged, but only irregularity, and that consists solely in the court's finding a default to exist when, as the defendants claim, it was not in law a default. It is true there is an averment that the judgment was entered without notice to counsel for defendant, but, if they were in default, they were not entitled to notice.

Before we can consider whether the court was in error in holding defendants to be in default, we are, therefore, confronted with the question whether a circuit court of the United States has the power

to set aside a final judgment for error of law after the term at which the judgment was entered, and when no motion for the purpose had been filed before the close of the term. In *Eronson v. Schulten*, 104 U. S. 410, it was sought, long after the term at which it had been rendered, to correct a judgment for the recovery of duties erroneously assessed and collected, in which the amount of the recovery was much less than it should have been, through an error of a master to whom the determination of the amount had been referred by agreement of parties. The circuit court granted the motion, but this action was reversed by the supreme court. Mr. Justice Miller, in speaking for the court, said (page 415):

"It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them, during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that, after the term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and, if errors exist, they can only be corrected by such proceedings, by a writ of error or appeal, as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court that, while realizing that there is no court which can review its decision, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court."

The learned justice then referred to the common-law writ of error *coram vobis* by which a court, having rendered judgment, was enabled to set it aside after the term, for some error in fact which had escaped attention and was material in the proceeding,—as that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed, or was a feme covert, or for some misprision of the clerk,—and pointed out that, in practice, this writ had been supplanted by a motion for the same purpose. *Pickett's Heirs v. Legerwood*, 7 Pet. 144. But the conclusion was reached that the writ *coram vobis* did not "reach the facts submitted to a jury, or found by a referee or by the court sitting to try the issues," and therefore that it did not reach the case then before the court. If that be true, a fortiori does it not reach alleged errors of law upon which the judgment was based. And this is expressly held in the case of *Phillips v. Negley*, 117 U. S. 665, 6 Sup. Ct. 901. See, also, *Hickman v. Ft. Scott*, 141 U. S. 415, 12 Sup. Ct. 9; *Bank v. Moss*, 6 How. 31; *Noonan v. Bradley*, 12 Wall. 121; *Sibald v. U. S.*, 12 Pet. 488. Nor can the plaintiffs in error derive any aid from the remedies for correcting judgments after the term provided by the statutes of Ohio. In the case of *Bronson v. Schulten*, where the judgment sought to be set aside was rendered in the circuit court of the United States, sitting in New York, a statute of that state was relied on as furnishing ground for the action of the lower court in modifying the judgment after the term. To this Justice Miller made reply:

"The question relates to the power of the courts, and not to the mode of procedure. It is whether there exists in the court the authority to set aside,

vacate, or modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a state or the practice of its courts."

We are therefore of opinion that the motion to set aside the judgment of December 16, 1891, upon the first cause of action,—i. e. the recovery of the land,—was rightly overruled, for want of power in the court to grant it. There is no hardship in this result. The defendants below, being in court as parties, were charged with notice of everything done in the case (*White v. Crow*, 110 U. S. 183, 4 Sup. Ct. 71), and, at any time within six months after the judgment, could have brought a writ of error to review the holding of the court in respect to the existence of a default. If any equitable reason exists for setting aside the judgment or enjoining its execution, that should be taken advantage of by bill in equity. The writ *coram vobis* (or the motion which is its substitute in practice) does not afford a remedy on such a ground.

The next assignments of error are to the action of the court in overruling the motions of the defendants to set aside the report of the commissioners in partition and the report of the special master. The only reason brought to the attention of this court by the brief or argument of counsel for plaintiffs in error why these motions should have been granted is that the plaintiffs in error (the defendants below), after the reports had been made, filed an application to have accounted to them all the improvements made by them and their grantors in bona fide reliance upon a title of record since 1823. It is said that they were entitled to an allowance for improvements under the occupying claimant's law of Ohio. Section 5786, Rev. St. Ohio, provides that a person in quiet possession of lands or tenements, and claiming to own the same, who has obtained a certain specified color of title to, and is in possession of, the same, without fraud or collusion on his part, shall not be evicted or turned out of possession by any person who sets up and proves an adverse and better title, until the occupying claimant or his heirs are fully paid the value of all lasting and valuable improvements made on the land by him, or by the person under whom he holds, previous to receiving actual notice by commencement of suit on such adverse claim of title. Section 5788, as amended by act of April 21, 1890 (87 Ohio Laws, 237), provides that the "court rendering judgment against the occupying claimant, in any case provided for by this subdivision, shall at the request of either party cause a journal entry to be made; and the cause shall then proceed as in other civil cases." Section 5789 (as amended) provides that, "for the trial of the question of fact remaining undisposed of, a jury shall be impaneled and sworn as in other civil cases and shall at once proceed," etc. Sections 5792, 5793, 5794, and 5795 provide the forms of judgment to meet the possible verdicts of the jury and judgments of the court as to the improvements, their value, and the good faith with which they had been made, together with the proper offsets against the same, arising from rents and profits withheld from the successful claimant. It is obvious to us that, in order that a defendant in an

action for the recovery of real estate may avail himself of the benefit of the occupying claimant law, he must give notice of his claim to the court before or at the time judgment for plaintiff on the main action is entered, or at least before the term has passed in which such judgment is entered. Otherwise the successful plaintiff can never know when he has a clear title to the land adjudged to be his. Such seems to be the opinion of the supreme court of Ohio; for in *Raymond v. Ross*, 40 Ohio St. 343, it was held that a claim for improvements under the occupying claimant law was barred by a judgment for the recovery of the real estate, because, if valid, the claim for improvements should have been set up in the main action. We think, therefore, that the default judgment of December 16, 1891, was a bar to any claim by the defendants below under the occupying claimant's law.

Secondly, it is urged that, in the partition of the land, the defendants are entitled to compensation for the value of permanent improvements made by them in good faith, and especially that they may use this as a set-off to the claim for rents and profits. Such relief is frequently accorded in equity, but the difficulty in doing so in the present case is that the action below was on the law side of the court, where no equitable remedy can be administered. The court below treated the action for partition as an action for partition at law, and held that such an action lay in Ohio, and could be united with an action for the recovery of the real estate and mesne profits. We do not understand that, under the writ of partition at common law, there was any power to order a partition sale and division of the proceeds, and yet this is what the court did in regard to the 25-acre tract of Edmund Klever. From this course, we must infer that the circuit court was proceeding under the partition statute of Ohio. The question, therefore, arises whether a partition under the Ohio statute is cognizable by a federal court of law, or should be properly sought by bill in equity. The question has not been argued or assigned for error, but it is so fundamental in the partition proceedings, which are attacked, that we cannot overlook it. It is too important to decide it without argument. We shall therefore affirm the default judgment and the judgment for mesne profits, and set the case down for reargument on the point above stated.

---

DAVIS v. DAVIS et al.

(Circuit Court, N. D. Georgia. December 10, 1894.)

1. PLEADING—DECREE.

A petition, stating a decree entered in a former proceeding, either as matter of inducement or as the basis of plaintiff's action, need not set out the petition on which such decree was rendered.

2. SAME—CONTRACT MADE UNDER DIRECTION OF COURT.

D. had an agreement with the executors of her husband's estate as to what should be allowed her from such estate, in settlement of her claim for dower, as against the provisions of her husband's will, to which agreement the executors desired to obtain the assent of the court. They accordingly filed a petition in a state court, and obtained a decree ratifying a

the settlement, and directing them to execute a contract in pursuance of it. The contract, so made, not having been performed, D. brought suit in the United States court against the executors to recover the money agreed to be paid. *Held*, that such suit was upon the contract, and not upon the decree of the state court, and could be maintained without regard to the question of the right to sue, on a judgment of a state court, in a United States court sitting in the same state.

**8. FEDERAL AND STATE COURTS—RIGHT TO SUE ON JUDGMENT.**

Whether an action can be maintained in a United States court on a money judgment obtained in a court of the state in which the United States court sits, *quaere*.

This was an action by Icelia E. Davis against Charles A. Davis, Jr., and others, executors of Charles A. Davis, Sr., deceased. The defendants demurred to the declaration.

Bishop & Andrews and M. J. Clarke, for plaintiff.  
N. J. & T. A. Hammond, for defendants.

NEWMAN, District Judge. This is a general demurrer on the following declaration:

To the Honorable Judges of the Circuit Court of the United States, for the Northern District of Georgia:

Mrs. Icelia E. Davis avers:

(1) That she is a citizen of the state of Illinois, resident in the city of Chicago in said state; that she is not a citizen of the state of Georgia.

(2) That Charles A. Davis, Jr., Oscar S. Davis, and Edwin Davis are executors of the last will and testament of Charles A. Davis, Sr., late of said district of the state of Georgia; and that said executors are now residents of said state, residing in said Northern district of Georgia; that the said Charles A. Davis, Jr., and Edwin Davis reside in the city of Greensboro, in the said Northern district for the state of Georgia; and that the said Oscar Davis resides in the city of Atlanta, in the said Northern district for the state of Georgia.

(3) That the said executors are indebted to her in the principal sum of eleven thousand five hundred and thirty-five (\$11,535.00) dollars, which said amount is to bear interest at the rate of 6 per cent. per annum from the 18th day of August, 1894, until the same shall be paid.

(4) That she is the widow of the said Charles A. Davis, Sr., lately deceased, as aforesaid; and that the said Charles A. Davis, deceased, left a will conveying to his seven (7) children and to your oratrix a very large estate, estimated at five hundred thousand (\$500,000) dollars or more; and that in said will he provided for her by directing that she be paid an annuity of nine hundred (\$900.00) dollars so long as she remained his widow, or so long as she should live. She avers that she was dissatisfied with the provisions made in her behalf by the said will, and that she thereupon determined to have set apart to herself dower out of said estate, in lieu of said provisions contained in said will. As a result of said determination upon her part, an agreement was finally arrived at, settling her controversy with the executors of said estate, a copy of which said agreement, or contract, is hereto attached, marked "Exhibit A" and prayed to be made a part hereof, with leave of reference thereto as often as may be necessary.

(5) That said court passed a decree upon the petition of Charles A. Davis, Jr., et al., executors, etc., against Icelia E. Davis et al., praying for the construction of said will, directions, etc., the same being filed to the August term, 1894, in Greene superior court of said state; that that portion of the decree passed by the court referring to the settlement made by the said executors with your oratrix, as set out and contained in paragraph 13 of said decree, is as follows, to wit:

"It is further ordered and adjudged that the settlement and agreement between petitioners and said widow [meaning your oratrix] referred to in the 18th paragraph of said petition be, and the same is hereby, ratified and con-



firmed, and said executors are hereby authorized and required to execute the contract made with said widow [meaning your oratrix], a copy of which is attached as 'Exhibit B' to said petition.

"W. F. Jenkins, Judge Superior Court, G. C."

(6) That said executors now have in their hands eleven thousand and five hundred and thirty-five dollars (\$11,535.00), as aforesaid, the same being the balance of said settlement, as confirmed by the court as heretofore set out; and that they refuse to pay said amount, or any part of the same, to her, though requested. Wherefore she prays that process may issue, requiring the said executors, Charles A. Davis, Jr., Edwin Davis, and Oscar Davis, defendants in said case, to be and appear at the next term of said court to answer, etc.

The following instrument is the agreement entered into between the parties, and is the paper referred to in the foregoing declaration:

State of Georgia, County of Greene.

The following agreement is hereby entered into between Charles A. Davis, Jr., Oscar S. Davis, and Edwin Davis, as executors of the will of Charles A. Davis, Sr., of said county, the widow of said deceased, party of the second part:

Said executors, parties of the first part, agree to pay to said Mrs. Icelia E. Davis, or attorney, out of the assets of the estate of said deceased, the sum of forty thousand (\$40,000.00) dollars, less such amounts as have been paid or expended to or for her by said executors. Said sum thus credited shall become due and payable as soon as judgment of superior court of said county ratifying this agreement can be obtained. Said executors shall at once institute proceedings in said court to procure such ratification; and, in the event it is not had at the August term, 1894, of said court, said sum, less whatever credits are herein provided for, shall bear interest from said time, say 18th day of August, 1894, at the rate of 6% per annum till paid, which shall likewise be the rate of interest on said sum from and after the rendition of said judgment by the court till the payment of said sum—shall bear no interest between now and the said term of the court, and no interest shall be charged on any credits to which said sum may then be entitled. Said executors further agree to pay to the said Mrs. Davis, from and after the first day of July, 1894, the annuity of nine hundred (\$900.00) dollars devised to her in said will from the income of the twenty thousand dollars fund to be invested in bonds for the Foreign Mission Board of the Baptist Convention as provided in said will. Said annuity is to be paid her during her life or widowhood, and otherwise in accordance with the provisions relating thereto in said will; save only that said Mrs. Davis relinquishes to said executors, for the children of said deceased, all income from said fund accruing prior to said date July 1st, 1894. Said executors further agree to pay to said Mrs. Davis, if she so desires, a sum or sums of money amounting to (\$75.00) per month from now until 1st day of July next, at such time as she may select; which sum or sums shall likewise be allowed as a credit on the aforesaid amount of (\$40,000.00). Said Mrs. Davis shall have the privilege of occupying as a home, free of rent, the dwelling of the deceased, until the time the interest on said (\$40,000.00), less credits, begins, when the possession of said dwelling will be delivered to her by said executors. The consideration of the payment of said sums to be made to the said Mrs. Davis as hereinbefore stipulated, she hereby agrees that the same shall be in full settlement and satisfaction of all her interest in the estate of her said deceased husband, and of all her claims and demands, whether as an heir at all, legatee, or creditor against said estate, wherever the same may be located, whether within or without the state of Georgia. She therefore hereby relinquishes all right to her support, dower, to income, to rent, or interest from dower, and claim to the property, real or personal, purchased or acquired by said deceased, including the furniture in said dwelling, and other personalty on the premises where said dwelling is located. It is further understood and agreed that this contract of compromise is in full settlement of all claims, demands, and right of accident, whether ex delicto or ex contractu, which the said Mrs. Davis may

have against any of the other legatees named in said will, as well as in full settlement of any such claims which any of the said legatees may have against her, the said Mrs. Davis. Said legatees shall be under no obligation to make good said annuity of nine hundred (\$900.00) dollars to said Mrs. Davis in the event of the contingency mentioned in the latter part of the 24th item of said will. Said Mrs. Davis or her counsel shall be consulted about the bonds in which said twenty thousand dollars fund shall be invested. In witness whereof the aforesaid parties to this contract hereunto set their hands and seals, this 16th day of January, 1894.

C. A. Davis, Jr.,  
Oscar S. Davis,  
Edwin Davis,

Executors of the Will of Charles A. Davis, Sr.  
Mrs. C. A. Davis, Sr.

The demurrer is on two grounds. The first ground is, because the petition does not fully and distinctly set forth the plaintiff's cause of action, and especially in not setting out in its entirety the petition on which the decree alluded to in this suit was rendered. This ground of demurrer is not good. The declaration sets forth the plaintiff's cause of action with sufficient clearness and particularity. This is true, even if it be a suit on a judgment. 2 Greenl. Ev. § 279, and note; 2 Ohit. Pl. p. 244; Biddle v. Wilkins, 1 Pet. 686.

The next ground of demurrer is that this suit is an effort to enforce in the federal court a decree of the state court, and is, therefore, merely supplemental to the original proceeding instituted in the state court, and so connected with it as to form an incident to it, and should not, for that reason, be entertained here. The argument of this demurrer has gone on the assumption that the result of the proceeding in the state court was a judgment as on a money demand, and such a judgment as could be enforced by execution issuing from that court. The contention is that the state court has taken jurisdiction of the subject-matter of this suit, and has gone with it to a point where all that is left to be done is to issue execution and collect the money; and that, therefore, the proceeding, supplemental or auxiliary to the proceeding in the state court, should be controlled by the rule that, where one court has taken jurisdiction of a controversy, another court will not interfere, but will allow the court which has acquired jurisdiction to proceed to a conclusion in the matter. As stated above, it was assumed by both sides on the argument that there was a judgment in the state court in favor of the plaintiff against the defendants, which could be enforced by execution, and the question discussed was, whether such a judgment was a proper subject-matter of suit in this court. Conceding this to be true, a question of difficulty would be presented. Can an action be brought in this court on a plain judgment for money, obtained in the state courts of the state in which the federal court is held? The only authority directly in point is a case in Baldw. 543 (Barr v. Simpson, Fed. Cas. No. 1,038). The decision in that case was by Mr. Justice Baldwin, and the decision is squarely in favor of the right to bring such an action. Several other cases have been cited, but they do not present the exact question at issue. If a party can sue a money demand to judgment in a state court, and then bring that judgment, and make it the subject-matter of a suit in a federal court, instead of

proceeding to enforce it in the state court where it was obtained, a very novel condition of things would exist, at least; yet the only direct authority on the question is in favor of the right, and from a very high source. The question underlying this, however, is whether there is such a judgment in the state court as makes a decision of the question just discussed necessary. The plaintiff in this case had an agreement with the executors of her husband's estate as to what should be allowed her from the estate, but the executors desired the approval and direction of the superior court before carrying the contract into effect. They filed a bill for this purpose, and asked the direction of the court as to that, among other things. They obtained a decree of the court authorizing and directing them to make and execute the contract. That proceeding in the state court was by the executors, and, if it be a judgment, it is against them, in a suit brought by themselves, where no cross bill or other pleading was filed which would seem to authorize it. The paragraph of the decree set out here contains none of the language which is usual in rendering a judgment, and is not framed as such. It merely authorizes and directs the executors to make and execute the contract which they had previously made with the plaintiff. My own view of this action would have been that it was a suit on the agreement, and that paragraph of the decree of the state court which is set out in the pleading here was merely brought in for the purpose of showing the validity of the agreement entered into, as having the approval of the chancellor in the proper jurisdiction. If Mrs. Davis had an agreement with these executors to pay her a certain sum of money in satisfaction of all claims against the estate, and to that they obtained the assent of the chancellor, and they failed and refused to comply with their agreement, now why is not that a proper subject-matter of suit in this court? This seems to me to be the character of this proceeding. It is clear that it is not such a judgment as renders necessary a decision of the question suggested above, namely, as to whether a judgment obtained in the state court is the proper subject-matter of suit in the federal court held in the state in which such judgment is obtained. On the whole, I think this suit can be maintained, and the demurrer must be overruled.

---

MARTIN v. CHICAGO & A. RY. CO.

(Circuit Court, W. D. Missouri, W. D. January 21, 1895.)

**INJURY TO BRAKEMAN—FELLOW SERVANTS.**

Injury to a brakeman of a train, while coupling the front car to the engine, by the backing, without warning, of the yard engine against the rear of the train, under the orders of the train master, through the conductor of the train, to the yard master, to take cars out of the train which had got in it by mistake, is an injury occasioned by the negligence of fellow servants, for which, therefore, the railroad is not liable, as, even if the train master is not a fellow servant, his order is proper, and the negligent execution of it is the cause of the injury.

Action by one Martin against the Chicago & Alton Railway Company for injuries received in its employment. Heard on motion to set aside a nonsuit.

Heitman & Adams, for plaintiff.

Wash Adams, for defendant.

PRIEST, District Judge. The charge of negligence made in this case is that the train master, who had full charge of the work in the yards at Roodhouse, after the train with which the plaintiff was connected as brakeman had been made up to go out on the road, gave an order through the conductor in charge of plaintiff's train, to the yard master to take out of the train thus made up three cars which, through inadvertence, had been put in it. In the execution of this order, by the act of taking hold of the rear end of the train with the switch engine, the cars were moved forward, and caught plaintiff's arm between the road engine and front car of the train while he was in the act of coupling the two together. No information of such movement or of the intention to take the three cars out of the train was imparted to the plaintiff. This is the essence of the charge contained in a very voluminous and verbose petition, which deals largely with immaterial facts, legal arguments, conclusions, and deductions. Do these charges constitute a ground of recovery against the defendant, even if proven as charged? The safest guide to keep ever present in the mind when discussing the relation of master and servant is that of the contract of employment, and the necessarily implied obligations which arise out of the simple engagement of the one to enter into the employment and service of the other. This chart will always afford a satisfactory and consistent solution of propositions that often present themselves in a complex form. The measure of duty upon the one hand is the limit of liability, and, upon the other, the right to demand compensation for injury sustained. So far as the master's duties to the servant growing out of the contract of service are concerned, they are limited to the exercise of ordinary care in providing a safe place to work, reasonably fit machinery with which to do the work, and competent fellow workmen; and for all injuries which the servant may receive, not growing out of the violation of any of these positive and nonassignable obligations of the master, he undertakes, himself, to bear. Applying these fundamental principles to the facts charged in the petition, it is perfectly manifest that the one who gave the order and those who executed it were fellow servants with the plaintiff, for whose neglect the master is in no wise held responsible. Both the order and the execution of it were details of the work which necessarily devolved upon the plaintiff's fellow servants, and neither of them was a performance of any of the personal obligations of the master arising out of the contract of employment. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914; *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983; *Railway Co. v. Needham*, 11 C. C. A. 56, 63 Fed. 107. But if we were to concede that the order given, and which is characterized as a negligent one, falls within the purview of the master's

v.65f.no.4--25

personal undertaking, no different result would follow. The order, in and of itself, was a perfectly proper one; one which the situation and circumstances required to be given. The fault, if any, which resulted in the plaintiff's injuries, attended the execution of the order as an incident of that act, and was not naturally or necessarily inherent in or resultant from the order. It was the fault of those who were called upon to execute the order. If in carrying out the order those in charge of the work had reason to suppose that some one connected with the train already made up might be in a position of peril from moving it those circumstances would require them to give timely warning before attaching the switch engine onto the train, and the failure to give such warning, under such circumstances, might be an act of negligence; but it was the carelessness of those appointed to do the work, who are fellow servants with the plaintiff, and not a natural consequence of the giving of the order. The train master, when giving the order, had the right to assume that it would be properly carried out; that those appointed to execute it would exercise all reasonable and needful caution in doing so. No one could for a moment reasonably contend that it would be incumbent upon the train master, every time he ordered a train out on the road, to caution the engineer to blow the whistle at stations and at public crossings, and to run trains so as to avoid negligent injury of person or property, or specifically charge the brakemen that they should be cautious and watchful in the performance of their several duties, giving warning where warning should be made, and admonition where circumstances required it. He has the right to presume that all these things will be done as a necessary part of the servant's duty in connection with his work. These are all matters of detail incident to the performance of the servant's duty. *Card v. Eddy* (Mo. Sup.; December Term, 1894) 28 S. W. 979; *Relyea v. Railroad Co.*, 112 Mo. 95, 20 S. W. 480.

Plaintiff has presented an amended petition, and asks that the motion to set aside the nonsuit be sustained, in order that he may file it. The application comes too late, but, even were it within the proper time, the legal aspect of this case would not be modified by it. The motion to set aside nonsuit will be overruled.

---

KIRTLEY et al. v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, W. D. Missouri, W. D. January 21, 1895.)

No. 1,978.

ACCIDENT ON RAILROAD TRACK—MUTUAL NEGLIGENCE.

Recovery cannot be had of a railroad for the death of a person killed while walking on its tracks, notwithstanding persons were in the habit of walking there, where the persons in charge of the engine did not discover him in time to prevent the accident, though, by the use of ordinary care, they might have done so, deceased having been in full possession of his faculties, and negligent in not observing the engine.

Action by Lulu Kirtley and others against the Chicago, Milwaukee & St. Paul Railway Company.

Plaintiffs sue for the death of their father. He was killed while walking on one of the defendant's double tracks within the city of Kansas, by a single engine, moving with the tender forward. The accident occurred on a fair day, between 9 and 10 o'clock in the morning, at a place where the deceased had an unobstructed view, both before and behind him, of more than a thousand feet along the track. He was walking westward, and on the north one of the two tracks. The north track was used by trains going westward, and the other by those moving in an opposite direction. The deceased had been traversing the south track, until, a few feet before he was struck, he discovered the train approaching him, and he turned from off that, and moved towards the north track. Whether he got upon it further than the south rail does not distinctly and decisively appear. Just at this time alarm whistles were given by the engine (which was approaching him from the rear, and by which he was struck) a few feet distant from him, which he did not seem to heed, and hence was immediately struck and killed. There is no evidence that the engineer actually saw the deceased until the alarm whistles were given, when it was then too late to avert the accident. The tracks at the point of the accident were on an elevated embankment, and were not intersected by any streets which crossed them at the level. There was testimony tending to show that it was somewhat the common practice for pedestrians to occupy these tracks in going from one point to another in the city. The jury were directed to find a verdict for the defendant, whereupon the plaintiffs took a nonsuit, and now move to set it aside.

Ed. G. Taylor, for plaintiffs.

Pratt, Ferry & Hagerman, for defendant.

PRIEST, District Judge (after stating the facts). This case, in its every essential feature, so closely resembles that of *Railway Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 921, that it is quite sufficient, for the justification of the action of the court in giving the peremptory direction to the jury, to refer alone to that case; but counsel contend that there is a charge in the petition here which was not made in the one in that case, and an element present here not noticed there. We think counsel in this is mistaken. The facts upon which counsel seek to distinguish this case from that were present there as conspicuously as here, but, because they were not so prominent and decisive of the case as those dwelt upon by the court, they appear not to have been directly commented upon. In addition to this, the charge of the trial court in that case obviated the necessity of reviewing those theories which are now called to my attention as distinguishing that case from this. In that case there was a contention that the plaintiff ought to recover because the defendant's servants saw him, and might, by the exercise of ordinary care, have averted his injuries; and also that, by the exercise of ordinary care, they would have discovered him in time to have avoided injuring him. Upon these two issues the trial court charged as follows:

"But there can be no recovery in this case on the ground that the engineer and fireman saw him, and might have avoided injuring him for this reason. There is no evidence in the case tending to show that either the engineer or fireman saw him before he was struck. That being so, the plaintiff is not entitled to recover upon the ground which I last stated. The plaintiff's attorney contends that under other circumstances the plaintiff would be entitled to recover, and he further contends that such circumstances exist in this case, and can be proven; that is to say, the plaintiff's attorney contends that the engineer and fireman, although they did not see him, by exercising

such reasonable care as they were bound to exercise might have discovered the plaintiff on the track, and the danger he was in, in time to have avoided injuring him. He further contends that they did not exercise such care, and on that ground he asks a verdict at your hands. The court is of the opinion, and the court so instructs you, that there can be no recovery on the ground last stated; that is to say, there can be no recovery on the ground that the engineer and fireman were at fault in not discovering the plaintiff on the track; and the court is of that opinion for the following reasons: It is true that it was the duty of the engineer and fireman to exercise ordinary care in looking out for persons and objects who might be ahead of them on the track, but it was also the duty of the plaintiff to exercise care to see that he was not overtaken by the trains or engines approaching him from the front or rear. The obligation resting on the engineer and fireman to look out ahead was no greater than the obligation resting on the plaintiff to keep a careful lookout to the rear. If the engineer and fireman in this case were at fault, in the mere matter of watching the track, the plaintiff was equally at fault in the same respect; and you are aware when two persons are equally at fault, and one of them is hurt, he cannot recover of the other. For that reason, I say to you, gentlemen, that you cannot render a verdict for the plaintiff in this case on the ground that the engineer and fireman were guilty of neglect in not discovering him on the track before he was struck. Conceding that they were guilty of neglect in that regard, plaintiff himself was guilty of the same species of neglect in not discovering the engine. Both were at fault, and, under these circumstances, he is not entitled to recover on account of the particular neglect last mentioned."

It is true this theory concerning the want of exercise of care after discovering the peril of one upon the track, or the failure to exercise ordinary care in discovering the peril of one on the track,—the theory now put forward with earnestness in this case,—was not descanted upon at length in that. We will give our understanding of the principles which form the component elements of that rule of law which permits a recovery by the plaintiff, although he may be in a condition of negligence, if by the exercise of ordinary care the defendant could have avoided injury to him after discovering his peril. Such a rule has its origin in the opinion of the court in the case of *Davies v. Mann*, 10 Mees. & W. 546, where it is said:

"This subject was fully considered by this court in the case of *Bridge v. Railway Co.* [3 Mees. & W. 246], where, as appears to me, the correct rule is laid down concerning negligence, namely: That the negligence which is to preclude a plaintiff from recovering in an action of this nature must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. I am reported to have said in that case, and I believe quite correctly, that the rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester* [11 East, 60], that although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover; if by ordinary care he might have avoided, he is the author of his own wrong."

This case has been much misunderstood and maligned, and its principles put to very unjust uses and applications. Analysis of it will demonstrate the perfect soundness of its reasoning, and the validity of the principle there laid down. Every principle must be tested by the particular facts in relation to which it is announced. The facts in this case, briefly stated, are these: The plaintiff turned his ass out on the highway, fettered, to graze, and abandoned him. The defendant's servant, coming along with a wagon and team, care-

lessly ran over the animal, for the injuries in consequence of which the plaintiff brought action. Of course, it could not be predicated of the animal that it was guilty of negligence, and its owner was not present; so that, notwithstanding it was the duty of the owner not only to keep the animal from doing harm, but out of harm's way, he had not the opportunity of knowing that it was exposed to danger through the negligence of defendant's servant. On the other hand, it was not only the duty of the defendant's servant to keep a lookout to avoid harming anything which might be upon the public highway, but he had also, what the plaintiff had not, the present opportunity to know that the plaintiff's animal was exposed to danger through his careless driving. So that, when the rule in *Butterfield v. Forrester* was invoked, the court, in effect, said:

We admit the rule in that case to be perfectly accurate, but it is not applicable to the conditions in this; for in this case, while the duty to watch out was alike incumbent upon the plaintiff and the defendant's servant, yet the servant had in the discharge of that duty imposed upon him an opportunity to know of the animal's danger, and with that knowledge the power to avoid the injury, while the plaintiff had not; and therefore the plaintiff's neglect was not a present co-operating cause of the injury, but merely an attendant condition. If the plaintiff had been present in charge of the animal, with an opportunity to know of the danger to which it was or might be exposed through the negligence of the defendant's servant, and with that knowledge, or such as he would have gained by giving attention to the duty incumbent upon him by reason of the circumstances surrounding him, could have avoided the effect of the defendant's servant's negligence, it would have been perfectly proper and just to have applied the rule of *Butterfield v. Forrester*. The rule deducible from the case of *Davies v. Mann* is that where both parties are under obligation to anticipate, and have contemporaneous opportunities to know of, a danger which may be impending, and, with the knowledge which would come from the performance of the duty and the observance of the opportunity, have the capacity to avoid the danger, and both fail to discharge the duty or employ the opportunity, and one or both be injured in consequence, neither can recover of the other.

No well-considered case has fallen under my observation which cannot, by close and analytical study, be made to fall within the rule which we have just stated. This principle has been invoked in cases wherein there was not a mutual or like duty of vigilance, as in the cases of *Huelsenkamp v. Railway Co.*, 37 Mo. 537; *Walsh v. Transportation Co.*, 52 Mo. 434; or in those cases where like duties rested upon the party injured and the party charged with liability, and like opportunities to know of the danger in which the injured party was, but with a want of capacity on the part of the injured person (which was imparted to the tortfeasor at the time) to avoid injury. This latter principle may be illustrated by supposing one, lawfully upon a railway track, suddenly prostrated, in the full possession of his senses, yet powerless to extricate himself from an approaching train, in which condition he is negligently run onto and killed. In such a case both parties were alike neglectful of their duties to watch. Both had contemporaneous opportunities to know of the danger of the one prostrate upon the track, but the driver of the engine could, by regarding the duty and opportunity, have stopped the engine before striking him; the prostrate individual, through no fault of his, could not have avoided the injury. Unless the rule is applied with



a view to these discriminating and distinguishing characteristics, it results in folly and injustice. It is ridiculous as reasoning, and accidental in application. It is nothing more than a declaration that, although both parties have contributed equally by their fault to the injury, the one who has suffered damage is to be exonerated, and the other punished, for the product of their mutual fault. No clearer statement of this principle can be made than that which is contained in the following expression in the case of *O'Brien v. McGlinchey*, 68 Me. 552, where it is said:

"This rule applies usually in cases when the plaintiff or his property is in some position of danger from a threatened contact with some agency under control of the defendant, when the plaintiff cannot, and the defendant can, prevent the injury."

This, then, suggests an inquiry as to when a perilous situation exists, so as to call into application the principle which we have been discussing. This is not a question of fact purely, but, like the question of negligence itself, is a mixed question of law and fact, or, upon undisputed facts, is purely a question for the court. The very moment a person starts in the direction of a railway track, with the purpose to cross it, he is confronted with perils, unless he uses a proper degree of care to avoid trains which may be passing; but if he looks and listens, as a prudent man should, he is in no greater danger than if he were elsewhere. So a man upon a railway track is in no more danger from an engine approaching him 100 feet away, if by looking or listening he could see or hear it, and, seeing or hearing it, get out of its way, than if the engine was a mile away. From this we infer that so long as a person can, by the proper exercise of care, avoid a danger which might otherwise be impending, he is not in that dangerous situation contemplated by the rule which we are discussing, and which calls for active efforts of prevention on the part of trainmen.

From this discussion of the law it is easy to make application to the facts in this case. The deceased was in a situation which imposed upon him, for his personal safety, a duty of constant vigilance. Upon the other hand, the defendant's servants had no reason to anticipate that trespassers would be upon the defendant's track, and hence was under no duty to look out for them. The deceased had an opportunity, by the exercise of vigilance, of seeing and knowing of the approach of the engine by which he was struck. The defendant's servants might also have seen him if they had been on the lookout for him. The deceased having regard for his duty, and availing himself of the opportunity to know of the approach of the engine, had the ability, by a single step, to have gotten out of the way of the engine. If the defendant's servants had seen the deceased, they might also have stopped the engine, and have avoided injury to the deceased. Thus, it will be seen, of the three elements which go to make up a completed transaction in the relation of direct causing agencies, all of them were present and operating on the side of the deceased, whereas only two lay on the side of the defendant's servants; and in cases of that character the principle here invoked

and insisted upon has no sort of application. Conceding that there was a duty upon the defendant's servants to anticipate that persons would be upon the track, this is set off by the duty on the part of the deceased to anticipate that trains would run on the track, and hence to keep a lookout for them. Conceding that a careful lookout on the part of the defendant's servants would have revealed the deceased on the track, this is set off by the fact that a diligent outlook by the deceased would have revealed the approach of the engine at his rear. Conceding that the defendant's servants might have stopped the engine by the exercise of ordinary care before running onto the deceased, this concession is set off by the indisputable fact that the deceased after he might have discovered the engine, and even at a later stage in the events which led up to the catastrophe, might have stepped aside and have avoided the engine. In addition to this, there is no evidence that the deceased was in a position of peril a sufficient length of time to enable those in charge of the engine to realize his peril, or do more to protect him from injury than was done. The evidence disclosed the fact that, so soon as the deceased was discovered in danger from the engine by those in charge of it, alarms were given, and there is no proof that they could have done more than they did to avert the sad accident. The evidence shows that the engineer did make an effort to notify the deceased of his danger, while it shows no response to this admonition on the part of the deceased. This, at least, manifests a willingness upon the part of the engineer to do all in his power to save the deceased from harm; and we cannot justly presume, in the face of such actual efforts, that the engineer would have relaxed any efforts that under the stress of circumstances might have occurred to an agitated mind to avert the accident. We are not to judge of the care exercised under circumstances of this kind, by a deliberate retrospect of the facts, because we can never place ourselves, by a calm analysis of the features of these occurrences, in precisely the same frame of agitation as those who are actors in such events. If the engineer did all that reasonably occurred to him to do, confronted, as he was, by a pressing emergency, we cannot censure him because, after deliberate reflection over the events, we can point out something else which he might have done to have averted the calamity. The extremity of the situation was not of the engineer's making. It was created by the deliberately unlawful act of the deceased, and it would be unjust to charge the engineer and defendant with fault because his mind did not operate with the same deliberation which we have a right to expect if he were confronting an anticipated occasion usually within the line of his experience. If the deceased had manifested one-half the effort for his own protection that the engineer displayed, his life might have been saved. His wrongful act created the duty and necessity for the exercise of care upon the part of the engineer, and for his, and not the railway company's, interest, and thereby, so to speak, he made the engineer his agent for his safety; and hence he, and not the railway company, should suffer should the engineer be at fault under the cir-

cumstances. Nothing short of an injury willfully or wantonly inflicted, under such circumstances, should visit a liability upon a defendant. We have thus seen that the principle contended for by the plaintiffs' counsel, that a recovery might be had notwithstanding the contributory negligence of the deceased, is without justification in principle, so far as its application to the facts of this case is concerned.

We now turn to the questions of the deceased's contributory negligence, and a brief survey of the circumstances will be helpful in the solution of this inquiry. It must be borne in mind that whatever care is imposed upon the defendant is in consequence of the wrongful conduct of the deceased in going upon the railroad tracks, and using them for common highway purposes. He was a trespasser, invading the rights of the defendant, and violating a positive statutory law, while the defendant was enjoying the use of its property in that manner to which it was dedicated, violating no law and doing no wrong. The deceased was in full possession of all his faculties, and knew from experience and daily observation that many trains were continually passing to and fro over the track, and might have seen and heard the one by which he was struck, and by a single step have gone completely out of its way. We have, then, a case, in brief, of a person trespassing upon another in a place beset with dangers, abandoning all care and effort for his own safety, and demanding of those whom he was wronging to anticipate his unlawful conduct, and exercise for his protection more caution and greater care than he was willing to employ. This demand cannot be supported by law. *Moore v. Railway Co.*, 24 N. J. Law, 268; *Manly v. Railway Co.*, 74 N. C. 658; *Railroad Co. v. Kean* (Md.) 5 Atl. 325; *Tuff v. Warman*, 5 C. B. (N. S.) 585; *Frazer v. Railroad Co.* (Ala.) 1 South. 85. Contributory negligence, in its practical form, is the failure of plaintiff to exercise that degree of care which is incumbent upon him by reason of his circumstances and surroundings, and which would enable him to avoid the effect of the defendant's negligence. As evidence tending to establish a liability, some proof was offered tending to show that it was customary for footmen to travel along the track at the point where the deceased was struck. Conceding, for the present, that the frequency of persons upon the tracks would call for the employment of greater care in the operation of the defendant's trains than under other circumstances, and created a duty to anticipate their presence there, yet the degree of care to be exacted of the traveler is not diminished in the proportion that the degree of care of the railroad operatives is increased. The care of the respective persons is increased in equal ratio as the proportion of possible dangers of accident is increased. It is a rule of common sense that persons ordinarily prudent will exercise watchfulness to avoid danger in proportion as the sources of peril by which they are surrounded are few or great, or are capable of slight or more serious injury. If the instruments from which danger may be apprehended would be capable of inflicting only slight injury, a less degree of care on the part of the person exposed would

be exacted than if the instruments were capable of inflicting distressing, and perhaps fatal, injuries. As was well said by the supreme court of Missouri in *Harlan v. Railway Co.*, 65 Mo. 24:

"The increased care exacted of the company on the one hand, and of the public on the other, is equal, and leaves the question of liability of the company to an adult person of sound mind, in the enjoyment of the senses of sight and hearing, dependent upon the rule applicable if the accident had occurred at any point on the road."

It follows from this, conceding that the defendant's servants are bound to exercise care because they might reasonably anticipate the presence of persons on the track, that this did not absolve to the slightest extent the deceased from the exercise of ordinary vigilance, having regard to the perils of his surroundings, for his own safety. He was the person who was in danger. It would be unusual that an injury should befall those in charge of the engine, or the engine itself, from a collision with an individual, but very natural that in such collision the individual should sustain serious, and perhaps fatal, injuries. The deceased, therefore, had the greatest inducement and greater reason to be alert and watchful, and this duty should never abate while a person is upon a railroad track. The books abound with authorities to the effect that one approaching a railroad track is bound to exercise his faculties in order that he may discover, and discovering avoid, collisions with trains that may be passing. Is it reasonable to exact this degree of care before one comes into a position of actual peril, and then relieve him when in a position of actual peril? The deceased, in going upon the track without the use of his senses of sight and hearing, was in a situation of peril continuously, and each moment that he lingered brought him nearer and closer in the presence of immediate danger. His duty was one of constant and unremitting vigilance so long as he remained upon the track. It continued down to the very instant of the collision, as a prominent factor to its accomplishment. The latest hope of rescue was within the power, and the exclusive power, of the deceased, had he exercised proper care; for he could, in an instant, having discovered the near approach of the train, have stepped out of its way, when it would have been too late possibly to have stopped the engine. So that, in point of time, his neglect is more proximate to the harmful act than that—conceding there was some—of the defendant's servants. The views which we have herein expressed are amply supported by one of the latest decisions of the supreme court of the United States. *Elliott v. Railway Co.*, 14 Sup. Ct. 85. The motion to set aside nonsuit will be overruled.

---

KLEVER et al v. SEAWALL et al.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1895.)

No. 150.

CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—PARTITION.

The circuit courts have no power to hear, on their law side, petitions for partition of lands, under a state statute which provides for the determina-

tion of questions arising in such proceedings without a jury, since actions for partition are among the suits at common law in which, under the constitution of the United States, trial by jury is preserved; but jurisdiction may be taken in equity, partition being a recognized head of equity jurisprudence.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This was an action by J. Hairston Seawall and others against J. M. Klever and Edmund Klever to recover an undivided interest in certain lands, the demand for relief also joining a prayer for partition of the premises. A judgment was rendered for the plaintiffs for the relief demanded. Defendants brought error. The circuit court of appeals affirmed the judgment as to the recovery of the land claimed and mesne profits, but directed further argument as to the power of the circuit court to entertain the proceeding for partition on its law side. 65 Fed. 373.

Mills Gardner and Humphrey Jones, for plaintiffs in error.

Matthews & Cleveland, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This was a proceeding in error to review a judgment for plaintiff in an action at law in the circuit court to recover an undivided one-third interest in certain real estate in the Southern district of Ohio, for mesne profits, and for partition, under the Ohio statute. In an opinion announced May 14, 1894, we affirmed the judgment for the undivided interest in the land and for the profits, but we reserved the question for further argument whether it was within the power of a circuit court of the United States to hear and determine on its law side a petition for partition of lands under the statute of Ohio. Further argument has been had, and we are now to decide the point reserved.

Partition under the Ohio statute is now a civil action, under the Ohio Code of Civil Procedure (*McRoberts v. Lockwood*, 49 Ohio St. 374, 34 N. E. 734), though it has not always been so regarded (*Barger v. Cochran*, 15 Ohio St. 460). By section 5756, Rev. St. Ohio (*Smith & Benedict*), it is provided that:

"A person entitled to partition of an estate may file his petition therefor in the court of common pleas, setting forth the nature of his title, and a pertinent description of the lands, tenements or hereditaments of which partition is demanded and naming each tenant in common, co-parcener, or other person interested therein, as defendants."

Upon the filing of the petition, a summons issues against the defendants, under section 5035 of the Civil Code. Thereafter the defendants may file answers under sections 5059 and 5070, and the plaintiff may reply under section 5079. By section 5757 it is provided that:

"If the court find that the plaintiff [in partition] has a legal right to any part of such estate, it shall order partition thereof in favor of the plaintiff and all parties in interest, appoint three disinterested and judicious freeholders of the vicinity to be commissioners to make the partition, and order a writ of partition to issue."

By section 5758 the writ issues to the sheriff, commanding him, by the oaths of the commissioners, to cause to be divided and set off to the parties the land in question as the court shall order. By section 5759 the commissioners are required to set apart the land "in such lots as will be most advantageous and equitable, having due regard to the improvements, situation and quality of the different parts thereof." By section 5762 the commissioners are to appraise the land when, in their opinion, it cannot be divided without manifest injury to its value, and report their action to the court; and, if this is approved by the court, one or more of the parties shall be permitted to take the land at the appraised value. If the land is not taken at the appraisement, then by subsequent sections the land is to be sold, and the proceeds are to be divided. The supreme court of Ohio has decided that in the statutory action for partition the parties are not entitled to a jury. *McRoberts v. Lockwood*, 49 Ohio St. 374, 32 N. E. 734. If, therefore, on the petition and answers in a partition proceeding, a controversy should arise,—for example, as to whether the plaintiff was entitled to one-third or one-half of the land,—the issue, whether of fact or law, must be settled without a jury, and by the court alone. We are of opinion that the circumstance that the parties are not entitled to a jury in the proceeding for partition under the statute of Ohio requires a United States court to decline to assume jurisdiction over such a proceeding except on its equity side.

The seventh amendment of the constitution of the United States provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." Before the adoption of the constitution, suits for partition could be brought either at the common law or in equity. In the common-law action for partition the general issue was raised by the plea "non tenent insimul." It was triable before a jury (*Chit. Pl.* [6th London Ed.; 11th Am. Ed.] 1394, note); and such is the procedure under many of the state statutes for partition (*Clapp v. Bromagham*, 9 Cow. 530; *Hewlett v. Wood*, 62 N. Y. 75; *Covington v. Covington*, 73 N. C. 168; *Harding v. Devitt*, 10 Phila. 95; *Ham v. Ham*, 39 Me. 216). When suits for partition under such statutes are brought into the United States courts, either by original action or by removal, there is no difficulty in assigning them to the law side of the court. Thus, the partition statute of Massachusetts provided for the trial of the issues raised in an action for partition by jury as in other cases (Act March 11, 1784, as amended by Act Feb. 14, 1787); and Mr. Justice Story took jurisdiction on the law side of the court of a suit brought in a state court under these acts, and removed to the United States court (*Ex parte Biddle*, Fed. Cas. No. 1,391, 2 Mason, 472). The same learned justice, in *Parsons v. Bedford*, 3 Pet. 452, in defining the meaning of the phrase "common law," as used in the seventh amendment to the constitution, above quoted, said (page 445):

"The phrase 'common law,' found in this clause, is used in contradistinction to equity and admiralty and maritime jurisprudence. The constitution had declared, in the third article, 'that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United

States, and treaties made or which shall be made under their authority,' etc., and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes in courts of equity and admiralty juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved, in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By 'common law' they meant what the constitution denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. *Probably there were few, if any, states in the Union in which some new legal remedies, differing from the old common-law forms, were not in use, but in which, however, the trial by jury had intervened, and the general regulations in other respects were according to the course of the common-law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified.* In a just sense the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights. And congress seems to have acted with reference to this exposition, in the judiciary act of 1789, c. 20 (which was contemporaneous with the proposal of this amendment); for in the 9th section it is provided 'that the trial of issues in fact in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury'; and in the 12th section it is provided that 'the trial of issues in fact in the circuit courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury'; and, again, in the 13th section, it is provided that 'the trial of issues in fact, in the supreme court, in all actions at law against citizens of the United States, shall be by jury.' " (The italics are ours.)

The twelfth section of the judiciary act of 1789, above quoted, is now embodied in section 648 of the Revised Statutes.

It follows from the foregoing that every civil action provided by state statute not of equity and admiralty jurisdiction is a suit at common law, within the meaning of the seventh amendment, and that the United States courts, if they assume jurisdiction in such an action at all, must afford a jury trial, even though this is contrary to the spirit and letter of the state statute. But partition was cognizable either at law or in equity before the adoption of the constitution. It is and has been for centuries a well-recognized branch of equity jurisprudence. When, therefore, a statutory proceeding for partition cannot be heard in a United States court on the law side, without affording a jury trial, and thereby doing violence to the forms of procedure provided in the state statute, it seems to us to be the duty of the court to decline to take jurisdiction of it as a court of law, and to direct that it be brought in equity, where no jury need be had, and where every remedy provided by the statute may be amply administered. We are fully supported in this conclusion by the decision of the supreme court of the United States in *Bank of Hamilton v. Dudley's Heirs*, 2 Pet. 492. That was a writ of error to a judgment in ejectment in the circuit court of the United States for the district of Ohio. The occupying claimant law of Ohio provided that the defendant should not be evicted until he should be fully paid the value of his lasting improvements, made in good faith, previous to his re-

ceiving notice of the suit, unless the defendant should refuse to pay the plaintiff, at his election, the value of the land without the improvements. The second section directed the court to make the valuation prescribed in the preceding section by commissioners. A verdict was found for the plaintiff, whereupon the counsel for the defendant moved the court, in accordance with the state statute, to appoint commissioners to value improvements. This motion was overruled, and judgment was rendered for plaintiff. The action of the court was assigned for error. The supreme court affirmed the action of the court below. Chief Justice Marshall used this language in delivering the opinion of the court:

"The seventh amendment to the constitution of the United States declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This is a suit at common law and the value in controversy exceeds twenty dollars. The controversy is not confined to the question of title; the compensation for improvements is an important part of it, and, if that is to be determined at common law, it must be submitted to a jury. It has been said that the occupant law of Ohio must, in conformity with the 24th section of the judiciary act, be regarded as a rule of decision in the courts of the United States. The laws of the states and the occupant law, like others, would be so regarded, independent of that special enactment; but the exception contained in that section must be regarded likewise. The law, so far as it consists with the constitution of the United States and of the state of Ohio, is a rule of property, and, of course, a rule of decision in the courts of the United States; but that rule must be applied consistently with their constitution. Admitting that the legislature of Ohio can give an occupant claimant a right to the value of his improvements, and can authorize him to retain possession of the land he has improved until he shall have received that value, and assuming that they may also annex conditions to the change of possession, which, so far as they are constitutional, must be respected in all courts, still that legislature cannot change radically the mode of proceeding prescribed for the courts of the United States, nor direct those courts, in a trial at common law, to appoint commissioners for the decision of questions which a court of common law must submit to a jury. But this inability of the courts of the United States to proceed in the mode prescribed by the statute does not deprive the occupant of the benefit it intended him. The modes of proceeding which belong to courts of chancery are adapted to the execution of the law; and to the equity side of the court he may apply for relief. Sitting in chancery, it can appoint commissioners to estimate improvements, as well as rents and profits, and can enjoin the execution of the judgment at law until its decree shall be complied with."

The analogy between the case cited and the one at bar in respect to the question we are discussing would seem to be complete. It is true that in courts of Ohio the statutory proceeding for partition has frequently been held not to be a suit in chancery, and, though termed a "special statutory proceeding," was heard on the law side of the state courts, before the new constitution of 1851 and the Code of Civil Procedure were adopted. *Doane v. Fleming*, Wright, 168; *Penrod v. Danner*, 19 Ohio, 218-221. But this ruling by the state court can have little or no bearing on the proper course to be taken by a United States court in determining whether such a proceeding is to be heard by it in law or in equity. The constitution of Ohio of 1802 provided that the right of trial by jury should be inviolate, but the supreme court of the state had no difficulty in reconciling with that provision the determination, in an action of ejectment, of the



value of improvements by commissioners under the occupying claimant's law, though the supreme court of the United States, as we have seen, had held it impossible, under the seventh amendment of the federal constitution. *Hunt v. McMahan*, 5 Ohio, 132. The fact that in a state court a proceeding is triable in an action at law does not affect the right and duty of the United States court, if the action is, under the federal system, cognizable in equity, to take jurisdiction of it in equity. *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75.

It follows from what has been said that it was the duty of the circuit court, when the defendants below objected to the joinder of the petition for partition with the action to recover real property, to dismiss the petition for partition, with leave to the plaintiffs to file a bill in equity for the same purpose. The judgment of the court below in partition is reversed, with instructions to dismiss, for want of jurisdiction, so much of the amended petition as prayed partition and the proceedings thereon, at the costs of the plaintiffs. The costs in this court will be equally divided.

---

VESEY et al. v. SEAWALL et al.

CRAWFORD et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1895.)

Nos. 151 and 152.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Mills Gardner and Humphrey Jones, for plaintiffs in error.

Matthews & Cleveland, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. As in these cases the same question is presented as that just now discussed, the same order must be made, reversing the case so far as partition proceedings are concerned, and affirming the judgment in ejectment. See opinion in *Klever v. Seawall* (No. 150) 65 Fed. 393.

---

VESEY v. SEAWALL et al.

CRAWFORD et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1894.)

Nos. 151 and 152.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

Mills Gardner and Humphrey Jones, for plaintiffs in error.

Matthews & Cleveland, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge. In these cases the same question precisely is presented which was decided in the preceding case of *Klever v. Seawall*, 65 Fed. 373. The same result, therefore, is reached, and the same orders will be made.

## WEED v. UNITED STATES.

(District Court, D. Montana. November 19, 1894.)

## 1. UNITED STATES ATTORNEYS—FEES—DOUBLE COMPENSATION.

The provisions of 26 Stat. 947; 27 Stat. 223, 714; Rev. St. § 837; and Supp. Rev. St. p. 767, § 16,—that United States district attorneys for Montana shall, for services, receive double fees, applies not only to the regular fee of \$20 allowed by Rev. St. § 824, in a criminal case, but to the counsel fee, not exceeding \$30, which it provides they may be allowed, in addition to the regular fee, when a conviction is had in a criminal case before a jury.

## 2. SAME—EXTRA SERVICES—EXAMINING TITLES.

A United States district attorney is entitled to extra compensation for examining the title to public property and making an abstract thereof, though not for giving an opinion on the title; this being part of his duty, under Rev. St. § 355, requiring him to furnish to the attorney general assistance or information in relation to the title to public property within his district.

## 3. SAME—ACTION FOR FEES—PETITION.

The petition of a United States district attorney in an action for fees need not state how or when the account claimed was presented to the proper accounting officer.

## 4. GENERAL DEMURRER—PLEADING NOT WHOLLY BAD.

A demurrer to a petition on the ground that it, in either or all of its paragraphs, does not state facts constituting a cause of action, will be overruled if, in any part of the petition, facts are stated showing a cause of action.

Action by Elbert D. Weed against the United States for services rendered as United States attorney for the district of Montana. Heard on demurrer to the petition.

Elbert D. Weed, in pro. per.

P. H. Leslie, U. S. Atty.

KNOWLES, District Judge. Petitioner, between the 21st day of February, 1890, and the 21st day of February, 1894, was a United States district attorney for the district of Montana. He brings this action against the United States to recover certain fees claimed to be due him as said attorney under and by virtue of certain laws of congress, and also to recover certain charges made by him for examining the titles to certain lands, and preparing a report concerning the same, and giving a written opinion thereon to the attorney general of the United States. The whole amount for which petitioner asks judgment is \$980.

The first claims he presents are for the fee of \$40 each in the cases of the United States against Fred Partello and the United States against Julia D. Barnum. In both cases, indictments were found, and trials before a jury were had.

The first clause of section 824, Rev. St., providing fees for district attorneys, etc., is as follows:

"On a trial before a jury, in civil or criminal causes or before a referee, or on a final hearing in equity or admiralty and maritime jurisdiction a docket fee of twenty dollars."

The balance of that clause has no bearing upon the question at issue.

In the appropriation act approved March 3, 1891, making appropriations for legislative, executive, and judicial expenses of the government for the fiscal year ending June 30, 1892, it is provided:

"That the marshals, district attorneys and clerks of the circuit and district courts of the districts of Washington, Montana, and North Dakota shall for the services they may perform during the fiscal year herein provided for receive the fees and compensation allowed by law to like officers performing similar duties in the districts of Oregon and Idaho."

See 26 Stat. 947.

As I shall have to refer to this matter in discussing another point in this case, I will refer to the fact that in 1892 and 1893 a similar statute was enacted. See 27 Stat. 223, 714.

Section 837, Rev. St., provides:

"The district attorneys and marshals for the districts of Oregon and Nevada shall be entitled to receive for like services double the fees herein provided, but neither of them shall be allowed to retain of such fees any sum exceeding the aggregate compensation of such officer as herein provided."

In Supp. Rev. St. p. 767, § 16, I find that the fees allowed by law to the marshal, district attorney, and clerks of the federal courts in the state of Idaho are the same as those allowed in the district of Oregon. In this case, petitioner alleges that he acted as a district attorney in the trial of the above-named defendants, and that they were tried before a jury upon an indictment. I cannot see, from anything presented in the petition, why he should not be allowed double the ordinary fee in such cases, which would be \$40. If there was any reason for disallowing this charge, it has not as yet been presented to the court.

The next point presented arises out of this state of facts: Petitioner was allowed by the court, it is alleged in the petition, upon his application, \$60 each in certain cases named in the petition, as an additional counsel fee. The cases, it is alleged, were criminal, and tried before a jury in the circuit court, and convictions obtained. The proper accounting officers of the government allowed \$30 of the \$60 in each one of the cases, but refused to allow the full \$60 charged. Petitioner asks for a judgment for the \$30 disallowed. The cases were against Bernard Leopold, Adolph Barnaby, James T. Collins, Alfred A. Haslar, and James McGrath. The disallowed fees amount, under this head, to \$150.

The last clause of section 824, Rev. St., provides:

"When an indictment for crime is tried before a jury and a conviction is had the district attorney may be allowed in addition to the attorney's fee herein provided a counsel fee in proportion to the importance and difficulty of the cause, not exceeding thirty dollars."

It will be observed that the term used is, "a counsel fee." In the case of *U. S. v. Waters*, 133 U. S. 208, 10 Sup. Ct. 249, this allowance is termed "a counsel fee," "a fee," and "an additional fee." This fee, it will be observed by this case, is to be fixed and determined, as a judicial act, by the court. Now, when this fee is fixed by the court, the law above referred to steps in and doubles it. To hold otherwise would be to hold that this allowance cannot be classed as a fee, and hence does not come within the purview of the statutes.

doubling fees of certain federal officers in specified localities, which have been cited above. There is no reason that I can see for doubling the other fees of a district attorney that does not apply to this fee. The truth is that the fees allowed an attorney who appears for the United States in criminal cases are so much less than is charged and paid in the sections named to attorneys for defending criminals that the courts feel that they should be liberal in awarding the allowances of a counsel fee in case of conviction. The government of the United States, in the administration of its criminal laws, ought to command the services of the most industrious, talented, and learned members of the bar. Without awarding a proper compensation, it will fail in securing such aid, and inadequately perform this governmental function. I see no reason for holding that the charges specified above are not proper, and in my judgment they should be allowed.

The next point presented is as to the charges made for examining the titles to certain lands, in preparing a report upon the same, together with an opinion thereon, accompanied by a complete abstract of the same. The petitioner was a United States district attorney. Section 823, Rev. St., provides:

"The following and no other compensation shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States to district attorneys \* \* \* except in cases otherwise expressly provided by law."

Section 355, Rev. St., provides that:

"The district attorneys of the United States upon the application of the attorney general shall furnish any assistance or information in their power in relation to the titles to the public property lying within their respective districts."

It would seem from the balance of this section that this public property referred to lands such as would be required for arsenals, forts, etc.

On page 18, § 3, Supp. Rev. St., it is provided:

"That no civil officer of the government shall hereafter receive any compensation or perquisites directly or indirectly from the treasury or property of the United States beyond his salary or compensation allowed by law; provided that this shall not be construed to prevent the employment by the department of justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees."

Section 770, Rev. St., provides:

"For extra services the district attorney for the district of California is entitled to receive a salary at the rate of five hundred dollars a year, and the district attorneys for all other districts at the rate of two hundred dollars a year."

It is nowhere decided what is meant by "extra services." In an opinion delivered by C. H. Hill, assistant attorney general, which opinion was approved by the Honorable B. H. Bristow, solicitor general, it was held that the examination of titles was no part of the official duties of a district attorney,—in fact, that such employment was not such as necessarily pertained to the legal profession; that persons who are not attorneys at law often performed such services. In this opinion, that of Atty. Gen. Speed (11 Op. Attys. Gen. 433) is

cited, wherein it was held that a district attorney was entitled to compensation for examining the titles to land purchased for the government. This opinion of Atty. Gen. Speed was approved in an opinion of Mr. Browning. 12 Op. Atty. Gen. 416. These opinions undoubtedly take the view that the duties of examining title to land, and making an abstract of the same, are services of a different character from those which pertain to the office of district attorney by law or usage; and hence, according to *Converse v. U. S.*, 21 How. 463, the district attorney would be entitled to charge therefor.

There is one item that enters into the charge that, it would appear to me, did pertain to his duties as an attorney, and that is giving an opinion upon the titles to the land which he examined and made abstracts of. The opinion as to the validity of title to land is a professional one, which pertains to that of an attorney and counselor at law, and, I think, must be classed as extra services. I think they are services which pertain to the office of district attorney, under and by virtue of section 355, Rev. St. As the allegations stand, I am unable to state what part of the charges of \$500 and what part of the \$250 was made for the opinion as to the title to the land in question. This question may arise on the trial.

This case came before the court upon a demurrer to the petition. The first ground thereof was that the petition, in either or all of the paragraphs therein, does not state facts sufficient to constitute a cause of action. If, in any part of the petition, facts are stated showing a cause of action, the demurrer upon this ground would have to be overruled. The second ground is that it is not stated how, or in what way or manner, or when, the claims were duly presented to the accounting officers of the government, or to what particular accounting officer. The third ground is that it is not alleged that said claims, or either of them, are made out in accordance with or in pursuance to the forms and rules adopted by the department of justice of the United States, to be made out before presented, as required by law, nor does the same show that said claims were reported and presented with plaintiff's verification thereof, and a certificate of the clerk showing that they had been presented in open court and allowed by the court. It was not necessary to state how or when the account claimed was presented to proper accounting officers. In regard to some of the claims, it is stated they were allowed by the court, and duly presented to the said accounting officers and disallowed. Considering the general character of the demurrer, I think it should be overruled as to all the counts charged in the petition.

---

UNITED STATES v. HOWELL.

(District Court, N. D. California. January 15, 1895.)

No. 3,040.

**CRIMINAL LAW—INDICTMENT—SEVERAL COUNTS.**

An indictment for having counterfeit money in possession may charge the offense in several separate counts, each alleging the possession of a different denomination of coin.

This was an indictment against Martin D. Howell for having counterfeit money in his possession. The defendant filed a plea in abatement to the first four counts of the indictment. The district attorney demurred to the plea.

Samuel Knight, U. S. Dist. Atty.

Reddy, Campbell & Metson and E. S. Pillsbury, for defendant.

MORROW, District Judge. The defendant, by his counsel, has filed a plea in abatement to the first four counts of the indictment, on the ground that, in and by these counts, the crime with which the defendant is charged, viz. that of having counterfeit money in his possession, is split up into separate charges, as if they were for distinct offenses. It is claimed that the offenses charged in these counts were all committed by the defendant, if committed at all, at the same time and place, and that they, in fact, constitute but one act and offense. The district attorney has demurred, and also answered in part, to the plea. The answer is made to that part of the plea which states that the defendant is charged, in the fourth count, with having in his possession 80 pieces of false, forged, and counterfeit coin, of the denomination known as and called a "quarter dollar" or "twenty-five cent piece." This accusation, it was claimed by the defendant in his plea, was one of the parts of the single offense split up in the indictment. The answer denies that the charge contained in the fourth count is part and parcel of that set out in the first three counts. A reference to the indictment shows that the offense stated in the fourth count is alleged to have been committed on the 22d of June, 1892, while, in the other three counts objected to, the date of the commission of the offenses therein charged is the 21st of May, 1892. It was conceded at the argument, by counsel for the defendant, that the fourth count of the indictment set out a separate offense, and that it had been inadvertently included in the plea of abatement with the first three counts to which objection is made. A separate offense being alleged, the plea as to that count must be overruled. Rev. St. U. S. § 1024; *Pointer v. U. S.*, 151 U. S. 396, 14 Sup. Ct. 410.

This leaves the first three counts for our consideration. As to these, also, the plea, in my judgment, is not well taken. The practice, in criminal pleading, of inserting in an indictment two or more counts, which relate to but one and the same offense, varying the counts to conform to the evidence as it may be developed at the trial, is now well settled, and, indeed, justified by the most enlightened sense of justice. Were this practice not permitted, prosecutors would often encounter fatal variances arising upon the trial, and it is to avoid this that the cumulative method of pleading referred to has been devised and sanctioned. It is particularly useful when the criminative facts are not fully known to the prosecutor, or when the evidence that will be disclosed at the trial is uncertain, or when the nature of the defense cannot very well be anticipated. "There is no objection to stating the same offense, in different ways, in as many different counts of the indictment as you may think necessary, even

although the judgment on the several counts be different, provided all the counts be for felonies or all for misdemeanors." Archb. Cr. Pl. & Prac. (7th Ed.) 308. "Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence; and this the law permits. Thus, he may vary the ownership of articles stolen, in larceny; of houses burned, in arson; or the fatal instrument and other incidents, in homicide. Hence a verdict of guilty on four counts, charging the murder to have been committed with a knife, a dagger, a dirk, and a dirk knife, is not double or repugnant, since the same kind of death is charged in all the counts." Whart. Cr. Pl. (9th Ed.) p. 204, § 297. In the case of *State v. Gray*, 37 Mo. 464, it was said:

"The practice is well settled and firmly established in this state that a motion to compel the prosecution to elect the count on which the trial shall be had is always addressed to the discretion of the court, and this court will not interfere with the exercise of this discretion, unless it is manifest that it has been abused to the obvious and palpable detriment of the accused. It is often indispensably necessary to include several counts in the same indictment, to meet the proofs which may be given on the trial; and to arbitrarily compel an election in all instances would tend to cripple prosecutions and defeat the ends of justice,"—citing *State v. Jackson*, 17 Mo. 544; *State v. Leonard*, 22 Mo. 449.

In *State v. Mallon*, 75 Mo. 355, this language was used:

"Nor did the court err in refusing to compel the state to elect upon which count she would proceed. It is usual to frame several counts where only a single offense is intended to be charged, for the purpose of meeting the evidence as it may transpire at the trial, and in such cases the court will not compel the prosecutor to elect,"—citing *State v. Porter*, 26 Mo. 206; *State v. Pitts*, 58 Mo. 556.

In the case of *U. S. v. Dickinson*, 2 McLean, 328, Fed. Cas. No. 14,958, the court said:

"This subject must depend, in a great degree, on the exercise of a sound discretion by the court. They will see that offenses shall not be so joined, in the same indictment, as to deprive the defendant of any right which the law gives him. Experience shows the propriety, and, indeed, necessity, of charging the offense in different ways, so as to meet the proof; and, within the knowledge of the court, no injustice has been done, under this practice, to defendant; and we think that, in a case like the present, great injustice would be done to the public by compelling the prosecuting attorney to make an election."

And in *Kane v. People*, 8 Wend. 211, it was there stated:

"In point of law, it is no objection that two or more offenses of the same nature, and upon which the same or a similar judgment may be given, are contained in different counts of the same indictment. It therefore forms no ground of a motion in arrest of judgment; neither can it be objected by way of demurrer or on a writ of error. *Rex v. Young*, 2 Peake, 228, note. It is every day's practice to charge a felony in different ways in several counts, for the purpose of meeting the evidence as it may come out upon the trial. Each of the counts on the face of the indictment purports to be for a distinct and separate offense, and the jury very frequently find a general verdict on all the counts, although only one offense is proved; but no one ever supposed that formed a ground for arresting the judgment. If the different counts are inserted in good faith, for the purpose of meeting a single charge, the court will not even compel the prosecutor to elect; and in the case of mere misdemeanors, which are only punishable by fine or imprisonment, the

prosecutor is permitted to join and try several distinct offenses in the same indictment."

In the case of *People v. Thompson*, 28 Cal. 215, the following language was used, Chief Justice Sanderson delivering the opinion of the court:

"Under our practice, an indictment must not charge more than one offense, but it may set forth that offense in different forms, under different counts. Cr. Prac. Act, § 241. \* \* \* The object of allowing different counts is to provide against fatal variances between the material parts of the indictment and the proofs brought forward in their support. Where a material fact is doubtful,—that is to say, where it is uncertain as to which of two or more conditions is the true one, and either is equally effectual in completing the offense,—it is proper to frame a count embracing each, in order that there may be at the trial no fatal variance between the matters alleged and the matters proved."

See, further, on this subject, *Abb. Tr. Briefs*, p. 183, § 325; *Chit. Cr. Law*, 248 et seq.; *Reg. v. Trueman*, 8 Car. & P. 727; *Reg. v. Bleasdale*, 2 Car. & K. 765; *Ex parte Hibbs*, 26 Fed. 426; *People v. Gates*, 13 Wend. 311; *Gonzales v. State*, 12 Tex. App. 657; *State v. Bell*, 27 Md. 675; *Engleman v. State*, 2 Ind. 91; *State v. Jackson*, 17 Mo. 544; *People v. Liscomb*, 60 N. Y. 599. It would seem that the practice of uniting several counts in one indictment is of comparatively modern origin. *O'Connell v. Queen*, 11 Clark & F. 275, per Lord Denman; *People v. Liscomb*, supra. Each count is, in effect, deemed to contain a separate offense. *Young v. King*, 3 Term. R. 106; *U. S. v. Davenport*, Deady, 264, Fed. Cas. No. 14,920. If one count is good, it will sustain the verdict. *People v. McKinney*, 10 Mich. 54; *Com. v. Hawkins*, 3 Gray, 460.

Section 1024 of the Revised Statutes has been referred to as authority for including several counts in an indictment for the same offense. That section reads as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

While I have been referred to no case which directly involves the question peculiar to the case at bar, and construes this section with reference thereto, still I think that the interpretation to be given to that part of the section material to this controversy is that it is a legislative recognition, in the courts of the United States, of the practice of incorporating several counts in an indictment for the same offense, to meet the evidence as it may transpire; otherwise, how could there be "several charges against any person for the same act or transaction." The case of *Pointer v. U. S.*, 151 U. S. 396, 14 Sup. Ct. 410, indicates a general rule applicable to this case. The supreme court had occasion to consider in that case section 1024, but it seems to have done so in connection with the question as to the joinder of two or more distinct offenses in the same indictment, which the provision expressly authorizes. The point decided was that the trial court had



not abused the discretion with which it is clothed in denying the application of the defendant to compel the prosecutor, at the beginning of the trial, and before the disclosure of the facts, of electing on which of two separate charges of murder he would proceed. It is to be observed, however, that the indictment there charged the defendant with the murder of two individuals in four counts, two for each accusation, one count differing only from the other in that the words, "beat, bruise," were used instead of "cut, penetrate." This, obviously, was done to meet the evidence as it should be developed at the trial. No question was raised as to the propriety of this method of pleading, and, if the discretion of the court was deemed sufficient to protect the substantial rights of the accused with reference to an election between two or more offenses charged in the same indictment, certainly that discretion exists in a case like the present, where but one and the same offense is set out, though averred differently in three counts, and where the only question can be whether the defendant is or will be prejudiced in any of his substantial rights at the trial by the system of pleading adopted. Now, while it is conceded by counsel for defendant that an indictment may contain several counts, each differently stating the same offense, it is contended that that practice does not extend to, and permit of, the splitting up an offense into several parts, with as many counts. But I can see no good reason, if the practice is to obtain at all, why it does not legitimately comprehend the method of averment employed in this case. In my opinion, the distinction sought to be drawn by counsel for defendant between stating an offense differently and "splitting" it up, so to speak, is, so far as this case is concerned, without foundation in law, and purely technical. The idea that the offense with which the defendant is charged is thereby cut up into three parts, making as many distinct infractions of the law, is only technically, but not literally, true. If a criminal pleader is permitted, by the now well-settled practice, to employ two or more counts in charging a single offense, varying them as he is advised so as to meet the proofs as they may transpire at the trial, I can see no valid reason why he may not adopt the course pursued here, viz. of dividing the offense into three separate charges, varying each according to the denomination of the counterfeit coin alleged to have been in the possession of the defendant. If the ownership of articles stolen may be varied, in cases of larceny (*State v. Nelson*, 29 Me. 329); or the fatal instrument, in homicide (*Hunter v. State*, 40 N. J. Law, 495); or as many charges of arson laid as there were houses consumed, although the fire was the result of but a single act (*Reg. v. Trueman*, 8 Car. & P. 727),—I do not see why the pleader cannot include as many counts for the unlawful possession of counterfeit money as there are different denominations of coin, or, to carry the practice still further, for every piece of money unlawfully possessed. While this practice, if carried too far, would become cumbersome and confusing, and might prejudice the defendant, still, so far as these counts are concerned, the court cannot now say, at this stage of the case, that the practice has been abused, or that the defendant is or will

be prejudiced. The court is not in a position to determine now that these different counts were not inserted in good faith, for the purpose of meeting a single charge, to prevent a fatal variance which may, under certain contingencies, arise. *Kane v. People*, supra. But the real test of the whole question, I take it, is whether the defendant is prejudiced in any substantial way. In passing upon this feature of the case, "the court is invested with such discretion as enables it do justice between the government and the accused." *Pointer v. U. S.*, supra. The defendant cannot be embarrassed or confounded in his defense, because if the three counts are, as it is claimed, all for the same offense, his defense on one count must necessarily cover the others. Dividing the unlawful act into as many charges as there are denominations of coin can make no difference in proving, or, on the part of the defendant, in meeting the proof of, the single possession of the various coins. Under any aspect of the question, it is difficult to appreciate upon what theory the defendant can complain, if none of his rights upon the trial are impaired, or likely to be. If a verdict of guilty on all three counts meant absolutely that the defendant was to be deemed convicted upon three separate and distinct offenses, entailing as many punishments, then the objection to this method of pleading a single offense would have great force, and, in all probability, be conclusive of the question presented here for decision, even before trial. But the method of pleading employed in the indictment, as to the possession of the alleged counterfeit coins, can lead to no such result. It is in this respect, I apprehend, that the counsel for defendant misconceive the legal effect of this cumulative system of pleading. The fear that, in case of a conviction on more than one count, the defendant will suffer additional punishment, as though he had been convicted for several distinct offenses, is not real or substantial. It is no more true of this case than of all the other cases which have been referred to where the same system of pleading was employed. When the time for imposing sentence comes, if it does come, the rights of the defendant will be fully protected. No court would, for a moment, permit one convicted for a single offense, averred differently in two or more counts, to be sentenced on each of the counts as if for separate and distinct offenses.

The cases cited by counsel for defendant, to the point that an offense or crime cannot be split up into several parts, are not applicable to the question presented here. In the two cases cited from the California Reports (*People v. Stephens*, 79 Cal. 428, 21 Pac. 856, and *People v. Defoor*, 100 Cal. 150, 34 Pac. 642) the question of splitting up an offense was raised as a plea in bar to further prosecution; it being claimed that, having been once placed in jeopardy for one part of the offense, a second prosecution for another part could not be had. The court, in both cases, held that this could not be done. This is quite another question from the one presented for consideration in the case at bar. There is an English case which is more directly in point than any other case I have consulted. It is *Reg. v. Trueman*, supra. The indictment there contained five counts, each charging the firing of the house of a different owner. It ap-

peared from the opening by the prosecutor that the houses constituted a row of adjoining houses, and that the fire was communicated to four of them from the house first set on fire. The burning of each house being charged as a distinct felony, the prisoner asked the prosecution to be put to its election. Erskine, J., said:

"As it is all one transaction, we must hear the evidence, and I do not see how, in the present stage of the proceedings, I can call on the prosecutor to elect. I shall take care that, as the case proceeds, the prisoner is not tried for more than one felony. The application for a prosecutor to elect is an application to the discretion of the judge, founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defense."

That case is very strong authority for the case at bar. There the burning of the five houses was caused by one act, but the court permitted the trial to go on, and denied a motion to elect, though the offense was split up into five separate charges. To repeat, the method pursued by the district attorney in this case, in varying the three counts for the one offense charged, is, in my judgment, in conformity with the practice, in criminal pleading, of using several counts for the same act, and, so far as the court is at present advised, is in no way prejudicial to the defendant. The demurrer to the plea in abatement will therefore be sustained, and the plea denied.

---

#### UNITED STATES v. DURLAND.

(District Court, E. D. Pennsylvania. December 6, 1894.)

Nos. 19 and 20.

**1. CRIMINAL LAW—USE OF MAILS TO DEFRAUD—SUFFICIENCY OF INDICTMENT.**

Indictments charging, in substance, either (1) that the defendant willfully devised a fraudulent scheme to obtain money from divers persons, and to cheat and defraud them thereof, by representing that the P. Co. (of which he was president) would, on the receipt of \$10, and a further sum of \$5 monthly for a time specified, from such persons, issue to each of them a bond in the terms set forth; that it was not intended to pay said persons the money mentioned in said bonds, but that the defendant intended fraudulently to apply the money so received to his own use; that it was intended to employ the United States mails to carry out the scheme by opening correspondence with such persons; and that the mails were so used; or (2) that the defendant devised a fraudulent scheme to obtain money by false pretenses, by representing to divers persons, and particularly to one B., that the P. Co. would pay large sums of money on the receipt of smaller ones, to wit, \$100 on receipt of \$60, etc.; that it was not intended to make such payments, but that the defendant fraudulently designed to convert the money to be received from such persons to his own use; that the defendant intended to use, and did use, the United States mails to carry said scheme into effect by opening correspondence, etc.,—sufficiently charge offenses under the statutes of the United States in respect to use of the mails to defraud. *U. S. v. Flemming*, 18 Fed. 907, followed.

**2. SAME—EVIDENCE.**

Upon trial of an indictment charging the defendant with using the United States mails to promote a fraudulent scheme to obtain money by means of subscriptions to bonds purporting to return large profits upon small investments, evidence as to the defendant's knowledge and experi-

ence of financial schemes, and as to previous attacks made upon the honesty of the scheme, is material as bearing upon the question whether or not the defendant was himself deceived respecting it.

This was an indictment against John H. Durland for using the mails to promote a fraudulent scheme to obtain money.

Ellery P. Ingham and Harvey K. Hewitt, U. S. Attys.

Wm. C. Gross, James M. Beck, and Hampton L. Carson, for defendant.

BUTLER, District Judge (charging jury). The defendant is charged with devising a fraudulent scheme, and with using the mails to carry it into execution. If the charge is sustained by the evidence he must be convicted; otherwise he must not.

That the mails were used to carry out the defendant's scheme is undoubted.

Was the scheme fraudulent? It consisted substantially, as I understand the charge, of representing by letters, circulars and pamphlets that the subscribers to, or purchasers of, certain bonds issued by the company, of which the defendant was the projector, and is the president, will be paid according to their face, and that the holders will thereby derive great profit over the cost. Samples of the letters, circulars and pamphlets are before you, from which you must ascertain what the representations made are. The bonds, with other evidence relating to the subject, exhibit the financial part of the alleged scheme. From this evidence you must determine what the scheme really is, and whether the representations respecting it were true or fraudulent. While the details of the financial scheme under which the bonds were issued seem to be complicated, its main features are very simple. It will be seen, I think, on reading the bonds, that the only means proposed for their payment, consists of money to be collected from the bondholders, and comparatively a very small amount of interest that may be derived from investment of what is called the "Reserve Fund," which is taken from the money collected from bondholders. While I say this appears to be the only means,—this four-fifths of what the bondholders pay and the small earnings of the reserve fund, you must determine for yourselves whether it is so or not. You will see that the bond contains the contract between the company and the bondholder. It develops upon its face the entire financial scheme, and by it you will discover that the company does not make itself or its capital liable for the payment of the bonds. No matter what its capital is, the bondholders cannot get a dollar of it. It is referred to in the circulars, you will see, which recommend this company, and referred to presumably to show the advantages of investing in these bonds, and yet, according to the contract, the bondholders cannot touch the capital, cannot recover a dollar on account of it, because, I repeat, the terms of the bond confine the holders to a proportion simply of the money they pay, with the small accumulation of interest that may be obtained from an investment of what is called the "Reserve Fund." You thus see

that the company assumes no responsibility whatever, except to return to the bondholders, at the times and under the circumstances stated in the bonds, a part of the money that it receives from them. That is, as I understand, the scheme, as written in the bonds. You will examine the subject and decide for yourselves.

After ascertaining what the representations are or were and what the bond scheme was and the chances of profit to the bondholders generally were, you must decide whether the representations and the general scheme which this defendant concocted and carried out through the mails was fraudulent or not. Of course he is responsible for what others did under his direction. If a fraud was perpetrated by the use of the mails in the furtherance of this scheme, he is responsible for what he did by the hands of others as well as by his own. At the commencement of the business here the contract provided for a forfeiture of the money paid in by holders who failed to pay subsequent installments as they matured, and these forfeitures of course, while they tended to impoverish those who suffered the lapses, tended to improve the situation of the holders who continued to pay. This forfeiture was, however, measurably and principally, soon after stricken out.

So long as subscribers, in abundance, could be found for the bonds, who would pay their installments as they matured, the company, of course, could pay its bonds; and many of the holders might realize the large profits promised in the circulars and pamphlets referred to. The bonds, under the scheme having a chance of being called in and redeemed (and in this respect the scheme bears resemblance to a lottery) at specified times and rates in advance of maturity, the holders of those so redeemed might in some instances realize enormous profits, and these profits would be realized to the disadvantage of the other bondholders. And the large profits thus realized, when made public, would reinforce the effect of the representations referred to and render the bonds very popular with a certain class of people; and the business would seem to prosper enormously. And such was the experience of the company. But was it a legitimate, honest business? Or was it a delusive scheme, wild, and visionary, a mere bubble, that must necessarily explode when its true nature came to be understood? It seems clear to me (but this is for your consideration and determination) that the company's means of making payment depends entirely on existing subscribers continuing to pay their subscriptions, and its success in obtaining new subscribers who will also thus pay,—and principally upon the latter. The money obtained from one set of bondholders would serve to redeem the bonds of other subscribers then or previously redeemable. But as soon as the people who incline to invest in such schemes lose their faith, and the sale of bonds and the payment of installments consequently cease, the means of paying the bonds is at an end, as I understand the scheme. It is true the company would not be in default on its bonds, because the promise in them is to pay only out of the money received from the bondholders. But is the situation of the bondholders under such circumstances con-

sistent with the representations made in the circulars and pamphlets? You must consider and determine. As an illustration, take the situation of the bondholders in the New York company when it suspended. What had they to look to? Nothing whatever that I can see. They were admitted into the new company here because, probably, the interests of the new company required their admission. These bondholders had no legal right to come in, but if they had not been voluntarily admitted, the new company would possibly, if not probably, have failed at once, failed to get under way, because of the distrust which would necessarily have been created by the failure to pay these bonds, or admit the holders to a chance in the new company; especially in view of the fact that the new company was, in substance, simply the New York concern transferred to this city. As a further illustration take the situation today of the bondholders in the Philadelphia company. Suppose in consequence of the developments made in this case, or from other causes, existing subscribers cease payment, and new subscribers cannot be obtained, will the situation of the bondholders be consistent with the representations made through the circulars and pamphlets referred to. I trust I am not mistaken, and if I am I want to be corrected. According to the evidence, as I understand it, many millions of dollars of these bonds are now outstanding. What in such case will be the situation of the holders? Will there be anything for them? You must answer that question. Not a penny that I can see, beyond the inconsiderable amount (which would not be a drop in the bucket)—the inconsiderable amount in what is called the "Reserve Fund." What would \$130,000 or \$150,000 be to men who held bonds representing many millions of dollars? I think \$15,000,000 is stated by one of the witnesses to be the amount outstanding. What source have they to look to?

I need not enlarge on the subject. You must determine whether the defendant has intentionally (because a man may delude himself, or may be deluded) devised a fraudulent scheme with a view to deceiving the public, and used the mails to promote it. In passing on the question you must consider all the evidence bearing on it, and consider it very carefully. If the defendant believed his representations to be true, believed in the justice and profitableness of his scheme, as represented in his circulars and pamphlets, he is not guilty of the crime charged, as I have already told you. In considering this you must carefully examine the financial scheme itself, and judge whether it is probable or not that any intelligent man who understands what it is, how it would work, could so believe; and, also, consider what the defendant has said upon the witness stand, who he is, and what his past life, character and experience have been.

It is further alleged by the prosecution that it was a part of this scheme that the president and managers, and their relatives and friends, should have an unfair advantage in the redemption of bonds, which advantage, it is said, could be obtained by reason of their having the management of the company and the administration of its rules. You must judge from the evidence whether such was a part

of the scheme, from the manner in which the scheme was worked, and, also, from what the witnesses speaking on the subject have said.

Of course, if the defendant could not make anything out of his scheme, you would not believe he contemplated the perpetration of a fraud. One never commits fraud without a motive. He does it in the hope, the expectation of gain. Here the defendant makes his salary of \$5,000. How much more he makes you must judge from the evidence. He deals in the bonds, as he has told you. Whether he and others connected with him obtain an undue advantage by such dealing you will judge.

If the evidence leaves your minds in doubt, you should acquit the defendant, as before stated. If, on the other hand, you are satisfied of his guilt, you should convict him. If he is shown by the evidence to be guilty, it is very important that he be convicted.

After a verdict of guilty, the defendant moved for a new trial and in arrest of judgment.

(January 15, 1895.)

BUTLER, District Judge. When called upon to plead the defendant moved to quash the indictments for reasons specified and filed.

The motion was overruled.

After verdict he moved for a new trial and in arrest of judgment, for reasons assigned, including those specified in the motion to quash.

These reasons, and others not specified at the time, are now urged with great earnestness in the defendant's behalf. I will not discuss the questions raised, at any length. They have, so far as material, been considered in the cases about to be cited.

Of the reasons specified for quashing, the first is wholly immaterial; and the second and third cannot be sustained. They are fully met by *U. S. v. Flemming*, [18 Fed. 907] *Pagin*, Fed. Prec. 255, note. That case was reviewed, and affirmed, and I adopt its conclusions respecting the matter here involved.

Of the reasons for new trial and arrest of judgment, I need do little more than say that I cannot sustain them. In considering the 1st, 3d, 4th, and 5th, it must be borne in mind that the business in New York, therein referred to, was identically the same as that transacted here; that it was, as the defendant testified, transferred here when driven away from there; and also to remember in this connection, and in considering the ninth specification, that a vital question in the case was whether the defendant was himself deceived respecting the scheme; that is, whether he believed it to be legitimate and honest, though in fact it was not. Under these circumstances it was deemed important to know what the defendant's knowledge and experience in this regard had been. For the same reason it was deemed proper to admit evidence that he had been attacked and the business denounced as dishonest, and his attention thus directed to its character. Of course his answer to the attack was also heard. In *U. S. v. Stickle*, 15 Fed. 798, where the defendant was on trial

(under the statute here involved,) and his intentions and the nature of his business were subjects of inquiry, the prosecution was permitted to prove a previous indictment and plea of guilty, for a like offense.

As respects the 2d specification, I need only say that it is inaccurate. The district attorney was not allowed to read from the attacks referred to; though doubtless some of his questions were based upon what he found in these attacks. The court forbade reading the attacks, or any part of them.

The 7th, 8th, and 11th do not seem to require comment. The 10th is directed against the latitude allowed in cross-examining the defendant. He came on the stand as a witness, and thus rendered himself liable to examination respecting his past conduct, so far as it might tend to shed light on his character and credibility. How far such examinations should go is matter for the discretion of the court. I do not think the discretion was abused in this instance.

A striking illustration of the extent to which such examinations are sometimes carried is found in *Tilton v. Beecher* (reported in a volume called "*The Tilton & Beecher Trial*"). The judge who sat was of distinguished character as a jurist, and the counsel engaged were among the most eminent of their time. All the material events of the parties' lives were brought out on cross-examination, several days being devoted to this object alone.

The 12th assignment is (unintentionally) misleading. The witness was under cross-examination and the question was deemed improper at the time. Whether he might have been examined on the subject if called by the defendant, would have depended on his qualifications as an expert. The counsel were informed by the court, (to avoid possible misunderstanding) that expert testimony respecting the scheme—its nature, feasibility, etc., was admissible, and would be received if offered.

The 6th, 13th, 14th, 15th and 17th specifications do not call for comment.

In addition to the reasons filed and above noticed, the defendant's counsel urge two others on which they seem to place most reliance: (1) That neither bill charges an offense under the statute; (2) if it does, more than three offenses (the statutory limit) are embraced.

The second is purely technical, and if correct in point of fact, cannot be allowed after verdict. If true the defendant has suffered no injury from this cause. If embarrassed in preparing his defense he should have called attention to it at that time, when the government could have cured the defect, if one existed without losing its right to punish the defendant if found guilty—as it must do if the reason is now allowed and judgment arrested. *U. S. v. Nye*, 4 Fed. 888; *Pickering v. Telegraph Co.*, 47 Mo. 461; *House v. Lowell*, 45 Mo. 381; *Com. v. Tuck*, 20 Pick. 356; *Forrest v. State*, 13 Lea, 103; 1 Bish. Crim. Proc. § 442; Rev. St. § 1025.

As respects the first of the additional reasons it must be conceded, I think, that the defendant should not be sentenced if it is true.

Indictment No. 19 charges, in substance, that the defendant at



the time named, willfully devised a fraudulent scheme to obtain money from divers persons unknown to the grand jury, to wit, sums of \$50 from each of said persons, and to cheat and defraud them thereof, by representing that the Provident Bond & Investment Company (of which he was president) would on the receipt of \$10, and a further sum of \$5 monthly for a time specified, from said persons, issue to each of them a bond in the terms set forth; that it was not intended to pay the said persons the money mentioned in said bonds and so promised to be paid, but that the defendant intended fraudulently to apply the money so received to his own use, and not towards the discharge of the said bonds as therein stated; that it was intended to employ the United States mails to carry out this scheme, by placing letters therein and opening correspondence with such persons, and that the mails were so used and correspondence opened.

No. 20, in substance charges that the defendant devised a fraudulent scheme to obtain money by false pretenses, in the manner and by the means described, which consisted substantially in representing to divers persons unknown, and particularly to one W. S. Burke, that the Provident Bond & Investment Company would pay in the manner and at the times stated, large sums of money on the receipt of smaller ones—to wit \$100 on the receipt of \$60, and \$1,000 on the receipt of \$500; that it was not intended to make such payments, or that they should be made, but that the defendant fraudulently designed to convert the money so to be received from such persons to his own use, and not to make payment to them as represented and promised; that the said defendant intended to use and did use the United States mails to carry said fraudulent scheme into effect by opening correspondence, etc.

Each of these indictments, in my judgment, charges an offense under the statute. The acts described seem, plainly, to be embraced by its terms. The indictments are possibly not drawn with so much care and skill as might have been employed. The only question here presented, however, is do they charge offenses? In my judgment they do. The argument to the contrary is I think fully met by *U. S. v. Flemming*, before cited. Indeed that case seems to meet every material question raised by this. What is there said respecting the refined criticism urged against the indictment under consideration, applies with equal force here. Time was when such criticism was effective but it has passed. Indeed it never was effective in the federal courts. They have always held that it is sufficient to charge an offense with such particularity as will protect the accused against danger of a second conviction and enable him to prepare for trial. Here, as we have seen an offense is charged, and it cannot be pretended that the defendant is in danger of a second conviction. The government has seen fit to include all use made of the mails, in furtherance of the scheme, in these bills. The language clearly precludes any further charge on that account. If such inclusion was erroneous, or the bill was so wanting in particularity as to embarrass the defendant's preparation for trial, he should, as before stated,

have taken advantage of these defects at an earlier stage of the case. While the defendant's construction of the statute is ingenious it seems to me to be clearly erroneous. It ignores the obvious signification of the terms used. The argument is so fully and satisfactorily met by the opinion of the court in *U. S. v. Flemming* that I could not profitably add anything to what is there said. The facts of that case were similar to those before me. The judge (Blodgett) who decided it below is greatly distinguished for learning and ability, and his decision as before remarked was affirmed on review. If it is in conflict with *In re Henry*, 123 U. S. 372 [8 Sup. Ct. 142], in one respect, as the defendant urges, it is not as relates to the matter here under consideration. See, also, *U. S. v. Watson*, 35 Fed. 359; *U. S. v. Wooten*, 29 Fed. 702; *U. S. v. Jones*, 10 Fed. 469; *U. S. v. Stickle*, 15 Fed. 798; *U. S. v. Haefinger*, 33 Fed. 469; *U. S. v. Haynes*, 29 Fed. 691; *In re Jackson*, 96 U. S. 727.

I am not able to see any materiality in the fact that the Provident Bond & Investment Company had a charter, and that the defendant was its president. As he testifies, he "invented the scheme," obtained the charter and formed the company. If the scheme was a fraud, as charged, and found by the jury, how could the charter authorize the use of the mails for its promotion, against the prohibition of the statute? As well might it be urged that a charter authorizes the use of the mails to promote a lottery. Indeed it was so urged in *Re Jackson* above cited, but the charter was held to be unimportant. The charter here relied upon is not, however, a charter of this scheme. It is couched in vague, general terms, and appears to have little if any relation to the business transacted by the company. Under similar charters issued by New Jersey, West Virginia, and some other states, most of the dishonest financial schemes designed to cheat ignorant and credulous men and women, are carried on. The charters are obtained for a double purpose, first to secure, or in the hope of securing, personal immunity to the dishonest schemers, and secondly to secure a greater degree of confidence in their schemes. The circuit court of this district has very recently had occasion to pass upon the character of business transacted under one of these charters, issued by West Virginia to the Mutual Bond & Investment Company and found it to be a gross fraud upon the public. *McLaughlin v. Investment Co.* (April Sess. 1894) 64 Fed. 908. The charter there was as vague and general in its terms as the one before me, and had about as little relation to the business transacted under it.

---

JACOT et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 59.

CUSTOMS DUTIES—MUSIC BOXES.

Music boxes, small in size, of inferior quality, playing less than six tunes, not musically accurate, wound up with a key permanently affixed to the outside of the box, easily operated by a child, and costing 8.35 francs or less each, are dutiable as toys, under paragraph 436 of the tariff act of October 1, 1890.

This is an appeal by importers from a decision of the United States circuit court for the Southern district of New York, entered on May 16, 1894, affirming the decision of the board of United States general appraisers, which affirmed the decision of the collector of the port of New York in the classification for customs duty of certain "music boxes" as "manufactures of metal," under paragraph 215 of Schedule C of the tariff act of October 1, 1890. That paragraph imposed a duty of 45 per cent. ad valorem. The importers claimed that the goods were "toys," and dutiable, under paragraph 436 of said act, at 35 per cent. ad valorem.

Albert Comstock, for appellants.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The appeal in this case brings up only the decision of the collector which was the subject of protest, and calls for a ruling only as to the articles included in the invoices covered by such protests. Upon the hearing in the circuit court a large number of samples of music boxes of different sizes and grades were put in evidence, which need not be now considered. The protests upon which this appeal is based covered importations by the Westernland, La Touraine, La Gascoigne, and La Bretagne. The importer testified before the board of appraisers that, of the music boxes imported by the Westernland, part were turned with a crank and part were wound up by a key. Those turned with a crank the board held to be toys, an opinion approved by the circuit court. No one questions the accuracy of that decision. A sample marked "Exhibit No. 1" was identified as being a fair representative of the goods on the invoices per Westernland, which were operated by winding with a key; the importer testifying that the music boxes on these invoices were identical "in style" in every way with the sample, being a little cheaper and less in size than Exhibit No. 1, and playing a less number of tunes. The highest-priced music boxes on the invoices resembling the sample were worth 8.35 francs each; others thereon were cheaper. The importer claimed that these music boxes, winding with a key, were also toys. He further testified that, upon the invoices per La Touraine, the only music boxes which he claimed to be toys were those like Exhibit No. 1, only smaller and playing a less number of tunes, and costing 5.45 francs or less; that on the invoices by La Gascoigne and La Bretagne there were no "toy" music boxes. The board of general appraisers had before it another sample (Exhibit No. 2) of a larger and more expensive box, but there is no evidence to show that any such boxes were included in these importations, nor in the protests thereon. Upon the taking of proofs in the circuit court, an effort was made to introduce some question as to the classification of other samples there presented; but the witness called to identify them, while satisfactorily proving that they were samples of goods imported by Jacot & Son, failed to prove that music boxes like them were imported by the Westernland and La Touraine. It

is manifest, therefore, that the only question properly before that court was as to boxes winding with a key, identical in style with Exhibit No. 1, and costing, some 8.35 francs, some 5.45 francs, and some less. The board of appraisers held that the boxes turned with a crank, and costing 5.45 francs and under, were designed for and chiefly used as children's playthings, but that the boxes like Exhibit No. 1, which they describe as "small spring boxes, wound with a key, costing about 8.35 francs each, \* \* \* playing six tunes, and the boxes being of mahogany, inlaid," are not specially adapted nor designed for the amusement of children, and that they are not used, nor suitable to be used, by children as playthings. The sole test they applied was the means employed for operating the boxes, on the theory that, because the "turning of a crank affords occupation and amusement to a child," boxes thus operated are toys, while boxes not thus operated would not be "suitable to be handled as playthings." This distinction commended itself to the learned judge who heard the case at circuit. Undoubtedly it would be a most convenient criterion for determining the classification of music boxes, but, in our opinion, it is an arbitrary distinction not warranted by the proofs. While a small, cheap music box, playing a few simple tunes inaccurately, and operated by turning a crank, would be a suitable plaything for a child two or three years old, and intelligent enough to turn the crank, we fail to see how it can be maintained that another box, wound up by a key, which is of like cost, of like grade of workmanship, and plays the same tunes, in the same way, would not be a suitable plaything for a child six or seven years old, who manifestly could wind it up unaided, and listen to the music thus produced. Many witnesses were examined, but the evidence wholly failed to show that there was any special trade-meaning of the word "toy." One witness testified that in his opinion every music box which is worked either by a crank or key is a toy, whereas all which are worked by a lever are not. But this distinction will not answer, since the evidence shows that many very expensive boxes, intended solely for adults, are wound with a key. All the other witnesses agreed in the statement that in their opinion the cheaper boxes, which do not produce music accurately enough to give enjoyment to an adult, and which are made, as one witness testified, by mere apprentices, not by skilled workmen, are regarded by them as toys. But they do not agree as to the limit of price which is the dividing line. Some of them make it as high as 25.25 francs, but none of them make it lower than 15 francs. Moreover, it appears that the toy dealers handle expensive music boxes, and that the so-called "toy" boxes are sold to others than toy dealers. The true test to be applied is best stated by one of the witnesses: It is "the quality of the instrument, which is governed by the price, largely." Applying this test to the only instruments properly now before this court for classification, they are found to be small in size, of inferior quality, playing less than six tunes, not musically accurate, wound up with a key permanently affixed to the outside of the box, easily operated by a child, and costing 8.35 francs or less each. These, in

our opinion, should be classified for duty as toys. The judgment of the circuit court is reversed, and the case remitted, with directions to classify the merchandise as above indicated.

---

UNITED STATES v. WEILLER et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 48.

CUSTOMS DUTIES—LITHOGRAPHIC PRINTS.

Articles consisting of lithographic prints, pasted upon sheets of paper which project beyond the prints, and are embossed so as to form frames, such frames being of more value than the prints, are dutiable as "articles produced in part by lithographic process," under paragraph 420 of the tariff act of October 1, 1890.

This is an appeal from the judgment of the United States circuit court, Southern district of New York, filed April 27, 1894, affirming the decision of the board of United States general appraisers reversing the decision of the collector of the port of New York in the classifications for customs duties of the merchandise involved in the case.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

Everit Brown, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The articles in question are composed of lithographic prints pasted upon sheets of paper of an appropriate size, the paper projecting beyond the print, and embossed, or otherwise so prepared as to present a repoussé effect, thus forming an attractive frame. The frames are of more value than the lithographic prints. Print and frame are permanently united before importation, and the completed combination is the article imported, which must be classified as a single article, and in the condition in which it is at the time of importation. *U. S. v. Schoverling*, 146 U. S. 76, 13 Sup. Ct. 24. The collector classified the merchandise under paragraph 420, and the importers claimed that it should be classified under paragraph 425, of the tariff act of October 1, 1890. Both of these paragraphs are found in Schedule M ("Pulp, Paper, and Books"); paragraph 425 being the last one in the schedule, and manifestly intended for the "catch-all" clause, to cover only such articles as were not otherwise provided for. It reads as follows:

"425. Manufactures of paper, or of which paper is the component material of chief value, not specially provided for in this act, 25 per centum ad valorem."

A similar paragraph (omitting the words "chief value") is found in paragraph 388 of the prior tariff of 1883. Paragraph 420, however is a new one, not found in whole or in part in the prior tariff of 1883, and manifestly intended to specialize certain paper manufactures which but for such specialization would have to be classified

under some more general description. Thus, under the act of 1883, it was held that photograph albums made of paper, leather, metal clasps, and plated clasps, were dutiable as a manufacture of paper, or of which paper was a component material. *Liebenroth v. Robertson*, 144 U. S. 35, 12 Sup. Ct. 607. This new paragraph reads as follows:

"420. Papers known commercially as surface-coated papers, and manufactures thereof, cardboards, lithographic prints from either stone or zinc, bound or unbound (except illustrations when forming a part of a periodical, newspaper, or in printed books accompanying the same), and all articles produced either in whole or in part by lithographic process, and photograph, autograph, and scrap albums, wholly or partially manufactured, thirty-five per centum ad valorem."

The merchandise in question is undoubtedly "a manufacture of which paper is the component material of chief value"; it is equally "an article produced in part by lithographic process"; and the only question in the case is, which of these two provisions in the tariff act is the more specific? The learned judge who heard the case in the circuit court cited three decisions of the supreme court as determinative of that question in favor of paragraph 425. In the first of these (*Solomon v. Arthur*, 102 U. S. 212), the two descriptive phrases were "manufactures made of mixed materials, in part of cotton, silk," etc., and "manufactures of which silk is the component part of chief value." The supreme court held the former to be the more general one, but its phrasing is very different from the one now under consideration. In the next case (*Hartranft v. Meyer*, 135 U. S. 238, 10 Sup. Ct. 751), the supreme court points out the circumstance that in neither of the two phrases then under consideration are found the words, "not specially enumerated or provided for in this act," so that "neither description is absolute or exclusive." And it holds that the description, "made of silk, or of which silk is the component material of chief value," is narrower and more limited than the one, "made wholly or in part of wool"; thereby, as the court says, "reaching to all manufactured articles of which any portion is wool." Had the descriptions, which in these two decisions were held to be the more general ones, been so specialized as to include not broadly all mixed materials, or all mixed materials where wool was present, but only mixed materials when made up in a certain way, as by weaving on a Jacquard loom, a different question would have been presented, and one more closely parallel to the case at bar. In *Seeberger v. Schlesinger*, 152 U. S. 581, 14 Sup. Ct. 729, the articles were opera glasses, and the two descriptive phrases were "shells, whole or parts of, manufactured," and "manufactures, articles, or wares composed wholly or in part of metal." But the court held that the opera glasses could not properly be included within the first phrase at all, "as this clause was obviously intended to apply to articles made entirely, or nearly so, of shell, such as combs, bracelets, chains, and lorgnons, and not to articles of which shell was a mere component, though perhaps, as in this case, the most valuable part." The decision in the *Seeberger Case*, therefore, is not in point here. In view of the fact that paragraph 420 is a

new one, evidently intended to cover specifically articles not theretofore thus grouped; that it does not contain the qualifying words, "not otherwise provided for"; and is thus, as the supreme court has held, at least in its phraseology, "absolute or exclusive"; and of the further fact that paragraph 425 is evidently the catch-all clause, is expressed in broad language, and expressly excludes any manufactures of which paper is the component material of chief value, which are "specially provided for in the act,"—we are of the opinion that the articles in question, being within that class of manufactures of which paper is the component material of chief value, which has been produced in part by lithographic process, are to be classified for duty under paragraph 420. The judgment of the circuit court is reversed, and the case remanded, with directions to classify the merchandise as indicated in this opinion.

---

LOWENTHAL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 2, 1895.)

CUSTOMS DUTIES—CLASSIFICATION—ASTRACHAN TRIMMINGS.

Certain articles, commercially known as "Astrachan trimmings," were woven on a loom, and consisted of a foundation of cotton and a long, curled pile, composed of goat hair, which was of chief value, the material being woven in strips, which were afterwards cut apart, and the sides stitched under, suitable to be made up into dress trimmings. *Held*, that this merchandise was properly classified for customs duty as "manufactures of goat hair and cotton as trimmings," at 60 cents per pound and 60 per cent. ad valorem, under paragraph 398 of the tariff act of October 1, 1890, and not as manufactures of wool, worsted, or mohair, according to value, under paragraph 392 of the same tariff act.

At Law.

Appeal by the importers from a decision of the board of United States general appraisers affirming decision of the collector of the port of New York upon the classification for customs duties of certain Astrachan trimmings entered at said port in August, 1892, which were classified for duty by the said collector as "manufactures, goat hair and cotton, goat hair chief value, as trimmings," at 60 cents per pound and 60 per cent. ad valorem, under paragraph 398 of the tariff act of October 1, 1890, which, omitting unimportant provisions, is as follows:

"398. On webbings, \* \* \* dress trimmings, laces and embroideries, head nets, buttons, or barrel buttons, or buttons of other forms, for tassels or ornaments, wrought by hand or braided by machinery, any of the foregoing which are elastic or non-elastic, made of wool, worsted, the hair of the camel, goat, alpaca, or other animals, or of which wool, worsted, the hair of the camel, goat, alpaca, or other animals is a component material, the duty shall be sixty cents per pound, and in addition thereto sixty per centum ad valorem."

Against this classification the importers protested upon several grounds, but chiefly that the goods were manufactures of wool, worsted, or mohair, chief value, and dutiable according to value, under paragraph 392 of said tariff act. The board of general appraisers took the testimony of certain witnesses, from which it appeared that the merchandise was commercially known as "Astrachan trimmings," and was included in the class of dress trimmings; that the material consisted of a foundation composed of cotton, woven in broad widths, and having at intervals, separated by plain pieces of the foundation, a curly pile of goat hair; that, after the weaving, these strips were cut apart by hand, and the edges turned under and stitched. The board of general appraisers decided: (1) That the importation was

made under the tariff act of October 1, 1890; (2) that the merchandise was commercially known at the date of the passage of the tariff act as "dress trimmings"; (3) that it was in fact dress trimmings, goat hair being the chief value; (4) woven, and then slit and turned under by hand, thus made suitable for dress trimmings; (5) that the merchandise was not commercially pile fabrics. In *re Herrman*, 52 Fed. 941, affirmed 5 C. C. A. 582, 56 Fed. 477. Following the principle established by the supreme court in *Robertson v. Salomon*, 144 U. S. 603, 12 Sup. Ct. 752, the board held that these dress trimmings were properly dutiable under paragraph 398, and affirmed the decision of the collector.

On appeal to this court, the importers' counsel argued that the provision in paragraph 398 of the tariff act required that all of the articles therein enumerated must be "wrought by hand or braided by machinery," and that the merchandise in question, being admittedly woven in a loom, and only cut into strips and roughly basted by hand, was not within the provisions of the paragraph.

The United States attorney, for the government, contended that, if the provision cited should be held to apply to all the articles mentioned in the paragraph, these dress trimmings, while woven in the piece, were yet wrought by hand by the cutting of the strips and the sewing down of the sides; but the chief contention on behalf of the government was that the case of *Robertson v. Salomon*, supra, decided by the supreme court, where the gorings in question in that case were shown never to be wrought by hand or braided by machinery, conclusively established the rule of construction as applicable to this paragraph,—that the provision "wrought by hand," etc., applied only to the immediate antecedent, the "buttons, or barrel buttons, or buttons of other forms," and had no application to the other articles enumerated in the paragraph.

Comstock & Brown, for appellants.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. Paragraph 398 of the tariff act of 1890 provides for a duty "on webbing, \* \* \* cords and tassels, dress trimmings, laces and embroideries, head nets, buttons, or barrel buttons, or buttons of other forms, for tassels or ornaments, wrought by hand or braided by machinery any of the foregoing which are elastic or non-elastic, made of wool, worsted, the hair of the camel, goat, alpaca, or other animals." These articles are dress trimmings of mohair, woven in the piece, and cut apart and hemmed by hand. They were assessed as dress trimmings under this paragraph, instead of as manufactures of wool and of hair of animals, not specially provided for under paragraph 392. They are included in 398, unless the words "wrought by hand or braided by machinery" apply to dress trimmings. These words are, however, directly connected with "buttons of other forms, for tassels or ornaments," and separated by "or" from the articles preceding these buttons. Therefore, most naturally and grammatically, these words do not apply to articles before this "or." The following words of description are carried back to all the articles by the broad words "any of the foregoing"; and these specific words, "wrought by hand or braided by machinery," would also, if intended to apply back to all the articles, have been placed after, and brought under the meaning of, these general words. These articles seem to be dress trimmings, specifically described in 398, and to have been properly assessed as such. Decision affirmed.



## GABRIEL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 2, 1895.)

## CUSTOMS DUTIES—LITHOPHONE—CLASSIFICATION.

Certain so-called "lithophone," a dry, white material, held to be dutiable at  $1\frac{1}{4}$  cents per pound, as "white paint containing zinc, but not containing lead," under paragraph 60, and not at 25 per cent. ad valorem, as "all other paints and colors, whether dry or mixed," under paragraph 61, of the tariff act of 1890.

At Law. Appeal by importers from a decision of the board of United States general appraisers. Affirmed.

The importers contended that there was no such thing known in trade as a "dry paint," and that the article in suit was a color, and not a paint.

The assistant United States attorney quoted the term "paints, dry," from prior tariff acts, and contended that congress had used the words in legislation for 40 years, and, whether technically correct or not, traders knew what it meant in the market. *Twine Co. v. Worthington*, 141 U. S. 468, 471, 12 Sup. Ct. 55.

Stephen G. Clarke, for importers.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. This article is a white, dry material, for use in painting, containing zinc, but not containing lead. Paragraph 60 of the tariff act of 1890 provides for a duty on "white paint containing zinc, but not containing lead; dry," and "ground in oil." This seems to be the article of that paragraph, dry, which in common speech is called "paint," although not usable as such until it is mixed with oil. Decision affirmed.

## WILLIAM J. MATHESON &amp; CO., Limited, v. UNITED STATES.

(Circuit Court, S. D. New York. January 2, 1895.)

## CUSTOMS DUTIES—CLASSIFICATION—SULPHOTOLUIC ACID.

Sulphotoluic acid, a remote derivative of coal tar, by combination with sulphuric acid, its dominant element being derived from coal tar, the chief use of the article being in the construction of coal-tar dyes by combining with a base, held properly classified for duty by the collector of the port of New York as a "coal-tar preparation," and dutiable at 20 per cent. ad valorem, under paragraph 19 of the tariff act of October 1, 1890, and not duty free, as an acid used for manufacturing purposes, under paragraph 473 of the free list of said tariff act.

At Law. Appeal by the importers from a decision of the board of United States general appraisers sustaining the classification and assessment of duties made by the collector of the port of New York upon certain sulphotoluic acid imported into the United States during the month of June, 1892, which was classified for duty, as a "coal-tar preparation," at 20 per cent. ad valorem, under Schedule A, par. 19, of the tariff act of October 1, 1890, which is as follows: "19. All preparations of coal-tar, not colors or dyes, not specially provided for in this act, twenty per centum ad valorem." Against this classifica-

tion the importers protested, claiming that the merchandise was duty free, as an acid used for manufacturing purposes, under paragraph 473 of the free list of the same tariff act, which reads as follows: "473. Acids used for medicinal, chemical, or manufacturing purposes, not specially provided for in this act." The local appraisers reported to the collector that the article was "a preparation of coal tar; also an organic acid." No testimony was taken before the board of general appraisers, who made their decision in the case, finding, among other things, that the merchandise was an organic acid, its peculiar and dominant element derived from coal tar; that it is a coal-tar preparation, not a color or dye, its chief use being in the construction of coal-tar dyes by combining with a base; that approximating 60 per cent. of coal-tar colors or dyes and coal-tar preparations are acids. The protest of the importers was overruled, and the collector affirmed. The case being appealed into the circuit court, the importers proceeded to take further evidence in that court before a referee, which evidence tended to show that this sulphotoluic acid was in reality a coal-tar preparation, being a remote derivative from coal tar. In *re Roessler & H. Chemical Co.*, 49 Fed. 272; *Id.*, 4 C. C. A. 1, 56 Fed. 481. It was abundantly proved that this acid was used in the manufacture of coal-tar colors or dyes, and that such use constituted a recombination chemically of the acid in the production of such colors or dyes; also that there was no other commercial use for this acid. In behalf of the United States evidence was introduced showing that there were a very large number of acids known and extensively used commercially at the time of the passage of the tariff act which were not preparations of coal tar, nor in any way derived from that material; such as sulphuric acid, nitric acid, hydrochloric acid, and a large number of others. On the trial it was contended in behalf of the government that the provision for coal-tar preparations in paragraph 19 was more specific as applied to this particular article than the provision in the free list for acids used for manufacturing purposes.

Comstock & Brown, for importers.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge. This importation is an acid prepared from coal tar, used in making coal-tar colors. By paragraph 19 of the tariff act of 1890, "all preparations of coal tar, not colors or dyes, not specially provided for," were made subject to a duty; and by paragraph 473 "acids used for medicinal, chemical, or manufacturing purposes" were free. If this acid had not been a preparation of coal tar, it would have been free. But it is not with colors and dyes in the specific exception of paragraph 19, nor specially provided for as a preparation of coal tar elsewhere, or more specially included among acids than it is there among coal-tar preparations. The wording of paragraph 19 seems to imply that exceptions of preparations of coal tar elsewhere would be made quite plain. Decision affirmed.

JAROS HYGIENIC UNDERWEAR CO. v. FLEECE HYGIENIC UNDERWEAR CO. et al.

(Circuit Court, E. D. Pennsylvania. December 18, 1894.)

No. 23.

1. TRADE MARK—"HYGIENIC."

The word "hygienic," as applied to underwear, cannot be monopolized under the guise of a trade-mark.

2. SAME—REQUISITES OF.

Not only priority is required in the appropriation of trade-marks, but the mark selected must be arbitrary, and not merely descriptive of the article to which it is applied or of some quality thereof.

3. RES JUDICATA—EVIDENCE—RECORDS.

Where the pleadings in a suit in equity show a prior proceeding to which the parties were privies, but in which no opinion was filed to explain the decree, the whole record of the former proceeding is good evidence in the latter for the purpose of showing that the preceding adjudication was upon the same subject-matter as the latter, and, as such, an estoppel thereto.

4. SAME—WHAT CONSTITUTES.

When it is shown that the subject-matter of a preceding suit was the same as that in issue, that the court had jurisdiction, that the parties to the second suit would have been concluded by a decree in the first, and that there was no technical or unsubstantial ground upon which the first suit could have been decided, the subject is res judicata.

Hearing on bill, answer, and proofs.

This was a suit in equity, charging infringement of certain trade-mark rights alleged to belong to the complainant. As originally filed, the bill of complaint also charged infringement of a certain patent. By amendment, all reference to the patent and charge of infringement thereof were subsequently withdrawn. The bill set forth an allegation of title in the complainant and its predecessors in the words "Hygienic," "Jaros Hygienic Wear," "Wool Fleece Knit," and in the symbol of the sun with projecting rays. It set forth that these four said trade-marks were registered in the patent office. It also set forth the publication of a book with photolithographic cuts of persons clothed in certain underwear, of advertising cards containing peculiar printed matter, and averred the use of a peculiar system of enumeration for designating different sizes and qualities of underwear. It charged that the defendant Rishel was the selling agent of the plaintiff, and, as such, became acquainted with the above-mentioned trade-marks; that he organized the defendant company, and began to infringe at various places, and more particularly in the city of Boston, through a company known as the "William H. Richardson Company." It averred the commencement of a suit by this complainant against the said company, and the granting of a preliminary injunction therein; further averring that the said suit was defended by the said defendants herein; and that, a motion having been made by them to dissolve said injunction, the motion was denied; and that the said injunction was still in force, and no further attempt to dissolve the same has been made. The bill particularized that the defendants had infringed complainant's right as follows: By the use of the word "Hygienic" as applied to underwear; by the use of a symbol resembling that of the complainant's, viz. that of the sun with projecting rays, surrounded by the words "Jaros Hygienic Wear"; by the use of the words "Wool Fleece Knit"; by the use of said pictures of persons clothed in said underwear; by the use of said peculiar system of numbers designating the quality of the fabric; by the use of advertising cards containing the same formula of construction, basis, advantages, and diseases indicated.

The answer, while admitting the registration of the said trade-marks, denied that such registration gave the complainant any right in the premises. It

also averred that the said publications were not original with the complainant. It further averred that the suit above referred to had been brought to final hearing in the supreme court of Massachusetts, and had been dismissed, with costs; that the decision in said suit was an estoppel upon the present one. It denied the use of said trade-marks, except the word "Hygienic," which was part of its corporate title.

Under the evidence, the suit was narrowed down to the right of the use of the word "Hygienic," and the adjudication of the essential matters in dispute in favor of the defendants in the Boston suit; both parties being privies thereto, as admitted in the pleadings. In said case no opinion was rendered, but the entire record was put in evidence by the defendants, for the purpose of showing that the subject-matter was the same as in the present suit.

W. P. Preble, Jr., for complainant.

Jos. C. Fraley, for defendants.

DALLAS, Circuit Judge. The oral argument of the learned counsel of the complainant, and the brief which he has submitted, have, I believe, presented as forcibly as possible every consideration which could be urged on its behalf; but I have not been persuaded that it is entitled to the relief which it seeks. I do not deem it necessary to detail the facts, or to discuss the familiar principles of law which have been debated at bar. It must suffice to say that I am of opinion that the final decree of the Massachusetts court in the case of this complainant against the William H. Richardson Company is conclusive in the present one (*Lyon v. Manufacturing Co.*, 125 U. S. 698, 8 Sup. Ct. 1024; *Billing v. Gilmer*, 8 C. C. A. 645, 60 Fed. 332; *Castle v. Noyes*, 14 N. Y. 329; *Follansbee v. Walker*, 74 Pa. St. 306; *Frauenthal's Appeal*, 100 Pa. St. 290; *Spring Run Coal Co. v. Tosier*, 102 Pa. St. 342; *Finley v. Hanbest*, 30 Pa. St. 190); and that, irrespective of that decree, the complainant has no right or title to such exclusive use of the word "Hygienic" as it claims. With reference to complainant's citation of *Manufacturing Co. v. Ludeling*, 22 Fed. 823, the attention of counsel is directed to *National, etc., Co. v. Munn's, etc., Co.*, [1894] App. Cas. 275. Bill dismissed, with costs.

# CLINTON WIRE-CLOTH CO. v. WRIGHT & COLTON WIRE-CLOTH CO.

(Circuit Court, D. Massachusetts. January 22, 1895.)

No. 222.

## PATENTS—INVENTION—INFRINGEMENT—WIRE CLOTH.

The Wright patents, No. 239,011, for a shuttle for weaving wire cloth, and No. 239,012, for an improvement in the art of weaving wire cloth, held valid, as showing patentable invention.

This was a suit by the Clinton Wire-Cloth Company against the Wright & Colton Wire-Cloth Company for infringement of certain patents.

Cansten Browne and Alex. P. Browne, for complainant.

Elmer P. Howe, for defendant.

CARPENTER, District Judge. This is a bill in equity to restrain an alleged infringement on letters patent No. 239,011, issued March

15, 1881, to George F. Wright, for shuttle for weaving wire cloth, and No. 239,012, issued March 15, 1881, for improvement in the art of weaving wire cloth. It appears that in weaving wire cloth by means of a shuttle a difficulty was found to exist by reason of the fact that the wire in leaving the shuttle acquired a twist, in consequence of which the surface of the fabric was distorted. This difficulty has been met by the improvement described in the art patent, which improvement may be best stated in the words of the claim of that patent, as follows:

"The hereinbefore described improvement in the art of weaving wire cloth, which consists in swaging the coils of filling wire into the body of the wire during the process of weaving, substantially in the manner specified."

The method by which this is accomplished is shown in the patent for the shuttle. It shows a shuttle containing a case or chamber for the cop of wire, swaging rolls around which the wire passes under strain, and delivery rolls at the point where the wire passes out from the shuttle. The invention here alleged to be infringed is claimed in the following terms:

(1) The combination of a shuttle body for weaving wire with a cop case or chamber to contain the wire, and with swaging rolls, around which the wire passes after leaving the cop and before leaving the shuttle, whereby the twists of the wire are swaged into its body, and smooth weaving insured, substantially as described.

(2) The combination, substantially as hereinbefore set forth, of the cop case, the delivery rolls, and the swaging rolls interposed between the delivery rolls and the cop, for the purposes set forth.

The respondents use a shuttle which contains the cop chamber and the delivery rolls, and between them a friction block, around which the wire is strained so that the molecular condition of the wire is changed, and the twist in the wire disappears. Their shuttle is shown in the drawings of letters patent No. 299,895, issued June 3, 1884, to George F. Wright, for shuttle for weaving wire cloth. In looms for weaving yarn there had been devices similar in construction to that shown in the patent. The English patent to John Combe, dated February 20, 1857, shows a circular groove or tension post around which the thread passes from the cop before it leaves the shuttle, and the patent No. 45,682, issued December 27, 1864, to William Tunstill, shows a roller around which the weft is carried between the cop and the delivery eye. In weaving wire cloth, where the wire is wound on a spool, and not upon a bobbin, the difficulty to be encountered was that the wire as it issued from the shuttle was curved, rather than twisted; and for the purpose of retarding the flight of the wire, so as to straighten it, there had been used tension devices, an example of which is seen in the patent No. 86,233, issued January 26, 1869, to Levi Kittinger. The mechanism in which this invention is involved was, therefore, a mechanism old in form or construction. But it was not old in function. It had not been applied to the swaging of wire, or of any substance capable of undergoing that operation. The manner in which the patentee applied the mechanism was, therefore, new; and so also was there a new result, substantially different from any which had been theretofore produced,

whether by this mechanism or otherwise, in wire which was in process of formation into wire cloth. It is said that the structures existing before the patent, and shown in previous patents, may now, with slight modifications, involving only ordinary mechanical skill, be used in weaving wire cloth in the method used by the patentee. I suppose this to be true, and I conclude that in the discovery that this is true resides the invention which is protected by this patent. *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220. The same observations lead me to the conclusion that the invention was not abandoned by these complainants by the descriptions of the mechanism capable of performing the function described in this patent, and by reason of which this patent is sustained, which descriptions are contained in the prior patents to Sawyer and Wright, No. 135,446, issued February 4, 1873, and to Waters and Orr, assignors to the complainants, No. 117,837, issued August 8, 1871, and No. 121,830, issued December 12, 1871.

The respondents set up in defense a prior public use of a loom containing the patented improvement. It is sufficient for me to say that I am satisfied from the testimony that the alleged use was only experimental, and does not operate as a bar to the rights under the patent. My conclusion, therefore, is that there must be a decree for an injunction and for an account as prayed in the bill.

---

#### THOMSON METER CO. v. NATIONAL METER CO.

(Circuit Court of Appeals, Third Circuit. January 2, 1895.)

##### No. 18.

#### 1. PATENTS—EXTENT OF MONOPOLY—UNFORESEEN RESULTS.

An inventor is entitled to all the legitimate results of the invention covered by his patent, including even those which were not foreseen by him.

#### 2. SAME—INFRINGEMENT—IMMATERIAL VARIATIONS.

Changes of form do not avoid infringement when the two devices do the same thing in substantially the same way, and accomplish the same result.

#### 3. SAME—WATER METERS.

The Nash patent, No. 379,805, for an improvement in water meters, *held* valid, and infringed as to claims 15 and 17.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a bill by the National Meter Company against the Thomson Meter Company for infringement of a patent. The circuit court rendered a decree for an injunction and accounting. Defendant appeals.

Edward H. Brown, for appellant.

J. Edgar Bull and Edmund Wetmore, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and WALES, District Judges.

WALES, District Judge. This suit was brought in the circuit court of the United States for the district of New Jersey to restrain

the infringement of letters patent No. 379,805, dated March 20, 1888, for improvement in water meters, issued to the National Meter Company, as assignee of Lewis H. Nash. The complainant had a decree for an injunction and an accounting. The defendant brings this appeal. The defenses in the court below were nonpatentability and noninfringement, and the same defenses are relied on here.

The claims alleged to be infringed are these:

"(15) In a water meter, a piston, formed of hard rubber, and having a motion of nutation, substantially as described, combined with a skeleton of strengthening material, such as steel wire, substantially as set forth."

"(17) In a water meter, a piston, formed of hard rubber, combined with a skeleton of strengthening material, such as metal, substantially as and for the purposes set forth."

The meter to which the Nash piston is applied may be briefly described as having a measuring circular chamber, with curved sides and conical ends, and a flat or conical disc piston, having a central ball bearing, to which piston a wobbling motion is imparted by the flow of water through the meter chamber. The meter chamber is provided with a radial partition, called an "abutment," which separates the inlet and escape ports, and which prevents any rotation of the piston. On the top of the meter case is a box containing a system of gear wheels and dials to register the number of complete movements of the piston, and to indicate the quantity of water passed. Nutating discs were not unknown before Nash's invention, but they had been made wholly of hard rubber or wholly of metal. The objections to the use of a metal piston were (1) its weight, and its resistance to the flow of water, in consequence of its not operating as rapidly as would a piston made of lighter material; (2) if made sufficiently thin to be light enough, accuracy of measurement would be impaired; and (3) the friction between metal and metal is greater than between metal and rubber. The superior adaptation of hard rubber for use in a water-meter piston was also well known, but, prior to the invention of Nash, it had the serious and apparently insuperable defect of losing its resilience and shape by temporary immersion in hot water. Only metal pistons can be successfully used for measuring hot water; but in meters designed for the measurement of cold water the hard-rubber piston is universally admitted to be the best. Cold-water meters, however, are subjected occasionally to the entrance of hot water from either one or two causes: First, whenever the valve which is between the meter and a kitchen range or steam boiler gets out of order, and there is an excessive back pressure of steam; and, second, by the cutting off or the reduction of pressure on the supply side. The effects of this "accidental hot water"—a phrase well known and understood by the manufacturers of water meters—are to soften the hard-rubber disc, to impair or destroy its resilience, and to produce a radial expansion, which causes its edges to jam against the sides of the meter chamber, so that the disc becomes warped, changed in form, and is rendered useless. The jamming of the disc by its radial expansion is accounted for from the fact that the coefficient of expansion of hard rubber is higher than that of metal, and that a slight elevation of temperature is sufficient

to cause it to jam. When in operation, the edge of the piston does not come into actual contact with the sides of the chamber; a small space intervenes between them; and what is known as "water packing" keeps the water from leaking around the piston. If the coefficient of expansion of hard rubber and metal were the same, the piston would never jam against the case, which is solely consequent upon the inequality of expansion referred to. In his specification Nash says:

"When the piston is formed of hard rubber, I prefer to construct it with an interior strengthening piece of metal, t, as shown in Figs. 6 and 7, so that it will be less liable to change its form, or distort."

Nash's contrivance was the introduction of a steel-wire ring embedded in the rubber near the periphery of the disc,—relatively like the tire of a wheel,—and after repeated trials this arrangement was found to effectually restrain the radial expansion of the disc when immersed in "accidental hot water," and prevent the jamming and the change of form and distortion of the disc, which it was the aim of Nash to overcome. On the proofs there can be no doubt of the novelty and utility of Nash's piston as applied to meters for the measuring of cold water. Hard rubber, by reason of its being of about the same specific gravity as water, and having a minimum of friction in addition to its other advantages, was conceded to be the best material for a water-meter piston, but it could not be used, as already explained, on account of its liability to soften, expand, and distort under certain conditions, until Nash discovered the means by which these disadvantages could be overcome or neutralized.

The defense of anticipation is not supported by the defendant's exhibits. Various articles were produced to show that it was not novel to strengthen articles made of rubber by the introduction of a metal rod or grid; but these articles were either made of metal, and covered with hard rubber for the purpose of ornamentation, or to protect them from oxidation, or such articles as were incased in ordinary India rubber or in soft rubber of various grades of hardness or adulteration.

It is also contended that Nash adopted the wire ring merely for strength, and that he did not contemplate nor foresee what is now claimed for it, namely, that it would prevent radial expansion of the disc. Be this as it may, admitting it to be true that Nash did not realize the full extent of his discovery,—which it would be difficult to believe after reading the specifications of the patent, and in view of the state of the art,—still he would be entitled to all the necessary and legitimate results attained by his invention, including even such as were unexpected. *Wells v. Jacques*, 5 O. G. 364, Fed. Cas. No. 17,398; *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073; *Brown v. District of Columbia*, 130 U. S. 87, 9 Sup. Ct. 437; *Stow v. Chicago*, 104 U. S. 457; *Gandy v. Belting Co.*, 143 U. S. 587, 12 Sup. Ct. 598.

Nor is the complainant's piston only an aggregation of old parts. The metal and the rubber do not act independently, but co-operate in producing a new result, and this constitutes a patentable combina



tion. *Reckendorfer v. Faber*, 92 U. S. 357; *Hailes v. Van Wormer*, 20 Wall. 353; *Pickering v. McCullough*, 104 U. S. 310. The new use of an old compound has been held to be patentable. *Muntz v. Foster*, 2 Webst. Pat. Cas. 93; *Merwin*, Patentability, 306.

The validity of the claims being established, infringement of them by the defendant is also placed beyond doubt. The only difference between complainant's meter and that of the defendant consists in this: that in the place of a wire ring used in the former the defendant uses a thin, broad, flat, and perforated metal plate, which produces the same result. The complainant's meter uses a thick, annular metal piece, while the defendant uses a broad, thin, annular metal piece, both being split to straddle the radial abutment in the measuring chamber. The substance of complainant's patented piston is employed, and only its form is slightly changed. As was said in *Machine Co. v. Murphy*, 97 U. S. 120:

"Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that, if two devices do the same thing in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape."

Nash sought to construct a meter piston of hard rubber that would not easily change its form or distort. Lightness, strength, and durability were the desirable qualities for such a piston, and this combination has been secured by his invention, which is none the less an invention because he may have been unable to explain or describe the principle or theory on which the desired effects have been obtained. It is the resultant product, and not the principle by which it is wrought out, which is patentable. The decree of the circuit court is affirmed.

---

#### THE COLUMBUS.

THE SCOWS NOS. 6, 8, 11, AND 12.

MUNN v. THE COLUMBUS et al.

(District Court, E. D. Pennsylvania. January 8, 1895.)

No. 25.

#### ADMIRALTY—SERVICES RENDERED TO SEVERAL VESSELS—JOINT LIEN.

The P. Dredging Co., owning three dredges and fifteen scows, which were employed, under a contract, in removing obstructions in a river, hired libelant's tugboats to tow the scows from the place where the dredging was going on to the place where they were to be discharged, and back again, and to move the dredges from place to place, as their work progressed. Neither scows nor dredges would have been of any use alone; neither had any means of propulsion or steering, and without the use of tugs they could do nothing. Libelant's tugboats performed the work and towed the various scows back and forth many times, no itemized account being kept of the towage of any particular scow or dredge. *Held*, that libelant had no joint lien on the several scows and dredges for the entire price of the services separately rendered to those vessels.

This was a libel by Frank W. Munn, managing owner of the tugboats Philadelphia and Alert, against the dredge Columbus and four

scows, for towage. The cause was heard on an agreed statement of facts:

"It is hereby agreed that the above case shall be heard finally upon the following facts, reserving the right to either party to appeal: The libellant is part owner and managing owner of the tugs Philadelphia and Alert. In the year 1891, James A. Mundy & Co. entered into a contract with the United States for the removal of Windmill and other islands in the Delaware river, opposite Philadelphia, and for the deposit of the material removed therefrom upon League island. To carry out this work, James A. Mundy and others organized under the laws of the state of New Jersey a corporation known as the Philadelphia Dredging Company, and this dredging company, or James A. Mundy and others associated with him, purchased and secured a dredging plant,—i. e. a number of dredges, scows, and towboats,—to be used in the same operation of dredging for the prosecution of the work in the removal of these islands. This plant was made up of two dredging plants, one known as the 'Philadelphia plant' and the other as the 'Thompson plant.' The Philadelphia dredging plant consisted of the dredge Starbuck and three bottom-dumping scows, Nos. 13, 14, and 15. The Thompson plant consisted of the dredges Columbus, America, and Norwalk, and the tug Bowen, and the scows Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12. These two plants were used and operated as one by the Philadelphia Dredging Company. The dredges above mentioned were anchored at the islands which were to be removed, and as the earth was excavated it was deposited upon the scows by the dredges in the manner usual in dredging operations. By the contract with the United States government the material excavated from the islands was required to be deposited upon League island, at a distance of about six miles from the scene of the dredging operation; and to receive the excavated material the above-mentioned scows were employed. They were bottom-dumping scows, constructed in the usual manner, and lacked any facilities whatever for propulsion, either steam or sail, or for steering, and it therefore became necessary to supply additional tugboats to tow the loaded scows down the river to League island and the empty scows back to the dredges to be refilled. In 1892 the Philadelphia Dredging Company, or James A. Mundy and those operating and owning the said plants, entered into an arrangement with libellant for the towage of the scows from the dredges to League island and back, and for such moving of the dredges as might be necessary, and agreed to pay the sum of \$26 per day for the tug Philadelphia and \$30 per day for the tug Alert. During the months of July and August, 1892, the tug Philadelphia rendered said towage service properly for 30 days, during November 26 days, and during December 20 days, for which the sum of \$2,054 became due to libellant. During July, 1892, the tug Alert rendered said towage services properly for 4 nights at \$30 per night, and 4½ hours' time at \$4 per hour, for which the sum of \$138 became due to libellant. The dredges above named were not supplied with any mud pockets, or dumps, except the said scows, and had no means of propulsion, and, in order to be used as dredges, were required to be operated in conjunction with one or more scows, as was done in this case, to receive the mud dredged, and were required to be advanced or moved from time to time as the dredging work progressed. The dredges excavated the earth and deposited it on the bottom-dumping scows. After the scows were loaded, they were, either singly, or, more usually, in a tow consisting of several, towed down the river to League island, and were there dumped over the receiver of the mud pump, the light scows being towed back to the dredge to be reloaded, the round trip occupying about three-quarters of a day. The said towage services were necessary to enable the work of dredging to be carried on, as without the use of the scows to carry the excavated material the dredges would have been useless for this work, and the scows would have been of no use for this work without the services of the dredges. The scows bore no name, but were known by numbers only. When brought back empty, the various scows were towed to the dredges, to be filled, in accordance with the directions of the superintendents in charge of the dredging work. No itemized account of the towing of the dredges or of each scow to and from each dredge or the towage of the dredges was kept by the

tugs. This suit was brought by libellant against the dredges Columbus, America, and Starbuck, and the scows Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, and of these the marshal attached the dredge Columbus and scows 6, 8, 11, and 12. The dredges and scows against which the suit was brought were the only ones within the jurisdiction of the court at that time."

John F. Lewis and Horace L. Cheyney, for libellant.

J. Rodman Paul, N. Dubois Miller, and Biddle & Ward, for respondents.

BUTLER, District Judge. The libellant has proceeded on a supposed joint lien against the several vessels attached, for the entire contract price of all the services separately rendered to these vessels, and to others not attached which were engaged in the same work. The proceeding is anomalous; no precedent for it is to be found in the history of admiralty jurisprudence. It is doubtless an experiment suggested by the libellant's necessities. The dredging company, having failed to keep its contract and being insolvent, the libellant must lose compensation for his services unless he can establish a lien such as he sets up. He might have kept an account with each vessel, and have proceeded against her separately for it, but looking, evidently, to the dredging company alone, for payment, he failed to do this. Now, to overcome the difficulty, he seeks to treat all the vessels as one, and supposes he may do so, because they were engaged in the same work, and thus hopes to recover his entire claim for the services rendered to all from such as he has been able to catch.

That he cannot do this seems plain. Where several vessels are physically connected, as in the case of a tow for instance, they may be considered one for certain purposes, but under no other circumstances. It is supposed *The Alabama*, 22 Fed. 449, is authority to the contrary; but it is not. The only question there was whether a dredge is a vessel, and liable to admiralty lien. The court held that it is, because it is intended for use in the water, in connection with scows. Whether the decision is justifiable has been doubted; but it has been followed, and is probably right. It certainly is not authority, however, for the proposition that several dredges and any number of scows which may happen to be employed with them, may be treated as one vessel, and consequently be made the subject of a joint lien for services rendered to any one of them. The courts are jealous of the extension of admiralty liens, and more inclined to restrict than to extend them. *The Mary Morgan*, 28 Fed. 197. If this libel is sustained it will only be necessary hereafter to call the several vessels belonging to a Line engaged in the same service, a "plant" (a new term in the admiralty) to render each and all liable to lien for services rendered either. The second point made, to wit, that the libellant did not render the services on the faith of the vessels, but in reliance on the contract, need not be considered.

The libel must be dismissed.

## SCHOFIELD v. HORSE SPRINGS CATTLE CO. et al.

(Circuit Court, D. Montana. January 3, 1895.)

No. 314.

## 1. COURTS—DURATION OF TERM—ABSENCE OF JUDGE.

A term of court does not lapse or terminate before the limit set by law for its continuance, because of the absence of the judge assigned to hold it, on a day to which its session has been adjourned for convenience in the transaction of business, though no written order adjourning such term is made.

## 2. EQUITY—PRACTICE—OPENING DEFAULT.

In support of a motion to set aside a default and a decree entered pro confesso, and for leave to defend, an affidavit of one of the defendants was submitted, stating that "as to a portion of the cattle mentioned in the complaint the said bank did not \* \* \* have a lien thereon, \* \* \* but the same are free from the mortgages," and that the affiant had fully stated his case to his counsel, and was advised that he had a good defense upon the merits. An affidavit of counsel was also submitted, stating that the defendant had stated his case as fully as he could, in the absence of certain papers, and that affiant believed that the defendant had a good defense upon the merits. *Held*, that such affidavits were too indefinite, and could not supply the place of a sworn answer, or an affidavit stating the facts constituting the defense, in the absence of which the motion to open the default must be denied.

This was a suit by John W. Schofield, receiver of the Albuquerque National Bank of New Mexico, against the Horse Springs Cattle Company, W. B. Slaughter, and D. C. Kyle. A decree pro confesso was entered against all the defendants. Defendant Kyle moves to set the same aside, and for leave to defend.

Toole & Wallace, for complainant.

Sanders & Sanders, for defendants.

KNOWLES, District Judge. This case is presented to the court on a motion to set aside a default and decree entered pro confesso therein. The bill of complaint was filed March 2, 1894. On the 5th day of April, said year, a subpoena was duly issued commanding the said Horse Springs Cattle Company, W. B. Slaughter, and D. C. Kyle to appear on the 7th day of May, 1894, and answer said bill. This subpoena was served on the defendant Kyle on the 10th day of said April, 1894. On the 5th day of April, 1894, an affidavit was filed showing the nonresidence of the defendants Slaughter and the Horse Springs Cattle Company. On the same date the court made an order requiring the said defendants Slaughter and the Horse Springs Cattle Company to appear, plead, answer, or demur on the said 7th day of May, 1894, and that this order be served, if practicable, upon said defendant the Horse Springs Cattle Company by the United States marshal of the district of New Mexico, and upon the said Slaughter by the marshal of the state of Kansas, that state appearing to be his residence. It appears from the return on this order that the marshal of New Mexico served the order personally on the defendant Slaughter in that territory on the 23d day of April, said year, and that the Horse Springs Cattle Company accepted service of the same on the 27th day of that month. On the 29th day of May,

v.65f.no.5—28

1894, a default, on motion of counsel for plaintiff, was entered against all of the defendants. On the 29th day of June, 1894, a decree pro confesso was entered against all the defendants. On the 12th day of July, said year, the defendants Kyle and Slaughter came into court, and filed their motion to set aside the default and decree in this case. This motion is based upon the ground that defendants have a defense in said case upon the merits thereof, which, by accident, mistake, inadvertence, or excusable neglect, they were prevented from making within the time prescribed therefor by law and the rules of the court. In support of this the affidavits of D. C. Kyle and W. F. Sanders were filed.

The only point, in connection with these affidavits which I will refer to is that part of the same which mentions the defense of the said defendants. The defendant Kyle states in his affidavit as follows:

"And affiant says, as to a portion of the cattle mentioned in the complaint herein, the said bank did not, and the said receiver did not, have, nor has either of them, a lien thereon, nor were nor are they the owners thereof, but the same are free from the mortgages mentioned in the said complaint, and are the property of this affiant and the said W. B. Slaughter; \* \* \* that he has fully stated his case to his said counsel in New Mexico, and to his said counsel in Montana, and is advised by them and believes that upon the merits he, as well as said Slaughter, has a valid defense."

In his affidavit, W. F. Sanders states:

"That the said Kyle desired to and did employ affiant and his said partner to make a defense in said action, and has stated, as affiant believes, so fully as he can, in the absence of papers which are in New Mexico, or absent from Helena, the merits of his case; and as to each of the said cases affiant believes the said defendants, and each of them, have a defense upon the merits thereof, which by reason of delays incident to the mails, consequent upon strikes and otherwise, they did not make prior to the time of entry of default herein."

This case is further complicated from the fact that on the 3d day of July, 1894, this court adjourned to the 12th of said month. That on said last-named date, by a telegram in writing, the judge holding said court ordered said court adjourned until the 19th day of said month. On that day the said judge telephoned to the clerk of said court an order that said court be adjourned until the 6th day of August following. On the said 6th day of August the aforesaid motion was called to the attention of the court and argued. Owing to the doubt as to whether the court was legally in session, a few days subsequent it was adjourned. It is a matter of some importance in this case to know whether or not the court was in session on the 6th day of August. There are several decisions of the United States supreme court that hold that a federal court cannot set aside or vacate a judgment entered at one term at a subsequent term; that, as long as a term lasts, a court can modify or vacate a judgment or decree entered at that term, but as soon as the term ends the power of a court over its decrees entered during the continuance thereof terminates. *Cameron v. McRoberts*, 3 Wheat. 591; *McMicken v. Perrin*, 18 How. 507. If, however, a motion is made to vacate a judgment or decree at the same term at which it was rendered, and the motion is presented

to the court, and submitted, and taken under advisement, the court at a subsequent term, in ruling upon this motion, may vacate and set aside a judgment or decree. *Goddard v. Ordway*, 101 U. S. 745. The telegram to the officers of the court directing an adjournment from the 12th to the 19th of July may be considered an order in writing. A telegram has been classed as a memorandum in writing, within the statute of frauds. *Thomp. Electr.* §§ 476, 477. But a conversation or order sent by telephone cannot be properly termed a "written" conversation or order. The statute requires that a written order should be directed alternatively to the marshal, and, in his absence, to the clerk, to adjourn the court. *Rev. St.* § 672. The court was not adjourned by the written order of court on the 19th day of July. Did the term lapse for this reason? This is a question not free from difficulty.

The case of *Railway Co. v. Hand*, 7 Kan. 380, is directly in point, to the effect that, under the condition of affairs presented in this case, the term would not lapse. In that case a verdict was received and judgment ordered on Saturday, the 5th of December. The court adjourned until Monday, the 7th. The judge was absent until the 9th, when court was called. On the 8th a motion for a new trial was filed. It was held to have been filed during the term. In that case the court said:

"The term of court is fixed by law. Having once opened, it so continues till the term expires or an adjournment *sine die* is made."

In the case of *Labadie v. Dean*, 47 Tex. 90, the court said:

"The court convened and was duly organized at the time prescribed by law. When a court is organized and opened for a regular term, the term continues until it is ended by order of final adjournment, or until the efflux of the time fixed by law for its continuance. \* \* \* The orders of adjournment of its sessions from day to day, or to a particular hour of the day, are mere announcements of its proposed or intended order of transacting the business to come before it during the term. But, certainly, the failure of the court to meet at the hour or on the day to which it had thus taken a recess can in no way affect or put an end to its term."

In the case of *Barrett v. State*, 1 Wis. 156, it was sought to set aside a verdict in a case because it was received during an adjournment of the court. The court adjourned at 6:30 o'clock p. m. to the next day at 8:30 a. m. Between these times the court received the verdict of a jury. It was held that the verdict was received in term time. In the discussion of the question, the court said: "But, for all general purposes, the court is considered as in session from the commencement till the close of the term." In this case it was shown that during the time when a court was adjourned, as it is called, the court had control over juries and their conduct; that grand juries could be in session, and witnesses could be examined and punished for contempt by the court for refusing to answer proper questions.

From these cases it would appear that these "adjournments," as they are called, of the court do not affect the term. This continues, when properly commenced, until a final adjournment, or perhaps, more properly, until the court declares it terminated, or it is ter-

minated by some law. In some states the length of a term is prescribed by law. It would seem, under the act of congress above referred to, it was thought it would be necessary to have the court adjourned from time to time, in order that the term might continue. If the above decisions are correct, this view of the law was not correct. I have concluded to hold that the term of court at which the decree was rendered in this case had not terminated on the 6th day of August, when the motion was presented to the court, argued, and taken under advisement. The practice in the federal courts has undergone several changes in regard to the time when a decree pro confesso should be entered, and under what circumstances it should be entered. The original practice seems to have been to attach the defendant for contempt for not obeying the subpoena and appearing and answering the complainant's bill. Subsequently the practice was to rule the defendant to answer. The order was served on the defendant, and if, within the time specified in the rule, no answer was filed, the bill was taken pro confesso. *Pendelton v. Evans*, 4 Wash. C. C. 336, Fed. Cas. No. 10,920. It seems, also, to have been the rule that a decree upon the bill, being taken as confessed, could not be entered at the same term at which the default was entered for want of appearance, but at the next term. *O'Hara v. MacConnell*, 93 U. S. 150. Rules 18 and 19 for the practice in courts of equity so provided at one time. On the 20th of October, 1878, these rules were amended by the supreme court. In accordance with rule 18, for said practice, the defendant was required to file his plea, demurrer, or answer to the bill in the clerk's office on the rule day next succeeding that of his appearance. In default, plaintiff may, at his election, enter an order as of course in the order book that the bill be taken pro confesso. Within 30 days after this order a decree might be had. 97 U. S. viii. In the case of *Thomson v. Wooster*, 114 U. S. 104-112, 5 Sup. Ct. 788, the supreme court said: "By our rules, a decree pro confesso may be had if the defendant, on being served with process, fails to appear within the time required." In accordance with the provisions of rule 18, after 30 days from that on which the order was entered in the order book that the bill be taken pro confesso the decree was entered, and I think properly. As far as the defendants *Slaughter* and the *Horse Springs Cattle Company* are concerned, they were served with the order of the court that required them to appear on a day therein named. When such an order is personally served, upon due proof thereof, in case the defendants fail to appear at the time named in the order, "it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication in such suit, in the same manner as if such absent defendant had been served with process within the said district." Supp. Rev. St. 84, 85.

The steps taken in the case, after the time at which the defendant named in the order should have appeared, were the same as in regard to *Kyle*, who was personally served. The decree having been entered at the April term of said court, it was proper to make the motion that the same should be set aside as it was during that term. There appears to have been no error in the steps taken before the

decree was entered. We then come to the question whether any ground is presented which would warrant the court in setting this decree aside. Allowing that there is shown excusable neglect or accident which prevented the defendants from appearing and making answer to the bill of plaintiff, we are confronted with the further question as to whether defendants show they have a meritorious defense to the course of action presented in the bill, for excusable neglect, surprise, or accident is not sufficient to warrant a court in setting aside a decree which it has entered. It must further appear that the defendants have a good and meritorious defense to the cause of action set forth in the bill. 1 Black, Judgm. § 347.

In the case of *Goodhue v. Churchman*, 1 Barb. Ch. 596, Chancellor Walworth said:

"It has repeatedly been decided in this court that a final decree which has been regularly entered upon a bill taken as confessed will not be set aside upon the mere affidavits of the defendant that he is advised he has a good defense on the merits. He must either state the nature and facts of his defense in the affidavit on which his application is founded, or he must move upon a sworn answer which he proposes to put in, so that the court can see what the defense is."

In the courts of Illinois it seems to be the practice to make the motion to vacate a decree entered upon a bill taken as confessed upon a sworn answer showing a meritorious defense which it is proposed to file. *Norton v. Hixon*, 25 Ill. 441; *Schneider v. Siebert*, 50 Ill. 284; *Burge v. Burge*, 88 Ill. 164; *Grubb v. Crane*, 4 Scam. 153. The decisions of the highest courts of other states might be cited to the same effect. Recurring, now, to the affidavits in this case. Kyle, in his affidavit, says, as to a portion of the cattle mentioned in the complaint, the said bank did not and the said receiver did not have, nor has either of them, a lien thereon, etc. Nowhere in the affidavit is it stated what portion of the cattle are not subject to the lien of the bank. The statement that there is a portion of them that are not so affected is too indefinite. Then, we have this: "That he has fully stated this case to his said counsel in New Mexico, and to his said counsel in Montana, and is advised by them and believes that, upon the merits, he, as well as said Slaughter, has a valid defense." The affidavit of W. F. Sanders is that Kyle has stated his defense as fully as he can in the absence of papers which are in New Mexico, or absent from Helena, and he believes they have a good defense on the merits to the suit. While, in some states, there has been a practice which considers such advice of counsel, when the case has been fully stated to him, as entitled to be considered by the court in lieu of an affidavit stating the facts which show a defense to the complaint on the merits, I find that this is a rule of practice that has been applied to law cases, and not to cases in equity; that in equity, as a rule, such affidavits are not allowed, but an affidavit stating the facts constituting the defense, at least, must be presented. In some jurisdictions an answer must accompany the affidavit. Black, Judgm. § 347; *Goodhue v. Churchman*, 1 Barb. Ch. 596; *Winship v. Jewett*, Id. 173. It would appear that such a rule was proper. A court might be willing to take the sworn opinion of some of the counsel who are accus-



tomed to practice before it as to the merits of a defense, but the opinions of all counsel are not entitled to the same weight. It would be difficult, and often embarrassing, for a court to state why it would not like to take the opinion of some counsel upon such a subject. The rule, if established, should perhaps be a general one. Hence I think the rule established in New York is the best. If a person has not time to obtain the facts requisite to show a good defense, the court, and perhaps a judge in vacation, could grant the necessary time. This seems to have been the practice in one case in Illinois. For the reasons assigned, the motion to set aside the decree in this case and permit the defendants to answer is overruled.

---

### HENDERSON v. TRAVELERS' INS. CO.

(Circuit Court, D. Wyoming. June 22, 1894.)

#### LIFE INSURANCE — WAIVER OF CONDITION IN POLICY — POWER OF GENERAL AGENT.

R. & J. were the general agents of the T. Ins. Co., having authority to receive and pass upon applications for insurance and complete contracts without referring them to the company. One H. applied to them for life insurance, and informed them that he was in danger of being attacked and killed, and desired a policy which would protect his family in that event. R. & J. assured him that the policy to be issued would be good in such case. The policy issued, which was received and accepted by H. without reading it, contained a condition to the effect that it should not be good if the insured came to his death by intentional injuries inflicted by another person. Upon renewing the policy, a year after its issue, H. again inquired if it would be good in case he was killed, and R. & J. again assured him that it would. *Held*, that the condition as to death by intentional injury was waived, and that the policy should be reformed by omitting said condition.

This was a suit by Fannie L. Henderson against the Travelers' Insurance Company to reform a contract of insurance. The cause was heard on the pleadings and proofs.

A. C. Campbell and R. W. Breckons, for plaintiff.  
Potter & Burke, for defendant.

RINER, District Judge. This is a bill in equity to reform a contract of insurance. The bill alleges, in substance, that there was a mutual mistake in the agreement, as reduced to writing, in that the said agreement, by its terms, provided that, in case said George B. Henderson (the insured named in the policy) came to his death from intentional injuries inflicted upon him by another person, there could be no recovery upon the policy, whereas the true agreement, made by and between the insured and the defendant company, was to the effect that, if the said George B. Henderson should come to his death from intentional injuries inflicted upon him by another person without his consent, the defendant would pay to the plaintiff herein (the beneficiary named in the policy) the sum of \$10,000. The testimony shows that Henderson paid the premium on the 7th day of January, 1889, and received a policy which had printed upon the back, "This

insurance does not cover [after enumerating a number of cases] intentional injury [inflicted by the insured or any other person]"; that he again, on the 7th day of February, paid an additional premium of \$50, and received a renewal receipt, renewing the policy for another year. The insurance in this case was solicited by one Gideon M. Kepler, a clerk in the employ of the firm of Riner & Johnson, who were the agents of the defendant company at Cheyenne. I think, under the evidence in this case, it must be held that Riner & Johnson were the general agents of this company. They had the power, as shown by the evidence, to complete the contract of insurance without referring the application to the company. They solicited the insurance, received the application, and, upon payment of the premium, delivered the policy, and determined, without referring the matter to the company or any of its officers, whether the particular risk was a proper one; and I think the power given, rather than their territorial jurisdiction, must determine whether or not they were general agents. The testimony shows that Mr. Kepler, the clerk who solicited insurance for this firm, was employed for that purpose; that he not only solicited insurance, but that he received the premiums, for the firm, and filled out and delivered policies, signing the firm's name thereto. In this particular instance he solicited the insurance, and received the premium, which was paid by check made payable to his order, and which he indorsed to the firm; the policy being filled out and the firm name signed thereto by Mr. Ransom, another clerk in the employ of this firm. The renewal receipt, which was issued a year later, was also solicited by Kepler, and was filled out and the firm name was signed thereto by him, and the premium was again paid to him by the insured, and by him paid over to the firm. Authorized, as he was, by this firm, to solicit insurance, receive premiums, make out and deliver policies, I think it must be held that his act was the act of these insurance agents so far as the rights of the insured under the policy are concerned. Mr. Kepler testifies that he solicited this insurance; that the insured was, at the time, stopping at the Inter Ocean Hotel, in Cheyenne, Wyo.; that the conversation took place in a little anteroom behind the washroom in the hotel; and that no one else was present at the conversation. He further testifies that Mr. Henderson, the insured, explained to him fully his situation and business, and stated, in the language of the witness, that "they were after him up in that country, and he would like the insurance policy as a matter of protection to his family." He further testifies that Mr. Henderson asked for a policy that would protect him against anything that would happen to him upon a ranch; and that he stated to Mr. Henderson, at the time, that this policy which he proposed to issue would insure him against any and all kinds of accidents, with the exception of encounter between man and man in the way of fighting; and that he particularly stated to Mr. Henderson that they would pay to Mrs. Henderson, his wife, the amount of the policy, if he was accidentally killed, or if any one killed him as he was going to and from the city; and that he assured Henderson, both at the time the insurance was taken

and at the time of renewal, in response to inquiries propounded by Henderson, that in such a case "this policy would cover him." He further states, on cross-examination, that he delivered the policy to Henderson at Maston's store; that Henderson took him to the Inter Ocean Hotel, and gave him a check for the policy; that Henderson put the policy in his pocket, and did not look at it. He further testifies that he supposed, at the time he delivered the policy to Henderson, it did cover intentional injury inflicted upon him by some other person without his consent, and that he repeatedly said to Henderson, during their conversation, that in case he came to his death in this way the company would pay to Mrs. Henderson the sum of \$10,000. As to the conversation which took place between Henderson and Kepler, at the time the renewal was made, Mr. Kepler is fully corroborated by Mr. Hosford, who was present at that conversation. He testifies that Henderson, at the time, turned to Kepler, and said to him (after Hosford had expressed some doubt about the insurance), "Is this all right?" and that Kepler replied, "Yes"; that Henderson then informed him that he was liable to be killed, and that he wanted to insure his family so that in case he was taken away they would be cared for; and that Kepler again assured him that the policy was all right. Mr. Kepler further testifies that his recollection is that he prepared the application, and that Mr. Henderson signed it. However this may be, it is apparent, from the character of some of the answers, that they were, at least, suggested by him.

I am entirely satisfied, from an examination of the testimony in this case, that, if it was within the power of general agents (as I hold Riner & Johnson to be in this case) to waive the condition of this policy, it must be held to have been waived in this case; because Mr. Henderson, as the evidence discloses, had some misgivings as to whether the policy covered a case such as resulted in his death. In one of the conversations with Mr. Kepler, in relation to this insurance, Henderson called Kepler's attention directly to this matter, and said that he wanted to be sure about it; that he preferred to pay a higher premium, if it was necessary, to have the policy cover a case of intentional injury inflicted upon him by another without his consent; and that he only accepted the policy and paid the premium upon being assured over and over again, by the soliciting agent, that the policy did cover such a case.

Upon the question of the power of the general agents of an insurance company to waive a condition of this character, the authorities are very much in conflict. That Kepler, who solicited this insurance, was acting within the apparent scope of his authority, must, under the evidence, be conceded. While I am aware that there are many authorities holding to the contrary, I am inclined to the opinion that the acts and assurances of Kepler should be held to be the acts and assurances of the company, and that the policy in its present form does not express the true agreement between the insured and this company. A decree will be entered reforming the contract as prayed in the bill.

## LAUGHLIN v. CALUMET &amp; CHICAGO CANAL &amp; DOCK CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 26, 1895.)

No. 195.

## 1. LIMITATIONS—SUIT AGAINST STRANGER.

The pendency of a suit affecting the title to land, to which the person in possession of such land is not a party, cannot prevent the running of the statute of limitations in favor of such person.

## 2. BANKRUPTCY—TITLE OF ASSIGNEE.

An assignee in bankruptcy takes no title to real estate, under section 5046, Rev. St. U. S., as against a grantee in a prior unrecorded deed, good as against the bankrupt himself, in the absence of actual fraud upon creditors in the making of such deed.

## 3. SAME—ELECTION BY ASSIGNEE—LACHES.

Where an assignee in bankruptcy has once elected not to attempt to set aside a conveyance by the bankrupt, and has omitted to take any steps for that purpose within the time prescribed by statute, he cannot afterwards come into equity to attempt to assert title to the property as against a bona fide purchaser for value.

## 4. DEEDS—EVIDENCE OF DELIVERY—RECORD.

A deed, duly recorded, is prima facie evidence of delivery by the grantor to the grantee, and conclusive evidence of delivery, in the absence of clear evidence to the contrary, as between them and a purchaser for value, relying upon it, unless such purchaser had or was chargeable with notice of its nondelivery.

## Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The only appellee concerned in this appeal is the Calumet & Chicago Canal & Dock Company, hereinafter called the "Dock Company." On February 12, 1884, the appellant, as the assignee in bankruptcy of Henry Wisner, filed this bill against George H. Waite and 20 others; and on March 26, 1888, by amendment, made the dock company a party defendant, alleging that it claimed title to the S. E. fractional  $\frac{1}{4}$  (south of the Calumet river) of section 25, township 37 N. of range 14 E. of the third P. M., and also the S. E. fractional  $\frac{1}{4}$  of the N. E. fractional  $\frac{1}{4}$  (south of the Calumet river) of the same section, township, and range, all in Cook county, in the state of Illinois. The object of the bill is to set aside a deed of this property from the bankrupt to one John N. Wisner, his brother, bearing date January 8, 1878; and also a sale and conveyance of the same property made by John P. Wilson, as trustee, April 14, 1881, under the powers contained in a trust deed executed by the bankrupt and one Waite, to secure the purchase price of the land. The prayer is that the deed from the bankrupt to Wisner, as well as the conveyance by Wilson, may be set aside as clouds on appellant's title as assignee, and that, if any equitable rights exist under the trust deed, they may be defined and declared. The dock company, by its answer, claims title to the property as an innocent purchaser for value by mesne conveyances from John N. Wisner, and from Thomas R. Wilson and George L. Thatcher, the purchasers at the trustee's sale; and it also claims the benefit of section 5057, Rev. St. U. S., as a limitation which bars an action by an assignee in bankruptcy after two years. The facts, so far as needful to an understanding of the questions involved, are as follows:

By a special warranty deed dated July 8, 1874, delivered and recorded July 13, 1874, James L. Campbell conveyed the land in question to Henry Wisner, the bankrupt, and to George H. Waite. Wisner and Waite gave notes amounting to \$12,000, constituting the principal part of the purchase money, bearing 8 per cent. interest, all of which notes, by their terms, fell due within three years from date; and contemporaneously an agreement was made, and referred to in the notes, to the effect that the notes should not be payable until certain clouds upon the title to the land should be removed, the agreement re-

citing that Campbell had already filed a bill to remove them. At the same time Wisner and Waite executed to John P. Wilson, as trustee, a trust deed to secure the payment of the notes according to their tenor. The deed did not refer to the contract shown by these notes, but contained express authority to sell the property upon default of payment, unless certain unfilled blanks therein defeated the power. The blank spaces for the time during which it was to be advertised before sale and the number of the advertisements to be made were not filled, and the record of the deed showed these blanks unfilled. On July 17, 1874, Waite quitclaimed to Henry Wisner his interest in the land by a deed which was recorded the next day, and it now appears that he took a contract from Wisner, providing that he should be entitled to a certain portion of the profits which might be derived from a sale of the land; but this contract was not recorded until August 18, 1883, which was after the dock company obtained title to the land. On July 12, 1875, a decree was entered in the Campbell suit, under the burnt record act, which, read in connection with certain deeds from Rucker to the Brighton Company, and from Forsythe to Wisner, appearing in the record, it is claimed, removed all clouds from the title. On January 8, 1878, Henry Wisner and wife executed to John N. Wisner a special warranty deed of the property in question, which was recorded February 28, 1880. On August 31, 1878, Henry Wisner filed his petition in voluntary bankruptcy, and scheduled this property, stating the value as unknown, subject to the incumbrance of the trust deed. The other assets scheduled consisted of land similarly situated. His unsecured indebtedness was scheduled at various small sums, amounting to about \$1,200, and his indebtedness to his brother, John N. Wisner, was scheduled at about \$5,000. Of this indebtedness only one note, amounting to \$111.15, was afterwards proved up, except that his brother proved up his debt to the amount of \$11,932. On December 3, 1879, Henry Wisner was adjudged a bankrupt, and the complainant was appointed his assignee, and the usual deed was made to him, which has never been recorded. On June 10, 1880, Wisner was discharged from bankruptcy. On April 14, 1881, Wilson, as trustee, having advertised the sale of the property under the terms of the trust deed for the period of 30 days, sold it at public auction, for the amount due upon the notes (about \$29,500), to Thomas R. Wilson and George L. Thatcher, and executed to them a deed, which was recorded on July 20, 1881. Thatcher shortly after conveyed his interest to Thomas R. Wilson. On July 16, 1881, William B. Howard purchased the property in question from John N. Wisner, and received a deed, which was immediately put upon record. Howard paid, on the day of the delivery of the deed, for this title, and for some claims of Gilbert Wyman, \$8,000. The amount paid Wisner and Wyman was \$4,000 to each. On July 22, 1881, Howard purchased the title acquired under the trust deed from Thomas R. Wilson, and paid him in cash \$21,750, receiving a deed which was put upon record the following day. On February 1, 1882, by a deed recorded February 20, 1882, Howard conveyed the land in question to the dock company, which paid therefor, and for other land embraced in the same deed, \$200,442.50, and this entire consideration was paid in full by June 28, 1882. The deed from Howard to the dock company was recorded December 15, 1883. In March, 1882, the complainant brought a suit similar to the present one in the court below, but the dock company was not made a party to it. No process was issued and served on that bill, and on July 5, 1883, it was dismissed for want of prosecution. So much of the bill as is material to show the grounds relied on by complainant is as follows:

"And your orator alleges upon information and belief: That at the time of filing of said petition the said bankrupt was the absolute owner of the property, subject to one certain incumbrance and one outstanding claim of title under an unrecorded deed. That the outstanding unrecorded deed above referred to was a special warranty deed, purporting to be signed by the said bankrupt, dated the 8th day of January, 1878, and recorded in Book 611 of Records of Cook County, Illinois, on page 535, on the 28th day of February, 1880, by which deed the bankrupt pretended to convey the said property to one John N. Wisner, his brother. But your orator alleges that the said John N. Wisner took no title to said property, and acquired no rights therein, by virtue of said deed, as against your orator as the representatives of the credit-

ors of said bankrupt; that he never took possession of said property; and that, therefore, your orator became invested with the title to said property, subject only to the said trust deed to said John P. Wilson. And your orator alleges that the said trust deed to said John P. Wilson, and the other conveyances made thereunder by him and his grantees, and the said deed from said bankrupt to the said John N. Wisner and his grantees, constitute such clouds and stigmas upon your orator's title that he has been wholly unable, and is now, unable, to sell said property for any material consideration whatsoever, and that, if such clouds are removed, he believes he can sell at once such property for enough to pay all the costs of the said bankruptcy proceeding, and to pay every creditor of the bankrupt in full. And your orator further prays that the said deed from the said bankrupt to the said John N. Wisner, and all deeds and conveyances by him or his grantees to any of the parties hereto, may be set aside and annulled and declared and decreed to be clouds upon your orator's title, and that an account may be taken of the rents, issues, and profits of said property from the 31st day of August, 1878, down to the present time, and that the said defendants, or some of them, may be decreed to pay your orator such sum as shall appear from such accounting to be justly due."

On final hearing the bill was dismissed for want of equity, and this appeal is prosecuted from that decree.

Hardy, Essick & Clark, for appellants.

Osborn & Lynde, for appellee.

Cohrs & Green, for Calumet & Chicago Canal & Dock Co.

Before JENKINS, Circuit Judge, and BAKER and GROSSCUP, District Judges.

After making the foregoing statement, the opinion of the court was delivered by BAKER, District Judge.

It is claimed that if the bill filed on March 14, 1882, was filed in time to obviate the bar of the statute of limitations, the present bill is not barred, nor is the appellant open to the charge of laches in sleeping on his rights. Appellant's counsel cite and rely on section 25 of the statute of limitations of the state of Illinois (2 Starr & C. Ann. St. 1559), and *Herring v. Poritz*, 6 Ill. App. 208, in support of this claim. The claim, however, is unfounded, because that bill was not filed for more than two years after the bankrupt had conveyed the land in question to his brother, who had conveyed the same to Howard, both of which conveyances were of record before the bill was filed. Besides, the dock company was never made a party to that bill, and, so far as it was concerned, it having acquired the title to the land in controversy for value before any bill was filed, the filing and pendency of the bill did not, and could not on the plainest principles of justice, arrest the running of the statute in favor of the dock company. Before the original bill was filed, the dock company had become the owner by mesne conveyances from the bankrupt and the trustee, under the trust deed, of the entire legal and equitable title to the land. A suit against strangers to the dock company's title could not impair or vary its rights or title.

On January 8, 1878, Henry Wisner and wife made and acknowledged to John N. Wisner a deed for the land in controversy, which was duly recorded in the deed records of Cook county, Ill., on February 28, 1880. This deed purported to be executed for a valuable consideration, and was perfect in form. The deed was executed 7 months and 23 days before Henry Wisner filed his voluntary

petition to be adjudged a bankrupt. It purported to convey the entire title to the lands in question, subject to the incumbrance of the trust deed, and it is conceded that it had this effect unless it can be set aside on one or the other of the grounds upon which it is assailed. It is urged that no title passed by this deed, because the grantor never delivered nor authorized the delivery of the deed to the grantee. This claim is evidently an afterthought, as the invalidity of the title by reason of the nondelivery of the deed is not charged, nor even alluded to, in the bill. The bill challenges the title conveyed by this deed on the ground that, as against the assignee in bankruptcy, no title passed to the grantee until the deed was recorded, on February 28, 1880, and that, prior to that time, the bankrupt had assigned by a proper deed of assignment the land in question, with other property, to the appellant, as assignee in bankruptcy. For this reason the question whether the deed was delivered or not was not open to inquiry without an amendment of the bill, and no amendment was asked for or made. But, if this objection was waived, the evidence of nondelivery is wholly insufficient to defeat the title of a bona fide purchaser for value. The bankrupt, Henry Wisner, alone testified to the nondelivery of the deed, and the character of his testimony, coupled with his knowledge that the deed had been placed on record before the land was sold and conveyed to Howard, would preclude him from assailing the title acquired by a purchaser for value and in good faith. A careful reading of his testimony leaves but little doubt on our mind that he not only delivered the deed, but that he knew of and participated in the sale of the land to Howard. And, even if there were an allegation in the bill of the nondelivery of the deed, and proof of less questionable character to support it, it could not avail the bankrupt or his assignee. Henry Wisner and wife had made and acknowledged a deed perfect in form to John N. Wisner, purporting to convey all his right and title to the land in question, which was of record when Howard bought of the latter; and this deed, duly recorded, was prima facie evidence of delivery by the grantor to the grantee, and conclusive evidence of delivery, in the absence of clear evidence to the contrary, as between them and a purchaser for value, relying upon it, unless such purchaser had or was chargeable with notice of its nondelivery. *Warren v. President, etc.*, 15 Ill. 236; *Grundies v. Reid*, 107 Ill. 304; *McDaid v. Call*, 111 Ill. 298; *Quick v. Milligan*, 108 Ind. 419, 9 N. E. 392. The bankrupt had executed a deed perfect in form, which had been properly recorded, and had remained of record 16½ months before the land was sold and conveyed to Howard. How the deed came to get from the possession of the bankrupt he does not attempt to explain. He contents himself with the naked assertion that he neither delivered it nor authorized its delivery to his brother, who was the grantee therein. The bankrupt did not remain in possession of the land; and Howard, the purchaser, had no notice from any source that the title of record was not the true title. For aught that is shown in the record, if the bankrupt neither delivered nor authorized the delivery of the deed, he permitted it to get out of his possession,

and be placed on record, by reason of his negligence and want of care. Where one of two innocent parties must suffer from the negligence or wrongful act of a third, it is fundamental that he who gave the opportunity for the wrong shall suffer the loss. The principle has been more tersely stated thus: "He who trusts most shall suffer most." These considerations lead to the conclusion that the deed of the bankrupt conveyed his entire right and title to the land in question to John N. Wisner, and that this title has passed by mesne conveyances to the dock company, unless the failure to record the deed until after Henry Wisner had been adjudged a voluntary bankrupt, and had executed a deed of assignment to the appellant, defeated such prior grant. Counsel for the complainant strenuously contend that the prior unrecorded deed of the bankrupt to his brother did not vest in him any title as against the appellant's title as assignee in bankruptcy. Section 5046 Rev. St. U. S. provides what rights shall pass to the assignee:

"Sec. 5046. All property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patent rights and copyrights; all debts due him or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which he had against any person arising from contract or from the unlawful taking or detention or injury to the property of the bankrupt; and all his rights of redeeming such property or estate, together with the like right, title, power and authority to sell, manage, dispose of, sue for and recover or defend the same, as the bankrupt had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, but subject to the exceptions stated in the preceding section, be at once vested in such assignee."

There is no allegation in the bill that the deed from the bankrupt to John N. Wisner was made with any intent to hinder, delay, or defraud any creditor, present or prospective, of the grantor, nor is it alleged that the grantor was insolvent, or in embarrassed circumstances, when the deed was executed by him. And there is no allegation that any of the creditors named in the petition, or who proved their claims, were creditors at the time the deed sought to be set aside was executed. The deed is sought to be set aside on the sole ground that the prior unrecorded deed did not, as matter of law, vest a valid title in the grantee therein as against the appellant's subsequently acquired title as assignee in bankruptcy. In support of this contention, counsel cite and rely upon *Wynne's Case*, 4 N. B. R. 23, Fed. Cas. No. 18,117; *In re Dow*, 6 N. B. R. 10, Fed. Cas. No. 2,955; *Barker v. Barker's Assignee*, 12 N. B. R. 474, Fed. Cas. No. 986; *In re Collins*, 12 N. B. R. 379, Fed. Cas. No. 3,007; and *In re Gurney*, 15 N. B. R. 373, Fed. Cas. No. 5,873, and cases there cited. These cases were all decided on the circuit, and most of them apparently support the views of appellant's counsel, though two of them seem to hold a contrary doctrine. These cases, however, if in point, could not be followed by us, in view of the language of the statute, and the exposition of it by the supreme court. In *Warren v. Moody*, 122 U. S. 133, 7 Sup. Ct. 1063, and in *Adams v. Collier*, 122 U. S. 382, 7 Sup. Ct. 1208, it was decided that fraud upon creditors was a necessary element to give the assignee in bankruptcy a right of action to set aside a conveyance, where the



bankrupt would not have had such right, and that insolvency, of itself, or the fact that the property conveyed constituted more in value than the grantor could rightfully withdraw from the reach of creditors, would not, of themselves, vest such right of action in the assignee. There must be fraud, for so the statute says. Insolvency not known, or only disclosed by subsequent events, or the fact that such events showed that the property conveyed was an undue part of the estate of the grantor, are not to be deemed frauds per se, regardless of a fraudulent intent. As the statute bottoms the right of the assignee to recover upon the existence of fraud, it must be alleged and proved. In *Warren v. Moody*, 122 U. S. 132, 136, 7 Sup. Ct. 1063, the court says:

"It will be noticed that the bill does not attack the deed on the ground of fraud. It does not allege that it was made with the intent to delay, hinder, or defraud the creditors named in the bill, or any other creditors of Kennedy. It does not allege that there are no other creditors than those named in the bill, or any creditors who became such after the making of the deed. The sole ground on which it proceeds is that the deed is a voluntary deed, and is void as against the persons who were creditors of Kennedy prior to the making of the deed. It is claimed that the plaintiffs, as assignees in bankruptcy, represent the debts of these creditors for the purpose of the suit, and, no fraud in fact, or intent to commit a fraud, or to hinder or delay creditors, being alleged in the bill, the case is not one in which the plaintiffs can set aside the deed as being a deed of property conveyed by the bankrupt in fraud of his creditors, even though the conveyance may have been invalid under the statute of Alabama."

The deed sought to be set aside in the present case was not invalid under the statute of Illinois (1 Starr & C. Ann. St. 591). In *Hardin v. Osborne*, 94 Ill. 571, it was said:

"When a bankrupt had conveyed land prior to the time he was adjudged a bankrupt, and the deed remained unrecorded, no title would pass to the assignee, or as against the purchaser holding under a prior unrecorded deed; and, so far as this jurisdiction is concerned, we regard it as settled that the assignee takes no better or greater title as against an unrecorded deed than was held by the bankrupt."

And it is incontrovertible that Henry Wisner, the bankrupt, could not successfully assail the title conveyed to John N. Wisner on the sole ground that the deed executed by him had been left unrecorded. The same doctrine is affirmed in *Yeatman v. Institution*, 95 U. S. 765, and *Stewart v. Platt*, 101 U. S. 731. In the case last cited it is said that:

"The failure to file a mortgage does not impair its validity as between the mortgagee and the mortgagors, or the assignee in bankruptcy of the latter. The assignee can assert, in behalf of the general creditors, no claim to the proceeds of a sale of the property, if the bankrupts of themselves could not have asserted it in a contest exclusively between them and the mortgagee."

The record shows that within the time prescribed by the statute (section 5057, Rev. St. U. S.) the assignee took no steps to set aside the deed in question. There is the direct evidence of the assignee himself to the effect that he deliberately and understandingly elected not to assert any right to the property. He testified:

"I made all the inquiry possible at that time as to the indebtedness and value of the property. The unpaid amount, with the accumulated interest, stands on the schedule; and my opinion was, as I remember it now, that it was about a stand-off—property worth just about the debts."

He never placed the deed of assignment on record, and the evidence shows that the present suit is being prosecuted at the solicitation of the bankrupt, who has paid all the costs and expense of the suit. Under these circumstances, the assignee is not only bound by the statute of limitations, but he is now estopped from asserting a right to the premises against a bona fide purchaser for value. It is for him to determine whether or not in the given case he will assert his right to the property. He may elect not to charge the estate with the burden of taking charge of property which he deems to be of no value above the liens upon it. This election he must exercise within a reasonable time, and a failure to do so as against third parties dealing with the property in good faith will be construed as an election not to assert a claim to the property. After he has, as in this case, deliberately elected not to assert any claim to the property, he cannot come into a court of equity, and, in spite of laches and acquiescence of the most pronounced character, invoke its aid to wrest from a bona fide purchaser for value the premises in controversy. *Sparhawk v. Yerkes*, 142 U. S. 1, 12 Sup. Ct. 106; *Taylor v. Irwin*, 20 Fed. 620.

In view of what we have already said, it is not necessary for us to determine whether or not the sale and conveyance made by John P. Wilson, as trustee, by virtue of the trust deed, were authorized by its terms, and passed to the purchasers a valid, legal title to the premises. Such sale and conveyance at least operated to invest the purchasers with the title to the premises as incumbrancers holding under an unfenclosed mortgage. They have the right in equity, as against the assignee, to keep the incumbrances on foot for the protection of the legal title acquired under the deed of the bankrupt to John N. Wisner. We are of the opinion that the suit is barred by the statute, and that the laches of the complainant also presents an insuperable barrier to the maintenance of this suit. It is not necessary further to discuss these questions, because we have reached the conclusion that the title of the dock company cannot be successfully assailed on the ground alleged in the bill.

The decree of the court below is affirmed, at the cost of the appellant.

---

McKEE et al. v. SHAFFER et al.

(Circuit Court, D. Indiana. June 23, 1894.)

No. 8,877.

INTERPLEADER—PURCHASE OF STREET-RAILWAY STOCK — DIVISION OF COMMISSION BETWEEN AGENTS.

W. H. Latta, for complainants.

A. J. Beveridge, for defendant Shaffer.

Miller, Winter & Elam, for defendant Mason.

BAKER, District Judge. The complainants filed their bill of complaint on the 5th day of June, 1893, asking that the defendants,

Shaffer and Mason, be required to interplead to settle their respective claims to the sum of \$25,000. The bill alleges, in substance: That on the 17th day of November, 1892, complainants executed a contract in writing, as follows:

"Chicago, Ill., Nov. 17th, 1892.

"We, the undersigned, do hereby promise and agree to pay to J. C. Shaffer, for services rendered in our negotiations for the purchase of stock of the Citizens' Street-Railroad Company, of Indianapolis, Indiana, the sum of one hundred thousand dollars (\$100,000.00) in cash, payable to said Shaffer whenever the final payment is made on said stock so purchased, and when said stock is delivered to said purchasers. This agreement is made upon the condition that the amount of said stock so purchased and delivered shall be eighty per cent. of the capital stock of said company; provided, that if the undersigned shall accept less than the said eighty per cent. as a fulfillment of their contract of purchase this day made with J. J. Mitchell, on behalf of the stockholders of said company, then this commission shall be due and payable the same as if the full eighty per cent. of said stock were delivered.

"[Signed]

H. Sellers McKee.  
"Murry A. Verner."

—That the sale and delivery of the stock were performed in accordance with the terms of said contract, and that they became liable to pay said sum of \$100,000 according to the terms of the said contract. That they have paid \$75,000 of said commission to said Shaffer, which he has accepted in full satisfaction thereof to that extent, leaving unpaid the sum of \$25,000, which sum they are ready and willing to pay. But they aver that the defendant Mason has notified them that he was and is jointly interested with said Shaffer in said commission, and that it was agreed by and between him and Shaffer at and before the said contract was entered into, and at and before the rendition of the services for which the commission was to be paid, that said contract was entered into by said Shaffer for the benefit of Mason, as well as himself, and that, of the said commission so agreed to be paid, the sum of \$25,000 should be paid to and received by said Mason for his own separate use and benefit; and said Mason has further notified them that none of that part of the commission which has been paid has been paid to or received by him, and that he is entitled to receive all of said sum of \$25,000 which remains unpaid; and he has demanded of the complainants that they pay said sum to him, and not to said Shaffer, asserting that he alone is entitled to receive the same. The complainants further aver that Shaffer has demanded of them that they pay said sum of \$25,000 to him, and he asserts that he alone is entitled to receive the same; that, by reason of said conflicting claims and demands, they are unable to determine which of said defendants is entitled to receive said money, and they are threatened with suit therefor by each of said defendants, although they are ready and willing to pay the same to the party entitled thereto; that neither of said defendants is making claim to said money by any collusive arrangement or understanding with the complainants, or either of them. The complainants bring said sum of \$25,000, and offer to pay the same into court, and ask that the defendants be required to interplead. The bill was amended by offering to pay said sum of \$25,000, and any interest that may be found to be due and owing

thereon. The complainants filed with their bill an affidavit as required by the practice of the court in such case. Thereupon the court made an order requiring the defendants to interplead.

The defendant Mason filed a cross complaint against the defendant Shaffer, in which he admitted the material allegations contained in the original bill. He further alleged, among other things, that he was and is jointly interested with the defendant Shaffer in the commission upon the sale mentioned in the original bill; that at and before the contract of November 17, 1892, was entered into, in a conversation between cross complainant and Shaffer, it was agreed that they should work together, and that there should be a fair division of the compensation between them; that upon that understanding, they went to Chicago, and entered upon negotiations with the owners of the stock of said street-railroad company, which finally resulted in its purchase; that, in pursuance of their said arrangement, the contract for the payment of the commission was entered into and delivered to said Shaffer, who, having obtained possession thereof, at once set up the claim of entire ownership, and repudiated all right and claim of the cross complainant, and insists that he alone is entitled to the sole compensation for making said purchase, notwithstanding the fact that he was brought into the matter by the cross complainant, and had distinctly agreed that the compensation should be divided between them upon an equitable basis, and that the services had been jointly rendered; that a fair and equitable division of said commission under their said agreement, and for the services rendered, would be and is an equal amount to each; that said Shaffer has received and appropriated to his own use all of the commission except the sum of \$25,000, which remains unpaid. Prayer that cross complainant be adjudged to be entitled to receive said sum of \$25,000 to his sole use. Defendant Shaffer denies with great and needless particularity all the averments of said cross complaint. He also put in issue all the material allegations of the original bill. He alleges that he alone is entitled to receive said sum of \$25,000, together with interest on the same, from March 9, 1893.

Proofs have been taken, and the cause has been argued and submitted upon the various issues presented by the pleadings. I shall content myself with a brief statement of the conclusions which I have reached. After a careful study of the evidence, both oral and documentary, the conclusions reached by the court are as follows:

First. The cross complainant, Mason, was and is a practicing attorney at law; and the defendant Shaffer was and is a business man, largely engaged in speculative enterprises, and having experience in the management and sale of street-railway property, and his services were retained by McKee and Verner because of his supposed ability to negotiate for them the purchase of a controlling interest in the stock of the Citizens' Street-Railroad Company of Indianapolis, Ind.

Second. The services of said Mason were engaged by McKee and Verner because of his supposed ability to aid them in making said purchase as their legal adviser, and the services rendered by him

in and about said negotiations and purchase were such as are ordinarily rendered by an attorney for his clients under like circumstances.

Third. McKee and Verner had no knowledge, during the pendency of said negotiations, nor until the latter part of May, 1893, that there was any claim on the part of cross complainant, Mason, that there was, or was claimed to be, a secret agreement and understanding between himself and said Shaffer by which he was to have and receive a fair and equitable share of the commission which McKee and Verner had contracted and agreed to pay to said Shaffer; but it was the belief and understanding of said McKee and Verner that said Mason was in their employ as their attorney and legal adviser, and not otherwise.

Fourth. McKee and Verner understood at and before they entered into the contract of November 17, 1892, that the entire amount of the commission mentioned therein had been earned by said Shaffer alone; and they contracted and agreed to pay him said sum on the distinct understanding on their part that he alone was entitled to receive the same for his sole use and benefit.

Fifth. McKee and Verner are justly indebted to said cross complainant, Mason, for the reasonable value of his services as their attorney in and about said negotiations and purchase.

Sixth. It is not proved by a preponderance of the evidence that the cross complainant, Mason, is entitled to receive any part of the commission agreed to be paid to said Shaffer by the contract of November 17, 1892; and the court therefore finds that the whole amount of the commission mentioned in said contract belongs and is due and payable to said Shaffer.

Seventh. Said sum of \$100,000, by the terms of said contract, became due and payable March 9, 1893; and said Shaffer is entitled to receive the sum of \$25,000, remaining unpaid, together with six per cent. interest thereon from March 9, 1893, to this time, amounting, in principal and interest, to the sum of \$26,933.80.

Eighth. The costs in this case ought to be paid by the complainants, McKee and Verner, and cross complainant, Mason.

Ninth. Let a decree be entered in conformity to the above findings.

---

HOLTON et al. v. GUINN.

(Circuit Court, W. D. Missouri, W. D. January 21, 1895.)

1. EQUITY—PLEADING—SIGNING ANSWER.

The court may allow defendant to sign his answer where objected to because not signed.

2. SAME—VERIFICATION.

Objection that an answer is not verified may be obviated by the court's allowing its verification.

3. SAME—JOINDER OF DEFENSES IN ANSWER.

Under equity rule 39 defendant may join in his answer all matters of defense in bar or to the merits of the bill.

## 4. SAME—DENIALS.

In equity pleadings, denials or admissions should be specific and direct, and it is not enough to allege that every allegation of the bill, not expressly admitted, is denied.

## 5. PARTNERSHIP REAL ESTATE—RIGHTS OF SURVIVING PARTNER—PARTITION.

A surviving partner has, for the purpose of administering and winding up the partnership affairs, the right of possession of partnership real estate, exclusive of the deceased partner's heirs, and therefore they cannot, pending the administration, maintain against him an action for partition thereof.

## 6. DOWER—IN PARTNERSHIP REAL ESTATE.

The dower of a deceased partner's widow does not attach to his interest in partnership real estate till the partnership debts are paid.

## 7. PARTITION—ADJUSTMENT OF PARTNERSHIP ESTATE.

A bill framed for partition and accounting as between tenants in common cannot be maintained as a bill for adjustment of a partnership estate, it appearing that the land is part of an unadministered partnership estate, defendant being the surviving partner, and plaintiffs, heirs of the deceased partner.

Suit by Holton and others against Guinn for partition. Heard on exceptions to the answer.

E. W. Pattison and A. E. Spencer, for complainants.

Karnes, Holmes & Krauthoff and Thomas & Hackney, for defendant.

PHILIPS, District Judge. Complainants have filed exceptions to the answer herein, which, for the purpose of consideration, will be grouped together in respect of their materiality.

1. It is objected that the answer is not signed by the defendant. This has been obviated by affixing the signature of defendant by leave of court.

2. It is objected that the answer conjoins matter of defense with matter in the nature of a plea in bar, and the same is not verified by proper certificate of counsel. Under rule 39 of practice in equity, a defendant is entitled in his answer to insist upon all matters of defense in bar, or to the merits of the bill. Waiving the question as to whether an answer thus containing matter in bar with the merits should be treated as of the nature of a dilatory plea, counsel for defendant, by leave of court, have appended to the answer the formal certificate required by rule 31.

3. It is objected that the answer does not specifically deny or admit whether or not the oratrix Sarah H. Lloyd is the widow, and the orators Tyree and William Lloyd are the heirs, of Elijah Lloyd, deceased. The answer denies every allegation of the bill not expressly admitted to be true. This form of pleading is of questionable admissibility, even in a law action. *Long v. Long*, 79 Mo. 649. In equity pleading, designed to search out the conscience of the party, and to put him to the very truth of the matter, all semblance of double and evasive pleading should be avoided, so as not to leave the adversary to seek out through the whole body of the pleading, and determine at his peril, precisely what is intended to be admitted and what controverted. Specific and direct denials or admissions not only tend to define and sharpen the issues, but better enable

the parties to prepare for trial, and save costs and trouble in taking testimony on matters not in good faith controverted. The answer in this respect should be made more specific, as also the issue tendered in the bill as to the guardianship of the alleged minors, and the action respecting such guardianship taken in the probate court of Jasper county. These are mere formal matters, the evidence of which is readily accessible to the pleader, and he should take the pains to ascertain such facts before taking issue thereon in the forum of conscience.

4. The remaining exceptions, stripped of all specialty and technicality, depend for their disposition upon the single question whether or not the matters and things pleaded over in the answer constitute any bar to complainants' right to the relief sought in the bill. The theory and gravamen of the bill is that one Elijah Lloyd, late husband of the oratrix and father of the orators Tyree and William Lloyd, died intestate in 1892, seised of the undivided one-half interest in certain lands situate in Jasper county, this state, and that the respondent, Guinn, is the owner of the other undivided one-half interest in said lands. After alleging the occupancy and use of said lands, and the reception of the rents and profits thereof, by the respondent, the bill seeks to have the lands partitioned, and the widow's dower assigned, and for an accounting against the respondent. The answer denies generally these averments of the bill, and then pleads affirmatively the substantive facts following, to wit: That in 1874, and prior thereto, the respondent was the owner in fee of said land. That at said time said lands were believed by respondent and said Elijah Lloyd to be mineral lands of great value; and that thereupon they formed a copartnership, under the firm name of Guinn & Lloyd, for the purpose of prospecting for mineral ores, and developing the same, and conducting mining operations thereon; and to that end entered into articles of copartnership, the principal provisions whereof are that the lands should be examined and prospected, and, in case valuable minerals were found, the same should be mined, and the product marketed. That said Lloyd was to make such examination, and give his personal attention thereto, the expenses, losses, and profits connected therewith to be equally shared between them, and securing to said Lloyd the right to purchase of respondent the one-half interest thereunder at any time during the existence of the partnership, by paying therefor such portion of the sum of \$6,000 (the original price paid therefor by respondent) as should be equal to the portion of the interest in said land purchased by Lloyd, the sum so to be paid by Lloyd to draw interest at the rate of 10 per cent. per annum from the date of respondent's purchase of said land until the same should be paid by said Lloyd. It is further provided that whenever the profits arising from mining operations and the sale of part of the land should amount to the sum of \$6,000, and be received by Guinn, together with 10 per cent. interest as aforesaid, then the said Lloyd should become owner of an undivided one-half interest in the lands remaining unsold; whereby it is averred the land became partnership property, respondent putting the land into the partnership, and the said Lloyd putting in his personal serv-

ices free of charge to the partnership. The answer then avers that in May, 1883, the profits of said mining operations amounted to the sum of \$6,000, together with 10 per cent. interest thereon, and said Lloyd thereby acquired an interest in the assets of the partnership equal to the interest of the respondent therein; and thereupon, in pursuance of the articles of copartnership, the respondent made a deed of conveyance to said Lloyd of an undivided one-half interest in said lands, and said Lloyd thereby became interested with respondent in all the partnership property, including said real estate. The answer further avers that thereafter the said partners began prospecting and mining operations further on said lands, and that from time to time respondent advanced to said partnership large sums of money for conducting the said partnership business; which said partnership was so carried on until June, 1892, when said Lloyd departed this life. That during the said copartnership the said Lloyd was the active business manager of said firm, receiving and disbursing large sums of money on account thereof, and received and drew out of the partnership assets large sums of money in excess of the amount received by respondent; and that said Lloyd appropriated to his own use a large amount of certain personal property belonging to the partnership, so that at the time of his death he had appropriated partnership property largely in excess of the amount which was received by the respondent. The answer then alleges that the partnership affairs have never been settled, and a full accounting had thereon. That soon after the death of Lloyd respondent was duly appointed by the probate court of Jasper county, Mo., having competent jurisdiction thereof, administrator of the said partnership estate, as surviving partner of said firm. That he executed a bond as such surviving partner, pursuant to the statute of the state, which was duly approved by said probate court; and that he has since been proceeding as such surviving partner and administrator to have charge of and administer said partnership estate; and that said administration has not yet been completed, but is still pending, and that the time for filing claims against said estate has not expired. That he has been and is proceeding with all reasonable dispatch to close up the affairs of said partnership. That owing to the character of the property, and the condition of the affairs of said partnership, it has been impossible for him to close up the affairs of said partnership, and he is unable to state the condition of the affairs thereof. That on a settlement thereof the said partnership will be found to be indebted to respondent in a large sum of money, which he believes will amount to the sum of \$20,000, and that said sum so due him constitutes a lien upon the land in question, and that until the closing of said partnership administration the interest of complainants in said real estate cannot be determined. The answer takes direct issue on the averments of the bill that complainants and defendant are tenants in common in the real estate, or that he has recognized that fact since the death of Lloyd, or that he has received any rents or profits of said lands as a tenant in common; but admits that during his administration as surviving partner he has received rents and royalty therefrom, which sums he



has credited to said partnership estate, and applied to the payment of partnership debts, and that as such administrator he has made and is making annually an accounting to the said probate court. The answer further alleges that upon the death of said Elijah Lloyd letters of administration were granted by the said probate court, of competent jurisdiction, on the estate of said Elijah Lloyd, to one Andrew Donnan, which estate is yet in process of administration, and that the time is not yet expired for the presentation and allowance of claims against the individual estate of said Lloyd; and it is further averred that, after the settlement of the partnership affairs, the interest of said Elijah Lloyd's heirs will be subject to the payment of the individual debts of said Lloyd.

The question, therefore, is, conceding these facts as pleaded, are the complainants entitled to proceed in partition of the lands, and for an accounting of the rents and profits thereof, against this respondent? If the lands were partnership property on the death of Lloyd, one of the partners, the right of possession, dominion, and management thereof devolved upon respondent as such surviving partner, for the purpose of administering and winding up the partnership affairs. In contemplation of law, the realty for this purpose is personal property and partnership assets. Its primary liability in his hands is for the debts of the copartnership. To this end respondent is entitled to the usufruct thereof, for the purpose of paying off partnership debts; and he may sell and dispose of such real estate, if necessary to such end. *Easton v. Courtwright*, 84 Mo. 27; *Hollman v. Nance*, Id. 674; *Duryea v. Burt*, 28 Cal. 569. The surviving partner who has advanced moneys for the use and benefit of the partnership, or for the benefit of the estate, is a creditor of the estate therefor, and is entitled to a lien on the partnership property for recompense. *Priest v. Chouteau*, 85 Mo. 398-406; *Willett v. Brown*, 65 Mo. 138. Until such administration is closed by discharge of the partnership debts, the possession of the partnership realty by the surviving partner is adverse to and exclusive of the heir at law, and hence suit in partition will not lie. *Holmes v. McGee*, 27 Mo. 597; *Priest v. Chouteau*, 85 Mo. 407; 2 *Bates*, Partn. 971 et seq.; 1 *Woerner*, Adm'n, § 126. Nor does the widow's dower attach to the deceased husband's interest until after the partnership debts are discharged. Authorities *supra*. In view of the state of the law, it is not essential that the court should discuss the extent of respondent's interest in the land, or the relative equities of the partners respecting the same. That question cannot be determined in a partition suit, if the lands were partnership property, and the partner is holding the same as surviving partner for the purposes of adjusting the partnership liabilities. Nor is it necessary for the court to undertake to determine the question, mooted by counsel, as to whether the fact that respondent, as surviving partner, has given bond to the probate court of the county where the land lies, and is accounting thereon, as surviving partner, administering the partnership estate, to the probate court, has the effect to preclude a court of chancery from entertaining a bill in equity for the adjustment of the partnership estate. The bill in question is not framed on the

theory of an unsettled partnership, but is simply for partition and accounting as between tenants in common. The answer, therefore, in my opinion, pleads matters which, if true, are a bar to the relief sought in the pending bill, and the exceptions thereto are overruled, save in the matters first indicated in this opinion.

---

LONG ISLAND LOAN & TRUST CO. v. COLUMBUS, C. & I. C. RY. CO. et al.

(Circuit Court, D. Indiana. January 28, 1895.)

No. 8,867.

**RAILROAD BONDS—SALE BY PRESIDENT—INNOCENT PURCHASER.**

Where negotiable railroad bonds perfect in form, payable to bearer, and certified by the trustee to evidence that they had become obligatory, are placed by the company in the hands of its president to sell or exchange for its benefit, they are valid in the hands of a purchaser in good faith before maturity, though they were disposed of by the president for his own benefit, after consolidation of the company with other companies, and though at the time of the purchase two of the semiannual interest coupons attached to each bond were past due.

Suit by the Long Island Loan & Trust Company against the Columbus, Chicago & Indiana Central Railway Company.

Kittredge, Wilby & Simmons, for complainant.

Lawrence Maxwell, Watson, Burr & Livesay, and S. O. Pickens, for defendants.

**BAKER, District Judge.** On or about the 1st day of November, 1864, pursuant to a resolution of its board of directors, the Columbus & Indianapolis Central Railway Company made and authorized to be issued its certain series of bonds, numbered consecutively from 1 to 1,000, inclusive, for \$1,000 each, payable on the 1st day of November, 1904, with 7 per cent. interest thereon, payable semiannually, evidenced by coupons annexed thereto. All of these bonds were duly signed by its president, and attested by its secretary, and sealed with its corporate seal. In the body of each bond was contained a provision in these words:

"This bond shall not become obligatory until it shall have been authenticated by a certificate annexed to it, duly signed by the trustee."

Each bond contains on its face, immediately below the signatures of the president and secretary, the following certificate:

"I hereby certify that this bond is one of the series of bonds described in and secured by the deed of trust or mortgage above mentioned.

"[Signed]

A. Parkhurst, Trustee."

At the same time the railway company executed a trust deed or mortgage to secure the bonds to Archibald Parkhurst, trustee, which was duly recorded in each county in the states of Ohio and Indiana into or through which the railway ran. On the 11th day of September, 1867, the Columbus & Indianapolis Central Railway Company was consolidated with other railroads, and became the Columbus & Indiana Central Railway Company. On the 1st of February,

1868, the Columbus & Indiana Central Railway Company was consolidated with other railroads, and became the Columbus, Chicago & Indiana Central Railway Company. The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, one of the respondents, has become, by proper conveyances, possessed, by lease for a long term of years, of all the property, rights, and franchises of the Columbus, Chicago & Indiana Central Railway Company during such term. Benjamin E. Smith was the president of the Columbus & Indianapolis Central Railway Company from 1864 until, by consolidation, it became the Columbus & Indiana Central Railway Company, of which last-named company he became and remained president until by consolidation it became the Columbus, Chicago & Indiana Central Railway Company, and he became and remained the president of the last-named company until 1883. After the bonds had been completed, they were taken, shortly after their date, by Smith, president, and Moodie, secretary, of the company, to Philadelphia, and thence to New York, where they remained in the possession of Smith and Parkhurst. Smith and Parkhurst were authorized to sell these bonds, or to exchange them for bonds of a prior issue. Prior to 1870 (how long Mr. Parkhurst cannot remember) all the bonds not previously sold or exchanged went into the exclusive possession of Smith. In November or December, 1875, Smith borrowed for his own use, of a firm of brokers in Philadelphia, a considerable sum of money, executing his own notes therefor, and putting up 99 of these bonds as collateral security for his notes. Among the bonds so pledged were the 36 now held by the complainant. These bonds, it appears, had never been issued until so pledged by Smith. The complainant purchased the bonds in controversy in the open market for full value, before maturity, and he is an innocent purchaser for value, unless the fact that he knew that default had been made in the payment of the interest coupons falling due May 1, 1875, and November 1, 1875, impairs his right to be so regarded. These bonds, completed as perfect obligations, with the qualities of negotiable paper, payable to bearer, were at all times in the possession of Smith, Parkhurst, or Moodie, who had authority from the company to issue them when sold or exchanged for the use of the company. The bonds in question were actually issued in 1875, by Smith, for his own use, to the Philadelphia firm of brokers, and came by sale in the open market, in due course of business, into the complainant's hands.

Counsel for the respondents state the question for decision thus:

"When a party executes a negotiable instrument, complete in form, and retains it with the intention of future use and delivery, but before such use or delivery, and without any present intention to deliver it for any purpose, it is gotten from his possession by force, crime, or fraud, and passes into the hands of an innocent purchaser before due, is the maker estopped as against the innocent purchaser from denying its validity?"

The question thus stated is elaborately argued, with the citation of many authorities, to show that the bona fide holder of such negotiable paper would not be entitled to protection. It is unnecessary to consider the question thus stated, because it does not state the

question for decision with accuracy. The true question for decision is this: When a railroad company has made its negotiable bonds, perfect in form, payable to bearer, and has caused them to be certified by the trustee, to evidence that they have become obligatory, and has placed them in the possession of its president, with authority to sell or exchange them for the benefit of the company alone, can it defeat the title of an innocent purchaser for value and before maturity by averring and proving that its president has fraudulently pledged or sold such negotiable bonds for his own private use, without its knowledge or consent, after such railroad company had become consolidated with other railroad companies? And does the fact that such negotiable bonds have two unpaid interest coupons past due annexed to each bond impair the transferee's right to be deemed a bona fide purchaser?

A purchaser of negotiable railroad bonds in good faith and for their full market value may be a bona fide holder, although some of the interest coupons attached thereto are past due and unpaid at the time of purchase. *Morgan v. U. S.*, 113 U. S. 476, 5 Sup. Ct. 588; *Thompson v. Perrine*, 106 U. S. 589, 1 Sup. Ct. 564, 568; *Railroad Co. v. Sprague*, 103 U. S. 756; *Cromwell v. County of Sac*, 96 U. S. 51; *Bank v. Kirby*, 108 Mass. 497; *McLane v. Railroad Co.*, 66 Cal. 606, 6 Pac. 748; *State v. Cobb*, 64 Ala. 127; *Boss v. Hewitt*, 15 Wis. 260.

In *Bank v. Kirby*, 108 Mass. 497, 501, the court say:

"We are referred to no case in which it has been held that failure to pay interest, standing alone, is to be regarded sufficient in law to throw such discredit upon the principal security upon which it is due as to subject the holder to the full extent of the security to antecedent equities."

"To hold otherwise," the supreme court said in *Cromwell v. County of Sac*, 96 U. S. 51, 58, "would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semiannually."

The doctrine was reaffirmed in *Railroad Co. v. Sprague*, 103 U. S. 756, and in *Morgan v. U. S.*, 113 U. S. 476, 5 Sup. Ct. 588.

But, where it appears that the interest on the bond is overdue and unpaid, this is held in some cases, and I think erroneously, to be a circumstance of suspicion sufficient to put a purchaser on his guard, and to impair his title. *First Nat. Bank of St. Paul v. Commissioners of Scott Co.*, 14 Minn. 77 (Gil. 59); *Parsons v. Jackson*, 99 U. S. 434; *Morton v. Railroad Co.*, 79 Ala. 590. The better doctrine, however, seems to be that suspicion of defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the buyer, will not affect his title. Nothing short of bad faith on the part of the purchaser of negotiable bonds passing by delivery, and which are fair upon their face, will destroy their validity; and the burden of proof lies upon the person who assails the title of the party in possession. *Murray v. Lardner*, 2 Wall. 110; *Railroad Co. v. Lewis*, 33 Pa. St. 33; *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Spence v. Railroad Co.*, 79 Ala. 576; *Goodman v. Simonds*, 20 How. 343.

The fact that two interest coupons attached to each of the bonds

were past due and unpaid at the time of his purchase, standing alone, does not impair the complainant's right to be deemed a bona fide purchaser of the bonds, and entitled to protection as such. *Anon.*, 1 Salk. 126, was a cause where a bank bill payable to A., or bearer, had been lost, and was found by a stranger, who paid it to C., for a valuable consideration. It was held by Holt, C. J., that A. could not maintain trover against C., "by reason of the course of trade, which creates a property in the assignee or bearer." Since the decision of Lord Mansfield in *Miller v. Race*, 1 Burrows, 452, there has been no serious dissent from the doctrine that the want of delivery of bank notes and other paper intended to circulate as money is not available against a bona fide holder for value, who has taken the same in due course of trade. *Worcester Co. Bank v. Dorchester & M. Bank*, 10 Cush. 488. If a perfected bank note were stolen from the vaults of a bank before it was issued, and it should be passed by the thief in due course of trade, for value, to a bona fide holder, the latter would acquire a good title as against its true owner. In respect of negotiable promissory notes, perfect in form, it has been held in some cases that the want of delivery by the maker will not be available to defeat the title of a bona fide purchaser for value and before maturity. *Kinyon v. Wohlford*, 17 Minn. 239 (Gil. 215); *Shipley v. Carroll*, 45 Ill. 285; *Clarke v. Johnson*, 54 Ill. 296; *Gould v. Segee*, 5 Duer, 260. In this country, however, the entire absence of delivery of negotiable notes and bills has been regarded, in a majority of the cases, as a sufficient defense even against a bona fide holder, unless the maker has executed an instrument perfect in form, and has been guilty of negligence in letting it go out of his possession, and thereby given an opportunity to negotiate it to an innocent purchaser. *Burson v. Huntington*, 21 Mich. 415; *Hall v. Wilson*, 16 Barb. 548; *Chipman v. Tucker*, 38 Wis. 43; *Carter v. McClintock*, 29 Mo. 464. In England there are no decisions which have come under my notice necessarily determining the question. Some of the dicta affirm that delivery is indispensable (*Marston v. Allen*, 8 Mees. & W. 504; *Baxendale v. Bennett*, 3 Q. B. Div. 525); while others deny that the want of delivery by the maker will avail to defeat the title of a bona fide purchaser for value before maturity (*Ingham v. Primrose*, 7 C. B. [N. S.] 82, 5 Jur. [N. S.] 710; *Young v. Grote*, 4 Bing. 253).

It is generally agreed that the delivery of negotiable paper left in escrow, contrary to the terms upon which it was to have been delivered, will pass a good title to the bona fide transferee for value and before maturity. *Fearing v. Clark*, 16 Gray, 74; *Graff v. Logue*, 61 Iowa, 704, 17 N. W. 171. In a note to *Willard v. Nelson* (Neb.) 53 N. W. 572, the editor, after reviewing many authorities, says:

"We think the better rule is that he who signs a writing knowing that it is intended to be used, or may be used, for some business purpose, must at his peril ascertain that it is not a negotiable instrument, and, failing to do this, is liable absolutely, though he was procured to sign it by some fraudulent device or misrepresentation, or, having signed it advisedly, it was taken from his possession by fraud or theft, and without any intention on his part to deliver it to any one, or to let it be negotiated for his benefit or otherwise."

Negotiable railroad bonds, payable to bearer, are intended to pass from hand to hand in all the money markets of the world. It is the understanding of the commercial world that the purchaser of such bonds may safely rely on the title evidenced by possession as the true title, and that, in the absence of fraud or negligence so gross as to justify the inference of fraud, the title of a bona fide purchaser for value before maturity is unassailable. Any other understanding would cast suspicion upon such bonds, and impair, if it did not defeat, the purpose of their issue. And so it has been said that a purchaser of negotiable bonds before maturity, in the usual course of business, acquires a good title thereto, although they may have been stolen; and in a suit by the purchaser of such the burden of proof that he did not acquire them in good faith is upon the defendant. *Evertson v. Bank*, 66 N. Y. 14; *Spooner v. Holmes*, 102 Mass. 503; *Seybel v. Bank*, 2 Daly, 383, 54 N. Y. 288; *California v. Wells, Fargo & Co.*, 15 Cal. 336; *Association v. Avegno*, 28 La. Ann. 552; *Carpenter v. Rommel*, 5 Phila. 34; *Gilbough v. Railroad Co.*, 1 Hughes, 410, Fed. Cas. No. 5,419; *Miller v. Race*, *supra*. Such negotiable bonds, in a certain sense, are the representatives of money, and freely pass by delivery in the money markets of all commercial countries. To accomplish this purpose, the holder of a perfected bond must be deemed to be the true owner, and be able to invest an innocent purchaser for value and before maturity with an unimpeachable title. The title of a bona fide holder of such bond ought to stand on as secure a foundation as that of a person who receives a bank note in the ordinary course of business. Any other doctrine would, in my judgment, undermine the very structure of commercial law, and shake the foundations of such paper credits.

Each bond bears on its face the statement: "This bond shall not become obligatory until it shall have been authenticated by a certificate annexed to it, duly signed by the trustee." And each bond contains the certificate of the trustee that the bond is one of the series of bonds described in and secured by the trust deed or mortgage. The bonds could in no event become obligatory until the certificate of the trustee was annexed to them. This act of the trustee, when performed, was to authenticate the bonds; that is, "to determine as real and true" each bond so authenticated. When thus authenticated, its effect was to render them obligatory, and to pronounce them the genuine and valid bonds of the obligor. A bona fide purchaser, in the usual course of business, could safely rely on the declaration in the bond that, when authenticated by the certificate of the trustee, it should then become obligatory. The bonds in suit were properly authenticated by the trustee on or about November 1, 1864. From that time they became the binding and valid obligations of the maker in the hands of any bona fide purchaser for value and before maturity. The maker of the bonds and those acquiring the property conveyed by the trust deed to secure their payment are estopped to deny their validity in the hands of such innocent holder for value. The respondents are chargeable with negligence in failing to require the surrender of all unissued bonds before consenting to take the property with an incumbrance

upon it securing negotiable bonds which might pass into the hands of innocent purchasers unless they were canceled and destroyed. Both of the respondent companies had it in their power to require the production and cancellation of these bonds before they had acquired any interest in the incumbered estate. This they failed and neglected to do. They confided in the honesty of the officers intrusted with the custody of the bonds to make no fraudulent use of them. Their trust has been abused, and the familiar principle applies that "he who trusts most shall suffer most." In my opinion, the respondents have failed to make out any defense which would justify the court in denying the complainant the relief sought by its bill. There will be a decree for complainant.

---

**BARKER v. NORTHERN PAC. RY. CO.**

(Circuit Court, E. D. Missouri, E. D. February 2, 1895.)

No. 3,774.

**1. RELEASE—RESCISSION—IMPROVIDENCE.**

The settlement of a claim for personal injuries will not be set aside merely because it is improvident.

**2. SAME—INCAPACITY OF PERSON CONTRACTING.**

The mere fact that a person at the time of making a settlement for personal injuries was still sensitive of her injuries, and had been taking medicine, is not ground for rescission; the medicine not being such as to impair her mental faculties, nor the pain such as to subvert her judgment.

**3. SAME—RETURN OF CONSIDERATION.**

One cannot have a settlement for injuries rescinded, without having offered to return the money received thereunder.

**4. SAME—MISTAKE.**

Settlement of a claim for injury to person and loss of property will not be rescinded on the ground that it was intended only to cover the loss of property, where there was no fraud, simply because the party seeking to set it aside failed to inform herself of what was contained in the agreement.

Suit by Barker against the Northern Pacific Railway Company to set aside a settlement of a claim for personal injuries.

Charles E. Gibson, for complainant.

Campbell & Ryan, for defendant.

**PRIEST**, District Judge. Plaintiff, who was injured in the derailment of one of the respondent's passenger trains on the early morning of January 15, 1892, and who on January 26th, following, made a settlement of her damages for the sum of \$500, and for that consideration, which she retains, executed a release, now seeks to set aside the release, upon the grounds—First, that it was procured from her by fraud and artifice, at a time when she was not master of her mental faculties; and, second, that it does not express the true agreement, she having only settled for the loss of her personal effects, while the release embraces her personal injuries as well.

I find, as a fact, no artifice or fraud was practiced upon her, and at the time she made the adjustment, and executed the release,

she was in a condition of perfect mental self-possession, capable of comprehending, and actually comprehending, each successive step in the progress of the settlement. Whether the settlement was a wise one, is a question upon which a court is not at liberty to enter, after it has ascertained that she had ample understanding to appreciate its scope, and know what she was doing. Courts of equity cannot, any more than courts of law, relieve parties from the bonds of improvident, hasty, or illy-considered agreements. But, were the question now presented to me whether the contract was a provident one for her to have made, I could not say that it was not. Manifestly, the injury was not wantonly inflicted. The cause of the accident is not revealed by the testimony. It is true, a passenger makes a *prima facie* case, but not a conclusive one, by merely proving the derailment of the train. A trier of fact might, in the very nature of the accident, find circumstances and conditions which would repel the *prima facie* case, and refuse to apply an inference of negligence. This presumption may be conclusively overcome. The plaintiff's injuries are comparatively slight. They were not permanent, nor of an excruciatingly painful character. The fair inference is that her most serious injury was occasioned by an effort to extricate her from the car, in pulling her out by the arm. Her arm was dislocated at the shoulder joint, but was readily reduced. It is true that the injury was painful, but so ordinarily, for only a short time. I should say, conceding plaintiff an unquestioned and undebatable right to recover, that her damages, including loss of property, as well as personal injuries, ought not fairly to exceed twelve or fifteen hundred dollars. The prompt settlement of the case at a compromise of five hundred dollars, the amount paid plaintiff, in my opinion, was a reasonable and fair adjustment. It is true that the plaintiff had been taking medicine and was still sensitive of her injury; but the medicines administered to her were not of a character to impair her mental faculties, nor was her physical pain of a nature to subvert her judgment. If persons are to be denied the capacity to make a valid contract, because suffering a slight pain or sickness or nervousness, but few contracts could be sustained by the courts. I suppose the majority of wills are made upon beds of sickness, in appreciation by the testator of an early dissolution. Those conditions are never held sufficient to discredit and overthrow the wills. The usual inquiry and test is whether the party possessed sufficient understanding to know the nature of the act and its effects. If this be answered in the affirmative, that is an end of the matter. Why such a rule should not be applied in cases of contracts, I can find no substantial reason. It may be that a person in a condition of illness is less able to resist strong importunities and persistent persuasion than in a state of health; and undue persuasion, under these circumstances, may amount to coercion. But I find nothing of that sort in this case. The representative of the railway company, according to plaintiff's own testimony, was not so insistent.

But there is another insurmountable obstacle in the complainant's way upon this feature of this case; and that is, although she desires to set aside the contract of release, she still retains the con-



sideration, and has never offered to return it. Where a party attempts to rescind a contract, the rescission must be complete. He cannot affirm it in part and reject it in part. Common honesty would require him seeking to escape the burdens of the contract to return the benefits which he has received. This is not only a rule of common honesty and fairness, but has been recognized by the courts from time immemorial. There are some few exceptions where railroads have been involved, but they simply illustrate that courts sometimes give way to sentiment, and allow compassion and sympathy to rule, instead of tranquil judgment. And these offers of restitution should come promptly, not reluctantly or tardily. To withhold a restitution is to exhibit a want of confidence in the integrity and justness of his case, who complains of a contract, and seeks to set it aside because of fraud. *Vandervelden v. Railway Co.*, 61 Fed. 54; *Johnson v. Granite Co.*, 53 Fed. 569; *Gould v. Bank*, 86 N. Y. 75; *Cobb v. Hatfield*, 46 N. Y. 533; *Thayer v. Turner*, 8 Metc. (Mass.) 550; *Kimball v. Cunningham*, 4 Mass. 502; *Doane v. Lockwood*, 115 Ill. 490, 4 N. E. 500; *Railway Co. v. Hayes* (Ga.) 10 S. E. 350; *Burton v. Stewart*, 3 Wend. 236; *Bain v. Wilson*, 1 J. J. Marsh. 202; *Jarrett v. Morton*, 44 Mo. 275; *Hart v. Handlin*, 43 Mo. 171; *Estes v. Reynolds*, 75 Mo. 563; *Kerr, Fraud & M.* 366.

But it is said that the written instrument does not express the agreement of the parties; that the agreement was made solely with respect to the personal property belonging to plaintiff, which was burned up in the wreck. This would seem to be inconsistent with the other ground urged for setting aside the release, for this recognizes, upon the part of the plaintiff, a mind capable of contracting, and having conceived a perfect understanding in regard to the terms of a valid settlement, but that, through mistake or fraud, the written instrument evidencing the agreement was made to comprehend more than was actually agreed upon. Were the case presented alone upon the plaintiff's evidence, I should be compelled to find against her upon this issue. It is necessarily inferred from the plaintiff's testimony that the basis upon which the settlement was arrived at, comprehending both her personal injuries and the loss of personal effects, was upon the value of the personal property lost. She inquired whether, in the settlement, she would not be allowed for the pain she would suffer and had suffered in consequence of personal injury; and, according to her own statement, it was replied to her that, unless she accepted the \$500 in full settlement, she would get nothing. But the instrument was read to her. She signed it,—not only signed this particular release, but one for her minor son, who was in the room with her at the time, to the same effect, settling for his personal injuries, as well as his loss of personal property. If she did not understand it, she had a right to require it to be read until she did understand it. She cannot impute her neglect to know the contents of the instrument which she signed, as a fraud upon the part of the defendant. Where there is an attempt to cancel a contract on the ground of a mistake, it must be shown that the mistake was mutual, or a mistake by the one party and a fraud by the other; and the proof must be so full, clear, and decisive as to leave no rea-

sonable doubt in the mind of the chancellor. Story, Eq. Jur. § 140, note a, and authorities. Again, a relief will not be given against a mistake, where the party complaining had within his reach the means, or at hand the opportunity, of ascertaining the true state of facts, and neglected to take advantage of them. Brown v. Fagan, 71 Mo. 563; Railroad Co. v. Shay, 82 Pa. St. 198; Wallace v. Railroad Co. (Iowa) 25 N. W. 772; Hinkle v. Railway Co. (Minn.) 18 N. W. 275; Pederson v. Railway Co. (Wash.) 33 Pac. 351. The bill will be dismissed at complainant's costs.

---

CHICAGO DOLLAR DIRECTORY CO. et al. v. CHICAGO DIRECTORY CO.

(Circuit Court of Appeals, Seventh Circuit. January 18, 1895.)

No. 210.

1. APPEAL—ORDER ENTERED ON MOTION OF APPELLANTS.

Defendants moved to dissolve a preliminary injunction, and their motion was denied. Subsequently, upon motion of defendants' attorneys, an order was entered correcting defects in the order first entered, but still denying the relief sought. *Held*, that defendants did not waive their right of appeal by procuring the entry of such order.

2. SAME—ORDER CONTINUING TEMPORARY INJUNCTION.

When a temporary injunction is granted, to continue in force "until the further order of the court," and a motion is made to dissolve it, and the court refuses to dissolve the injunction or orders it continued in force, its operation and effect thereafter depend upon the order so made, which may be appealed from accordingly.

3. SAME—IRREGULARITY IN BOND—CORRECTION.

An order was made by the court, continuing a preliminary injunction, and allowing an appeal upon the defendants' filing a bond, in an amount named, with sureties to be approved by the clerk. *Held*, that though the sureties should have been approved by the judge, and the bond taken by the clerk was therefore irregular, the appeal should not be dismissed for this reason, but the appellants should be given an opportunity to file a bond properly approved, and, upon their doing so, the motion to dismiss should be overruled.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Banning & Banning and H. C. Fancher, for appellants.

John J. McClellan and L. L. Bond, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge. On June 23, 1894, the court below granted a temporary injunction to continue in force "until the further order of the court." On July 17, 1894, the defendants below (appellants here) filed their written motion, praying the dissolution of the injunction for reasons stated. On September 19, 1894, the motion for the dissolution of the injunction theretofore made came on to be heard, and, after hearing had, the court denied the motion.

On September 20, 1894, the court made the following order:

"It is ordered that the National Gazetteer Association be, and the same is hereby, stricken from the injunction writ, without prejudice to the said writ."

On October 8, 1894, the following was entered of record:

"Upon motion of S. P. Douthart and H. C. Fancher, solicitors for defendants, the orders heretofore entered in said cause, denying the motion to dissolve the injunction, and amending the writ of injunction herein, are corrected and amended so as to read as follows: 'This cause coming on for further hearing, and having been argued by counsel for the respective parties, and the court being fully advised in the premises, doth order that the preliminary injunction granted herein of the 23d day of June, 1894, be, and the same is hereby, dissolved as to the National Gazetteer Association, but continued in force and effect as to all the other defendants until the final hearing herein, or until the further order of the court. And thereupon the defendants pray an appeal from so much of this order as continues said injunction in force, to the United States circuit court of appeals for the Seventh circuit, which appeal is allowed upon the defendants filing a good and sufficient appeal bond in the penal sum of five hundred dollars, with sureties to be approved by the clerk. On the same day, to wit, the 8th day of October A. D. 1894, came the defendants, by their solicitors, and filed their assignment of errors, and prayed an appeal to the United States circuit court of appeals for this circuit; whereupon it is ordered that said appeal be allowed upon the defendants' filing a good and sufficient appeal (bond), and in the penal sum of five hundred dollars, and a citation issued returnable on the 3d day of November next.'"

On the 10th day of October, 1894, an appeal bond in the penal sum of \$500 was filed with and approved by the clerk. On the 13th day of October, 1894, a transcript of the record was certified to this court by the clerk of the court below, and was filed in the office of the clerk of this court, October 27, 1894. The appellee has interposed a motion to dismiss this appeal upon various grounds, which will be considered in the order of their statement.

First, it is insisted that the order appealed from was entered on the motion of the solicitors of the appellants, and they cannot allege it as error and appeal therefrom. Whether the amended order of the court entered on October 8, 1894, is to be treated as a nunc pro tunc entry, to operate as of the date of the orders which it amended, or is to be deemed an order taking effect as of the date of its entry, it is not material to determine. Viewed in either aspect, the appeal was attempted to be taken in apt time. The appeal was asked for and allowed by the court on the 8th day of October, and at the same time an assignment of errors was filed. The appeal was granted on the condition that a bond in the penal sum of \$500 was filed with and approved by the clerk, and a citation was ordered issued, returnable November 3, 1894. The bond was filed with and approved by the clerk, October 10, 1894, and the citation was issued and served. It is true that the amended order was made at the request of counsel for the appellants. But the request of counsel to have the court correct and amend its prior orders ought not to be deemed a waiver of their right of appeal. The court had made its orders of September 19th and 20th, denying the appellants' motion, which orders had the effect to continue the injunction in force. The order entered October 8th simply corrected the orders of September 19th and 20th. By asking the court to cause the orders which it had actually made to be corrected of record, the appellants did not assent to the correctness of the orders, nor waive their right to appeal therefrom. The orders were not made at their request, because the court, by its orders, denied them the relief which they asked. While the decision was ad-

verse to their contention, they had an interest in having the orders actually made correctly entered of record; and their request to have this done will not bar their right of appeal.

It is next contended that the order entered on October 8th did not continue in force the injunction granted June 23d, and was wholly inoperative, because the injunction continued, and still continues, in full force, by virtue of its own terms. The provisions of section 7 of the appellate court act (26 Stat. 826) are remedial in their nature, and ought to be liberally construed. An interlocutory injunction may prove as destructive to the interests of the party enjoined as would a perpetual injunction granted on final hearing; and it was the obvious purpose of congress to enable the party thus injuriously affected to have a speedy review, that he may be relieved from the consequences of a wrongful or improvident injunction. The order appealed from in terms dissolved the injunction so far as it related to the National Gazetteer Association, and adjudged that it be "continued in force and effect as to all the other defendants until the final hearing, or until the further order of the court." It is argued that this order ought not to be construed as one continuing in force the injunction of June 23d, inasmuch as the section in question was only intended to apply to the case of an injunction having a definite limitation, and afterwards continued in force by a subsequent order, or to the case of an injunction granted by a district judge, which, under the provisions of sections 718 and 719, Rev. St., is limited in point of duration to the first term of the circuit court, and which for its continuance requires the order of that court. The section thus construed would limit the cases in which an appeal might be taken from an order continuing an interlocutory injunction to the two classes of cases just mentioned. We are not disposed to give it so narrow a construction. When a temporary injunction is granted to continue in force "until the further order of the court," and a motion is made to dissolve it, the continuance of the injunction in force is the question for hearing and judgment, and it is the duty of the court either to dissolve the injunction or continue it in force; and when the court refuses to dissolve the injunction, or orders it continued in force, its operation and effect thereafter depend upon the order so made. This construction gives effect to the plain language of the statute, and best effectuates the remedial purpose of its enactment. The case of *Boston & A. R. Co. v. Pullman's Palace-Car Co.*, 2 C. C. A. 172, 51 Fed. 305, in no wise conflicts with these views. That was a case which arose on the overruling of a petition for a rehearing and a motion to dissolve a perpetual injunction granted on a final hearing. In such a case the question of the continuance of the injunction was no longer in gremio legis. Besides, it was not a ruling touching an interlocutory injunction, and was therefore not within the terms of section 7.

The claim that the appellants failed to file with the clerk of the court below, at the time the appeal was prayed and allowed, an assignment of errors, is not supported by the record before us.

The filing of the bond with the clerk on the 10th day of October, in pursuance of the order of the court, was irregular; but we are not disposed to dismiss the appeal on account of such irregularity. The course pursued was undoubtedly attributable to the order of the court made on the 8th of October. The irregularity is one which was amendable below, and, as no substantial right of the appellee is affected by it, we are not disposed to dismiss the appeal for this reason.

The appellee insists that the appeal ought to be dismissed, because the surety in the appeal bond was not taken by the judge, but by the clerk of the court below.

Speaking of a like objection, the supreme court in *O'Reilly v. Edrington*, 96 U. S. 724, said:

"The security required upon writs of error and appeals must be taken by the judge or justice. Rev. St. § 1000. He cannot delegate this power to the clerk. Here the approval of the bond was by the clerk alone. The judge has never acted; but, as the omission was undoubtedly caused by the order of the court permitting the clerk to take the bond, the case is a proper one for the application of the rule by which this court sometimes refuses to dismiss appeals or writs of error, except on failure to comply with such terms as may be imposed for the purpose of supplying defects in the proceedings. *Martin v. Hunters' Lessee*, 1 Wheat. 361; *Dayton v. Lash*, 94 U. S. 112."

In our opinion, the like practice ought to be followed in this court; and we shall adopt it in the present case.

It is lastly insisted that the appellants did not file or cause to be filed with the clerk of this court, within 30 days from the time of the allowance of the appeal, a copy of the record. The copy of the record was filed October 27th, and within 30 days from the time the appeal was prayed and allowed from the order entered October 8th. And, if the appeal should be deemed to be taken from the order of September 19th, it ought not to be dismissed, for the reason urged, because the defect or irregularity in the time of filing the copy of the record is cured by its subsequent filing, unless a motion to docket and dismiss has been previously made. Rule 16 of this court (47 Fed. viii.); *Freeman v. Clay*, 1 C. C. A. 115, 48 Fed. 849. This question has been ruled in the same way in a former unreported decision of this court.<sup>1</sup>

The order of the court is that this appeal shall stand dismissed unless the appellants shall within 10 days file with the clerk below a bond in such penalty as is fixed by the court below, and to be approved by the judge of that court, and cause a certified copy thereof to be filed with the clerk of this court. Upon the filing of a certified copy of such bond with the clerk of this court, the motion to dismiss shall stand overruled.

---

#### WELD v. GOLDENBERG.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 32.

#### CONTRACTS—INTERPRETATION—GUARANTY.

G. sold to W. a lot of land upon which he was, at the time, constructing a building, the contract of sale containing a provision that G. "covenants

<sup>1</sup> *Woodland Mill Co. v. Standard Oil Co.* (No. 60). No opinion was filed in this case.

and agrees that the building now being erected on the said premises shall be completed at his expense before the delivery of the deed herein, in accordance with the plans and specifications of A. Z., Esq., architect." The plans and specifications, which were in existence at the time the contract was made, called for the use of certain materials and the doing of certain work, to construct a waterproof cellar, and for a guaranty by the contractor that the cellar should remain watertight for five years. *Held*, that G., by this contract, only bound himself to furnish a cellar constructed upon the plans and specifications of the architect, and accompanied by the contractor's guaranty, and did not covenant to furnish a waterproof cellar at all events.

This was an action by Ellen H. Weld, as residuary legatee of William F. Weld (in whose place she was substituted as plaintiff after the commencement of the action), against Simon Goldenberg, to recover damages for the nonperformance of a contract. The circuit court dismissed the complaint. Plaintiff brings error.

George A. Strong, for plaintiff in error.

Carlisle Norwood, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The undisputed facts in this case are that on October 10, 1890, the defendant, Simon Goldenberg, was the owner of land on the corner of Wooster and Broome streets, in the city of New York, upon which he was erecting a six-story warehouse, for which plans and specifications had been made by Alfred Zucker, an architect. On that day, Goldenberg entered into a written agreement with William F. Weld to sell the latter this land, and to complete at his (Goldenberg's) expense said warehouse, in accordance with the plans and specifications of the architect, at a specified time, for the sum of \$326,000. The building was completed at the proper time. Mr. Weld claimed that it had not been properly completed, and that the cellar was not waterproof, but paid the contract price, and received a deed of the premises, under a written agreement between the contracting parties that the acceptance or the payment should not operate to waive any of his existing rights. Subsequently, Weld brought this action at law against Goldenberg, before the circuit court for the Southern district of New York, to recover damages for the alleged nonperformance of Goldenberg's contract of October 10, 1890.

The fourth and fifth paragraphs of the complaint are as follows:

"Fourth. The aforesaid written agreement for the sale of said property contained a provision as follows: 'The party of the first part covenants and agrees that the building now being erected on the said premises shall be completed at his expense, before the delivery of the deed herein, in accordance with the plans and specifications of Alfred Zucker, Esq., architect, and delivered to the party of the second part, so as to be in all respects ready for occupation by the proposed tenant.'

"Fifth. Among the plans and specifications referred to in the provision above set forth, and delivered by defendant to this plaintiff in accordance therewith, were certain specifications for the work and materials required to construct a cellar, for the building then being constructed upon the premises aforesaid, including boiler vault and vaults under sidewalks, which cellar was to be a waterproof cellar."

The complainant further alleged, in the seventh and eighth paragraphs, that:

"After plaintiff received delivery of the aforesaid deed, great injury was caused to him by the fact that said cellar was not waterproof, but that, on the contrary, it permitted water to enter. Repeated notices of this fact were thereupon given to the defendant, and said cellar remained in a defective condition, in violation of the defendant's covenant. Thereupon the plaintiff was compelled to provide, at his own expense, said building with a really waterproof cellar, to his damage \$20,000."

Annexed to the defendant's answer were the contract of October 10, 1890, which contained the clause quoted in the fourth paragraph of the complaint, and the specifications in regard to waterproofing, and a contract dated April 21, 1890, between Goldenberg and William H. Arnott & Co., the contractors for waterproofing the cellar. The heading of the specifications was as follows:

"Specifications of waterproofing work and materials required to construct a waterproof cellar, including boiler vault and vaults under sidewalks under the six-story warehouse on the northwest corner of Broome and Wooster streets, in the city of New York, for Simon Goldenberg, Esq., owner, agreeable to plans, etc., prepared for the purpose by Arthur Zucker, architect, 346 Broadway, New York City."

The specification provided that the contractor should guaranty that the cellar should remain dry and watertight for five years from the completion of the building, and required him to do all the work and furnish the material necessary to carry out the guaranty. This guaranty was entered into by the contractors.

After the complaint was brought, William F. Weld died, and Ellen H. Weld, his residuary legatee, who was vested with the title to the claim in suit, was substituted as plaintiff. Upon the trial of the cause, after the jury was impaneled, the defendant moved to dismiss the complaint, because, among other reasons, the plaintiff did "not allege that the cellar was not waterproof in consequence of any failure on the part of the defendant to complete the building, including the cellar, in accordance with the plans and specifications." The court dismissed the complaint, and entered judgment for the defendant, to which direction or order the plaintiff duly excepted, and by writ of error brought the question before this court.

As the entire contract between the parties and the specifications for waterproofing were annexed to the defendant's answer, and were conceded to be correctly set forth, the question which was raised upon the defendant's motion was that of the construction of a written contract, viz. whether Goldenberg agreed to deliver a waterproof cellar, or a cellar constructed in accordance with the architect's plans and specifications, accompanied with the guaranty of the contractor that it should be watertight for five years. The complaint was founded upon the theory that the defendant covenanted to furnish a waterproof cellar, although it might have been built in accordance with the architect's plans, and consequently that the defendant would be liable, although the defect was caused by a defective system. The defendant's theory is that he was only called upon to complete the building as he had commenced, under and in accordance with the architect's plans and specifications. Goldenberg,

being the owner of real estate, had commenced its improvement by the erection of a large warehouse, had procured plans and specifications from an architect, had made contracts for the construction of the building and had leased it for five years and one month from January 1, 1891,—the date of its expected completion. In this state of affairs, he made a written contract for the sale of the land, the completion of the building in accordance with the existing plans and specifications, and the delivery of a deed when the building was finished. If he entered into a covenant to make a waterproof cellar, the undertaking must be found in the specifications; and from thence it was incorporated in the contract, by virtue of his promise to construct in accordance with the specifications. But, when the specifications are looked into, they contain the particulars which the architect thought or hoped would produce a watertight cellar, coupled with the requirement that the contractor should guaranty that his waterproofing should keep the cellar watertight for five years. If the cellar should be constructed according to the specifications, no promise or agreement is to be found emanating from the architect or the owner that the result would be accomplished, but there is a requirement that the contractor should promise that the desired result should exist for five years. Goldenberg's agreement, after incorporating into it the specifications, then was that the building should be arranged, erected, and constructed according to the designated plans, of the designated materials, and in the designated way, and that, in addition, he would have the agreement of a contractor to add to those materials whatever other materials might be required to carry into execution his contract in regard to the good results of his work. With this covenant Goldenberg complied, and procured the agreement of apparently responsible contractors. Inasmuch as he did all he promised to do, he is not responsible for the failure of the system of waterproofing which his architect selected, and which the contractors undertook should be successful.

The judgment of the circuit court is affirmed, with costs.

---

### PRICKETT v. CITY OF MARCELINE.

(Circuit Court, W. D. Missouri, W. D. January 21, 1895.)

#### 1. MUNICIPAL INDEBTEDNESS—BASIS OF LIMIT—LAST ASSESSMENT.

Under Const. Mo. art. 10, § 12, declaring that no city shall incur an indebtedness exceeding 5 per cent. of the value of its taxable property, "to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness," an assessment cannot be considered which has not passed the state board of equalization.

#### 2. SAME.

The extension by a city of the assessment for state and county purposes for taxation by the city for city purposes is not an assessment within the constitutional provision.

#### 3. SAME—BONDS—DATE OF INDEBTEDNESS.

Under Rev. St. Mo. 1889, § 847, providing that before any bond issued by a city shall be valid it shall be presented to and registered by the state



auditor, the date of such recording is not the time when the municipal indebtedness is incurred, but the date of the execution and issue thereof, from which time, by their terms, they bear interest.

4. SAME—RECITALS IN BOND—ESTOPPEL.

Where a city has incurred an indebtedness in excess of the limits imposed by Const. Mo. art. 10, § 12, it is not estopped, by recitals in the bonds representing the indebtedness, from alleging their invalidity.

5. SAME—CERTIFICATE OF STATE AUDITOR ON BONDS.

A city may deny the validity of its bonds because creating an indebtedness in excess of the limit fixed by Const. Mo. art. 10, § 12, notwithstanding recitals thereon in the certificate of the state auditor, who, by provision of Rev. St. Mo. 1889, § 847, must register them before they shall be valid, it being further provided that his certificate shall be only prima facie evidence of facts therein stated.

6. SAME—ENTIRE ISSUE OF BONDS INVALID.

All the bonds of a single issue, which exceeds the indebtedness of a city beyond the constitutional limit, are invalid.

**Action by William R. Prickett against the city of Marceline.**

Suit on municipal bonds. The city of Marceline was incorporated as a city of the fourth class under the Missouri statutes in March, 1888. At that time it was but a village with few people, and its territory was little more than farming lands. Its board of council levied no taxes for city purposes that year. The Santa Fé Railroad was located through this town, and established there a division. Extensive coal fields adjacent to the city were soon opened up and developed. These things collected there quite a number of railroad operatives and miners, until in 1890 the census showed a population of this character of about 1,900. Its council, in June, 1890, submitted to the voters of the city the proposition to authorize the issue of bonds to the amount of \$6,000, in denominations of \$500 each, for the purpose of constructing therein a plant for lighting the city with electricity. The proposition was voted, and, on the 2d day of July, 1890, the bonds were issued, running for 20 years, with the right of earlier redemption, and with semiannual coupons of interest attached, payable January 1st and July 1st of each year. The bonds provided on their face that in case of default in payment of any of the interest coupons, at the election of the holder of the bonds, the principal and remaining coupons should become due and payable. The interest was paid by the city for two years, when the city declined to make further payment. The plaintiff, as holder of four of said bonds, aggregating the sum of \$2,000 of principal, with attached coupons, and of other coupons detached from other bonds, brings this action to recover thereon. The defendant answers, admitting the issue of the bonds, but pleads that the same are invalid, for the reason that the then indebtedness of the city, together with the said bonds so attempted to be issued, in the aggregate, exceed 5 per cent. of the value of the taxable property within the said city of Marceline, ascertained by the assessment next before the last assessment of property of said city for state and county purposes previous to the attempt to incur said indebtedness, said indebtedness not being for the erection of a courthouse or jail. A jury being waived, the case is submitted to the court on the proofs. The evidence in the case shows that the assessed value of the property within said city, under the assessment of 1888, which was next before the last assessment of property in said city for state and county purposes, did not exceed \$80,000.

H. A. & A. C. Clover, for plaintiff.

Harry K. West and Lathrop, Morrow, Fox & Moore, for defendant.

PHILIPS, District Judge (after stating the facts). It is important at the threshold of this discussion that the preliminary question should be disposed of as to what particular assessment must be referred to in ascertaining the valuation of the taxable property within the city, within the meaning of the state constitution, admitting the

creation of an indebtedness of \$6,000, demanded by the issue of these bonds. The state constitution (article 10, § 12) is as follows:

"No county, city, town, township, school district or other political corporation or subdivision of the state, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness; provided, that with such assent, any county may be allowed to become indebted to a larger amount for the erection of a courthouse or a jail. And provided further, that any county, city, town, township, school district or other political corporation or subdivision of the state, incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof, within twenty years from the time of contracting the same."

The value of the taxable property is "to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness." The petition avers that the bonds were "made and issued \* \* \* on or about the 2d day of July, 1890," and the bonds on their face show that they were executed on said day; and, in fact, they are by their terms made to bear interest from that date, and the petition discloses the fact that the holders of the bonds collected and received interest thereon from the 1st of July, 1890.

The contention of complainant's counsel that the debt did not attach until the 6th day of August, 1890,—the date when the state auditor indorsed his certificate of registration on the bond,—is, in my opinion, not tenable. The statute (section 847, Rev. St. Mo. 1889) provides that:

"Before any bond hereafter issued by any county, city, town, village or school district, for any purpose whatever, shall obtain validity, or be negotiated, such bond shall first be presented to the state auditor who shall register the same," etc.

The purpose of this statute was to invalidate and obstruct the negotiation of any such bonds unless so registered. But, when registered, the bond "issued by any county, city," etc., unquestionably relates back to the date of the issue, and becomes operative therefrom. The indebtedness, therefore, was created of date July 2d, 1890.

When was the last assessment prior to July, 1890, "for state and county purposes"? It is confounding the marked distinction between the act of assessment for state and county purposes, and the formal act of extending the assessment for taxation by the city officers for city purposes, to suggest that the latter constitutes an "assessment," within the meaning of the constitution. The assessment of property for state and county purposes is conducted alone by and intrusted to the county assessor, the state and county boards of equalization. While property held on June 1st of each year is

liable for taxes for the ensuing year (section 7569, Rev. St. Mo.), the assessor of the county is required, "between the first day of June and January, \* \* \* to take a list of the taxable personal property in his county, town or district, and assess the value thereof," as provided (section 7531, Id.). And by section 7552 it is provided that:

"Real estate shall be assessed at the assessment which shall commence on the first day of June, 1881, and shall only be required to be assessed every two years thereafter. Each assessment of real estate so made shall be the basis of taxation on the same for the two years next succeeding."

The state constitution (article 10, § 18) provides that:

"There shall be a state board of equalization consisting of the governor, state auditor, state treasurer, secretary of state and attorney general. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the state, and it shall perform such other duties as are or may be prescribed by law."

This provision of the constitution is self-enforcing, without the aid of legislative enactment. *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 294. The county assessor is required to make out and return to the county court, on or before the 20th day of January in every year, a copy of the assessor's book; and the clerk of the county court is required to make out, on or before the 20th day of February, an abstract of the assessment book, etc., and forward the same to the state auditor, to be laid before the state board of equalization. Rev. St. Mo. § 7571. The state board of equalization meets at the capitol of the state on the last Wednesday of February, 1884, and every two years thereafter, when the state auditor is required to lay before it the abstracts of all taxable property in the state returned to him by the county clerks; whereupon said board proceeds to equalize the valuation of the taxable property among the respective counties by adding "to the valuation of the property, real and personal, in each county, which they believe is valued below its true value in money, such per centum in each case as will raise it to its true value. Second, they shall deduct from the valuation of the property, real or personal, of each county, which they believe to be valued above its real value in money, such per centum as will reduce the same in each case to its true value." Id. §§ 7513, 7514. After the state board has completed its labors, the state auditor is required to transmit to each county clerk "the per centum added to or deducted from the valuation of the property of his county, specifying the percentage added to or deducted from the real property and the personal property, respectively, and also the value of the real and personal property of his county as equalized by said board; and the said clerk shall furnish one copy thereof to the assessor, and one copy to be laid before the annual county board of equalization." And the state auditor is required to see that the respective county clerks keep up the aggregate valuation of real and personal property in their counties, for those years in which no state board is held, to the aggregate amount fixed by the last state board of equalization. Id. § 7516. Then a county board of equalization is provided for, to meet on the first Monday in April in

each year, to hear complaints, and to equalize the valuation and assessments upon such property within the county; but they shall not reduce the valuation below the value fixed by the state board of equalization. *Id.* §§ 7517, 7518. The statute (sections 1603, 1604) then provides that the mayor of any city shall obtain from the county clerk of the county in which his city is located, on or before the 1st day of May, each year, a certified abstract from the assessment books of the property within the city made taxable by law for state purposes, and the assessed value thereof as fixed by the board of equalization, and upon this the city council is to establish by ordinance the rate of taxes for the year. From all which it is apparent, not only that the city, for any extension it may make for taxation, must accept the assessment made for state and county purposes for the year preceding by the state and county boards of equalization, but that, from the very necessities of executing the statutory plan or system, there could be no assessment in existence for the year 1890, when these bonds were issued. The statute allows the county assessor all the time between June 1st and the following January for listing and valuing the property. This is one step in the process of assessment. After he has completed his work, it is submitted to the county clerk's office, and through the clerk to the state auditor, and by him submitted to the state board of equalization, as demanded by the state constitution, for the purpose of revision, which would not occur until February, 1891. This is the second step, after which the county board of equalization acts finally, which does not convene therefor before the first Monday in April. So I repeat that, by the very terms of the statute, there was not, nor, indeed, could have been, any assessment for the year 1890, when these bonds were issued, nor when the state auditor made his certificate of registration. This is the view taken of a similar statute in this particular in the state of Illinois by its supreme court. *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781. The constitution of that state provides that the value of the taxable property must be ascertained by "the last assessment for state and county taxes previous to the incurring of such indebtedness." Of this the court says:

"Inasmuch as the indebtedness must be regarded as having been incurred at the date of the contract,—that is to say, August 15, 1887,—we must ascertain the value of the taxable property for the purposes of this case from the assessment for state and county taxes for the year 1886, and not for the year 1887. This is for the reason that the equalized value of the assessable property in the city of Fulton for the year 1887 was not arrived at by the action of the state board of equalization until the 1st day of October, 1887. It is the assessment as fixed by the state board which must govern, and the state board did not fix such assessment until after August 15th, the date of the incurring of the indebtedness."

The construction contended for by complainant would thwart the very object and policy of the framers of the constitution of 1875. The purpose in going back two years to "the assessment next before the last assessment for state and county purposes" was, *inter alia*, to free the work of valuation from any influences from or consideration for the local community who might desire to embark in such improvements as demanded an increase of the burdens of taxation on the

property owners, and to give the taxpayer, when asked for his suffrage to authorize the increase of taxes, a definite, fixed assessment to look at to see what additional tax he was to vote on himself. So there must be at the time the debt is created, and I think when his vote of consent is given, two antecedent completed assessments next prior thereto. This being so, the assessment made in 1888 is the one that must control this case. Excluding merchants' license tax (*State v. Kansas City, St. J. & C. B. R. Co.*, 116 Mo. 15, 22 S. W. 611), the assessed value of all the property in the defendant city for the year 1888 was far below the constitutional limit to permit this debt. The assessed value of the property, real and personal, for 1888, for the entire school district, which includes the city of Marcelline and additional territory, was only \$89,945; whereas it would require a valuation of \$120,000 to authorize the debt in question. This being true, the state constitution interposes and pronounces the bonds in question invalid, because the power to issue them could not then be evoked. *Book v. Earl*, 87 Mo. 250; *Arnold v. Hawkins*, 95 Mo. 569, 8 S. W. 718; *Black v. McGonigle*, 103 Mo. 193, 15 S. W. 615; *State v. Town of Columbia*, 111 Mo. 365, 20 S. W. 90; *Marsh v. Fulton Co.*, 10 Wall. 676; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654; *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651; *Sutliff v. Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318; *Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71.

Counsel for plaintiff lays much stress upon the recitals in the bonds, and the certificate placed thereon by the state auditor. Mr. Justice Jackson, in *Hedges v. Dixon Co.*, *supra*, has answered the first suggestion quite effectually:

"The constitution of the state prescribed the amount which the county might donate to a railroad company. That provision operated as an absolute limitation upon the power of the county to exceed that amount, and it is well settled that no recitals in the bonds, or indorsement thereon, could estop the county from setting up their invalidity, based upon a want of constitutional authority to issue the same. Recitals in bonds issued under legislative authority may estop the municipality from disputing their authority, as against a bona fide holder for value; but, when the municipal bonds are issued in violation of a constitutional provision, no such estoppel can arise by reason of any recitals contained in the bonds."

The state auditor certified upon these bonds "that all the laws have been complied with in issuing the within bond, and that all the conditions of the contract under which it was ordered to be issued have been complied with (the evidence of which is on file), and that it is duly registered in my office." At the time this certificate was made, the last completed assessment in his office was for the year 1889. It ought to be a sufficient answer to the contention that this certificate should create an estoppel to say that the constitutional provision in question, which is self-executing, makes no provision for the registration of such bond or for such certificate. Its inhibition is absolute and unconditional. It was so made for a purpose. It was adopted at a time when local communities in the state were something like a wanton, surfeited and debauched in overindulgence, who suddenly becomes tense in the feeling of revulsion, and, uncertain of his moral forces, to withstand temptation,

takes refuge in a reformatory asylum. After years of reckless and ruinous prodigality in issuing municipal bonds by counties, cities, towns, and school districts, the taxpayers appealed first to the legislature, and afterwards to the constitutional convention of 1875, to take away the power of municipalities to create such debts, except upon the expressed consent of their constituent members, and then only for limited purposes and a limited amount. See Book v. Earl, 87 Mo. 251, 252, by Norton, J., who was a conspicuous member of the constitutional convention.

The first act of the legislature providing for the registration of such bonds by the state auditor was enacted in 1872 (Laws 1872, p. 57, par. 4), at the inception of the memorable bond litigation in the state and federal courts in Missouri. Its inspiration was rather to check than to facilitate the negotiation of municipal bonds. It was a well-known public fact that such bonds had been ordered executed secretly by some county and municipal officers, and surreptitiously put upon the market before the taxpayers were aware of the issue. This statute was designed to more effectually check such frauds. But, to guard the taxpayers against the possibility of collusion, negligence, or misinformation on the part of the state auditor, the legislature coupled with the act providing for registration and certification by the state auditor this express proviso:

"But such certificate shall be prima facie evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving the contrary in any suit or proceeding to test or determine the validity of such bonds or the power of any county court, city or town council, or board of trustees, or school board, or other authority, to issue such bonds; and the remedy of injunction shall also lie at the instance of any taxpayer of the respective county, city, town, village, township or school district, to prevent the registration of any bonds alleged to be illegally issued or funded under any of the provisions of this article."

Every purchaser of the bonds in question is presumed in law to have taken with notice of this proviso; and the state of the law is now well settled, in respect of the issue of bonds in excess of the constitutional limitation predicated of the assessed value of property within the municipality, that no recitals therein or thereon will exempt the purchaser from the obligation to first examine for himself the records of assessment, which are as open to him as the officers who make the recitals or certificate. Mr. Justice Mathews, in *Dixon Co. v. Field*, 111 U. S. 95, 4 Sup. Ct. 315, in respect of this issue, said:

"The amount of the assessed value of the taxable property in the county is not stated; but, *ex vi termini*, it was ascertainable in one way only, and that was by reference to the assessment itself,—a public record, equally accessible to all intending purchasers of bonds, as well as to the county officers. This being known, the ratio between the two amounts was fixed by an arithmetical calculation. No recital involving the amount of the assessed taxable valuation of the property to be taxed for the payment of the bonds can take the place of the assessment itself, for it is the amount, as fixed by reference to that record, that is made by the constitution the standard for measuring the limit of the municipal power. Nothing in the way of inquiry, ascertainment, or determination as to that fact is submitted to the county officers. They are bound, it is true, to learn from the assessment what the limit upon their authority is, as a necessary preliminary in the exercise of their func-

tions and the performance of their duty. But the information is for themselves alone. All the world besides must have it from the same source, and for themselves. The fact, as is recorded in the assessment itself, is extrinsic, and proves itself by inspection, and concludes all determinations that contradict it."

Counsel for plaintiff relies upon the observations of Mr. Justice Brewer in *Cairo v. Zane*, 149 U. S. 123, 13 Sup. Ct. 803, for his suggestion that the effect of the certificate of registration by the state auditor has been enlarged in favor of the bona fide purchaser. That is not this case. In the first place, it does not appear that the statute of Illinois imposing the duty of registering such bonds by the state auditor qualifies the effect of the certificate by a proviso similar to that of the Missouri statute. In the second place, the argument of the learned justice was more of a suggestion as to what the equity of the certificate should be held to be than a conclusion of the court by any affirmative declaration of law. The language of the opinion is also to be restrained to the fitness of the subject-matter. The matter under discussion was not as to the power of the city of Cairo to issue bonds in payment of a subscription to a railroad company, but rather as to the effect on the validity of some of the bonds, in the hands of a bona fide purchaser, of an arrangement between the city and the railroad company by which the city parted with its stock in the company in consideration of a return to it of a portion of the bonds. As this, at most, was an act supervenient, the doctrine of estoppel might well be invoked in favor of the bona fide purchaser.

The ordinances under which the bonds were voted and issued, and the issue of the entire amount ordered, being an entirety, in an action at law on the bonds they are one and indivisible, and the whole issue is void. *Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71. It results that the issues are found for the defendant.

---

#### LOMBARD INVESTMENT CO. v. AMERICAN SURETY CO.

(Circuit Court, W. D. Missouri, W. D. January 28, 1895.)

##### 1. EMPLOYER'S INDEMNITY BOND—CONSTRUCTION.

Under a bond given an employer for the term of a year by which a company covenants that, during its continuance, his employé shall faithfully perform his duties, and, at the cessation of said employment, he shall turn over to the employer all money and property, and indemnifies the employer against loss by default of the employé, occurring during the continuance of the bond, and discovered during said continuance, or within six months thereafter, or within six months from the death, dismissal, or retirement from the employer's service of the employé, recovery can be had for no default not discovered within six months after the termination of the year for which the bond was given, notwithstanding the employé thereafter continued in the employment, and similar bonds were given from year to year.

##### 2. SAME—ESTOPPEL.

The recital in an employer's indemnity bond that whereas a prior bond between the same parties had expired, and whereas it allowed six months from expiration in which to make claims for losses thereunder, the right of the employer to make such claims within such six months was recognized

by the second bond, notwithstanding any other provisions therein, estops the employer to assert that under the first bond he could recover for claims presented more than six months after its expiration.

**Action by the Lombard Investment Company against the American Surety Company on an employer's indemnity bond.**

This cause is submitted to the court on an agreed statement of facts, the substance of which is that the defendant company executed to the plaintiff company four indemnifying bonds, for one year each, covering the years from November 1, 1888, to November 1, 1889; from November 1, 1889, to November 1, 1890; from November 1, 1890, to November 1, 1891; and from November 1, 1891, to November 1, 1892. These bonds were to guaranty the plaintiff against loss in consequence of the employment in its service of one Henry W. L. Russell. The said Russell remained continuously in the employment of the plaintiff until the 18th day of June, 1892, when he retired therefrom; but the plaintiff did not discover the fact of loss by reason of the dishonest acts of said Russell until the 20th day of August, 1892. On the retirement of said Russell, as aforesaid, he departed for the City of Mexico, in Old Mexico, from whence plaintiff, after discovering his default, made unsuccessful efforts to bring him back to Kansas City to answer criminally for his defalcation and embezzlement. On the 26th of August, 1892, the plaintiff sent written notice to the local agent of defendant at Kansas City, and the agreed statement of facts shows action taken thereon by the defendant company in recognition of the sufficiency of the notice. On the 19th day of October, 1892, the plaintiff forwarded claim blanks to the defendant, which were received by the defendant in due course of mail. Losses resulted to the plaintiff by reason of the embezzlements of said employé during the existence of the first, second, and third terms of the indemnifying bonds, the last of which losses occurred on the 7th day of March, 1891. No loss occurred under the fourth bond. The essential provisions of said bonds, which give rise to this strife, sufficiently appear in the opinion of the court. This suit was instituted on the 23d day of March, 1893. The petition contains three counts, predicated of losses occurring under the first, second, and third of said bonds, on each of which judgment is asked for the sum of \$20,000, the amount covered by said bonds, although the losses claimed to have been sustained by the plaintiff are much in excess of the penal sum of said bonds. For the purposes of this controversy, the amount and the date of said losses are admitted to be true.

Gates & Wallace, for plaintiff.

Warner, Dean, Gibson & McLeod, for defendant.

PHILIPS, District Judge (after stating the facts). The questions presented on the agreed statement of facts for the determination of the court are as to the proper construction of the provisions of the indemnity bonds. In respect of the first bond, it is contended by the plaintiff that the liability of the defendant thereon continued for six months after the final retirement of the employé from the service of the plaintiff, and the discovery of the loss, in 1892. This proposition the defendant controverts, and contends that the period of limitation for the discovery of the default of the employé, under the first bond, was within six months after the 1st day of November, 1889; and, second, that under the terms of the succeeding employment, for the year beginning November 1, 1889, and ending on the 1st day of November, 1890, and so of each succeeding bond, the right of plaintiff to make claim of loss, occurring under its predecessor, was limited to the period of six months after the ending of the pre-



ceding term; and with the further limitation that the liability of the defendant for the acts of the employé, under both bonds, that is, the first and the second, and the second and the third, should not, during said period, exceed the amount of the last guaranty or bond on the employé for whose acts the claim was made.

It is to be conceded to the plaintiff that, if there is any contradiction, uncertainty, or ambiguity in the provisions of the contract of assurance, all reasonable doubts respecting the meaning thereof shall be resolved in favor of the assured, on the rule, applied more particularly in the construction of insurance policies, that an obscure phrase is to be construed against him who could have rendered it unequivocal in framing the conditions, but failed to do so. So that if the whole policy be susceptible of two constructions, one fixing the liability of the assurer and the other exempting him from liability, that construction is to be preferred which fixes the liability of the underwriter. But while this is correct, other well-recognized rules are to be applied to the interpretation of such instruments as to other contracts. Among these recognized canons of construction are that ordinary words and terms shall be given their ordinary and accepted meaning, and that the real intent and meaning of the parties to the contract is to be sought out through the instrument as a whole, so that due effect and operation shall be given to all its parts and provisions, so as, if possible, to make them all harmonious and consistent. As observed by Judge Napton in *Webb v. Insurance Co.*, 14 Mo. 9:

"It is better, where the terms of the contract are plain, and the meaning such as to be understood, that we should follow the plain language and manifest intent, rather than seek out a doubtful interpretation, with a view to reconcile all the clauses to the supposed interests and objects of both parties."

It is of prime importance, in the construction of the provisions of the first bond, to keep in mind the fact that the term of employment covered by the insurance was for "twelve months, ending on the 1st day of November, 1890, at twelve o'clock noon"; so that when the contract speaks of "during the continuance in force of this bond, \* \* \* and discovery during said continuance," and the like, it must be understood, in the absence of express qualifying provisions limiting or extending the ordinary, natural sense, to refer to the term of twelve months between November 1, 1888, and November 1, 1889. The covenant on the part of the obligor is:

"That, during the continuance in force of this bond, the employé shall, from and after the date of this bond, honestly and faithfully perform all the duties devolving upon him in his respective employment, and shall faithfully and truly account for and pay over to the employer all such moneys and valuable securities and other property as he shall receive from time to time for or from or on account of the employer; and that at the cessation of said employment he shall forthwith deliver over to said employer all books, documents, effects, moneys, etc., belonging to the employer, \* \* \* which shall then be, or which then ought to be, in the hands, possession, or custody of the employé; and the company hereby indemnifies the employer against all loss which the employer shall sustain by reason of the default of said employé in the premises, not exceeding the whole sum set opposite the name of the employé."

The term "cessation of his employment" means the end of the term of twelve months, unless sooner ended. The covenant then proceeds, after the quotation above made, as follows:

"And occurring during the continuance of this bond, and discovered during said continuance, or within six months thereafter, or within six months from the death or dismissal or retirement of the employé from the service of the employer."

—The simple meaning of which is that the assurer shall be responsible for such defaults as may be discovered within the twelve-months term, and, if not so discovered before the 1st day of November, 1889, the end of the term, six months' grace is accorded for the making of such discovery; or if the employé should die or be dismissed, or retire from the service of the employer, before the expiration of the term of twelve months, then within six months from the date of such death, dismissal, or retirement. Had the conditions and provisions of the bond stopped here, it would give color and force to the contention of plaintiff that this would have been simply a covenant contract, which, under the state statute, would carry the right of action thereon over a period of ten years from the day when the right of action accrued. Rev. St. Mo. 1889, § 6774. But the contract contains this further provision:

"As a part of this bond, that no suit or proceeding, at law or in equity, shall be brought to recover any sum hereby assured, unless the same is commenced within one year from the time of the making of any claim on the company."

To make still more apparent the intent and meaning of the contract as to the time within which an action for default thereon might lie, the succeeding paragraph, between lines 80 and 90, imposes certain duties upon the assured to entitle him to a right of action for any default. This provision is as follows:

"That the company shall be notified in writing, addressed to the president of the company, at its office in the city of New York, of any act or omission on the part of said employé, which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act shall have come to the knowledge of the employer."

The paragraph does not stop at this point, but proceeds as follows:

"That any claim made in respect of this bond on said employé shall be in writing, addressed to the president of the company as aforesaid, as soon as practicable after the discovery of any loss for which the company is responsible hereunder; in case of death, dismissal, or retirement of said employé within six months thereafter; and in all other cases within six months after the expiration of this bond, as aforesaid, or within six months from the death, dismissal, or retirement of said employé."

From all of which it seems clear to my mind that a period of six months is accorded for the discovery of a default, after the expiration of the term of twelve months; and that in case of a default occurring within the term, and the employé shall die, or be dismissed, or voluntarily retire from service during the term of twelve months, notice and claim of loss must be made within six months after the event of death, dismissal, or retirement. There could be no dismissal or voluntary retirement of the employé save during the con-

tinuance of the term; and the term "in case of death" must be known by its associates, and be interpreted in connection with the words "dismissal or retirement"; and of consequence it means a death occurring during the existence of the twelve-months term, as there could have been neither sense nor meaning in making a provision respecting a death which did not occur during the term. The evident object of this provision was that, in case of death, dismissal, or retirement, which must occur inside of the twelve-months term, the period of the six months in which to make claim of loss should date from that event, and not from the 1st day of November, 1889, the end of the term of service under the contract; and if claim of loss, in case of death, dismissal, or voluntary retirement from service, must be made within six months from the event, the conclusion is irresistible that, where the term of twelve months' service expires by lapse of time, likewise must claim of loss be made within six months thereafter.

Had all of the bonds for the successive years been executed at one and the same time, contemplating and providing for a term of service extending over a period of three or four years, there would be persuasive plausibility in the contention of the learned counsel for the plaintiff that the term "expiration," as employed in the contract, might be construed to refer to any time during the four-years term when the employé retired from such service. But the first contract was a separate and independent contract,—the only one during the twelve months in existence and in force,—and its provisions in the particular under consideration must be construed in respect of the twelve-months term contracted for by the assurer. The paragraph last above referred to concludes with these words:

"And upon the making of any such claim, on account of any employé, this bond shall wholly cease and determine, as regards any liability for any act or omission of such employé committed subsequent to the making of such claim."

This presupposes that a claim of loss might be presented during the running of the year of the term of employment, as there could be no continuance in service, in contemplation of the contract, after the end of the year, without a renewal contract. On the expiration of the term under the first bond, November 1, 1889, the defendant executed to plaintiff a like bond, assuring it against loss for the year ending November 1, 1890. This bond contains, in legal effect, the same recitals and conditions as its predecessor, except in the particulars now to be noted. Within lines 91 to 95 occurs this provision:

"That the company, upon the execution of a stipulated amount of risk or insurance, under the terms of this bond, in behalf of any employé, shall not thereafter be responsible to the employer under any previous insurance of said employé; it being mutually understood that it is the intention of this provision that but one (the last) insurance of the employé shall be in force at one time, unless otherwise provided."

Then follows this clause:

"The schedule hereto annexed is hereby declared to be a part of this bond."

The schedule referred to contains the following recitations:

"Whereas, the schedule bond issued November 1, 1888, by The American Surety Company of New York, in favor of the Lombard Investment Company of Kansas City, Mo., on certain employes therein mentioned and others subsequently bonded and guarantied subject to its provisions, expire November 1, 1889; and whereas, said bond allows six months from said date of expiration in which to make claims for losses thereunder,—the provisions contained in lines 91 to 95 of the bond hereto attached is hereby modified so as to recognize the right of the employer to make claim within six months from the expiration of the bond first mentioned, for any loss occurring thereunder; but with the understanding that the aggregate liability of the said American Surety Company of New York for the acts of any employe, under both the bonds herein mentioned, shall not during said period exceed the amount of the last guaranty or bond upon the employe for whose acts a claim may be made."

This is an express declaration and claim on the part of the assurer as to its understanding of the effect of the provisions of the first bond in respect of the time within which any claim thereunder for loss should be made, to wit, within "six months from said date of expiration," which was November 1, 1889, unless, as we have shown, the period of expiration was earlier brought about by reason of the death, dismissal, or retirement from service of the employe. Therefore, in order to preserve to the assurer the benefit of the provision respecting the six-months time accorded in the first bond, this saving clause was added, qualifying the effect of the words contained within the lines from 91 to 95 in the preceding part of the last-named bond.

When the plaintiff accepted this second bond, with its expressed provision of the limitation intended by the first bond, it thereby recognized and adopted such construction. Aside from the recognized rule, that, in construing a contract, weight will be given to the common understanding of the parties as to its effect, evidenced by their acts and admissions, when the plaintiff accepted from the defendant the second bond, containing the explicit statement that only six months was allowed from the expiration of the first bond, to wit, November 1, 1889, with the further stipulation that the liability of the assurer for any loss occurring under either or both bonds should in no event exceed the sum guaranteed under the bond, which was \$20,000, it created an estoppel against any claim based on a longer period of limitation, or for the liability of \$40,000, the aggregate of the two bonds. When the second bond was presented, the plaintiff had the right to refuse to accept it, with the recitation contained in the schedule, and to demand a modification thereof. Failing to do so, by accepting the bond he left the assurer during the whole term of its duration relying upon the fact that the plaintiff understood the provision as to the time within which any claim for loss could be presented under the first bond, as stated in said schedule, as also that the extent of defendant's liability under both bonds did not exceed \$20,000. Under such circumstances, the just rule of law applies that he who remains silent when he should speak, shall not be heard to speak, when he should be silent. No person will be allowed to adopt that part of a contract which is favorable, and reject the rest, to the injury of him from whom he derives the benefit. As no claim was made under the first bond of any loss for more than

three years after its expiration, the court, on the agreed statement of facts, declares the law to be that the plaintiff is not entitled to recover under the first count of the petition. While there is some variation in phraseology in the third bond, it in no essential manner differs from the legal effect of the second bond; and as the last two bonds, covering the terms, respectively, from November 1, 1889, to November 1, 1890, and from November 1, 1890, to November 1, 1891, are in their substantive effect the same, and no claim of loss under either was made prior to August, 1892, the same result must follow, that, under the agreed statement of facts, the court declares the law to be that the plaintiff is not entitled to recover under either the second or third counts of the petition; and the issues are found for the defendant.

---

CLYDE et al. v. RICHMOND & D. R. CO. (ELLIOTT, Intervener).

(Circuit Court, N. D. Georgia. December 10, 1894.)

**MASTER AND SERVANT—SAFETY OF APPLIANCES—DUTY OF MASTER.**

If a railway company purchases a locomotive from a firm of builders of recognized high standing and reliability, its duty to those employed about such locomotive will be to see, by the use of ordinary tests for determining its strength and efficiency, that it is reasonably safe, and suited to the uses for which it was purchased; and such company is not required to dismantle complicated machinery for purposes of inspection, nor to keep on hand such mechanical contrivances, nor to employ such expert labor, as are required for the highest tests.

This was a suit by William P. Clyde and others against the Richmond & Danville Railroad Company, in which receivers of the railroad had been appointed. Henry Elliott filed an intervening petition, claiming damages for personal injuries. The petition was referred to a special master, to whose report the defendant files exceptions.

This case was, by consent of counsel, referred to W. D. Ellis, Esq., as special master. The report (dated September 18, 1894) of the special master is so complete, and covers the questions involved with such particularity, that it is given in full, as follows:

By virtue of an order of the circuit court of the United States for the Northern district of Georgia, the above-stated intervention was referred to the undersigned, as special master, for hearing and report upon the law and facts connected therewith. Assignment of the case for trial was made, and due notice of the time and place appointed for the hearing was given to the parties plaintiff and defendant. At the appointed time and place, the plaintiff and defendant appeared by counsel, and the case proceeded to a hearing upon the testimony which had been taken on a former trial. An agreement of counsel is hereto attached, which will show the testimony agreed on. It was also agreed by the parties that, in the event a finding should be made for the intervener, the sum allowed should be \$10,000, and that the date of the finding should be fixed on the — day of January, 1894.

**Statement of the Case.**

The plaintiff contended that at the time of his injury he was an employé of the Central Railroad & Banking Company as head yard coupler, and that while in the discharge of his duty, in Atlanta, he was stricken by a piece of engine boiler or dome which was blown from a locomotive in the possession and control of defendant, and that such piece was thrown off by the ex-

plosion of said boiler or dome, brought about by the negligence of defendant. The particular acts of negligence were: (1) That more steam was allowed to accumulate than the boiler had capacity to contain. (2) That said dome was so insecurely fastened to the boiler as to render it dangerous, and liable to explode, which defect was known to the defendant. (3) That, on account of the large size and construction of said locomotive, it was not suited to defendant's road, and required great care and diligence on the part of the defendant, which defendant failed to exercise. (4) That said dome was negligently and defectively made and put together, and that such defects were either known or should have been known to the defendant. (5) That the explosion of said boiler was caused by the defective condition of the injector or pump, and that it failed to pump sufficient water into the boiler, which caused the boiler to become hot, and to generate an excessive and dangerous quantity of steam. (6) That the safety or "pop" valve was defective and out of order, and it failed to allow steam to escape when it accumulated to an excessive amount, and that the defects in said injector and pop valve were or should have been known to the defendant. The defendant entered a general denial of the plaintiff's allegation, but contended that, if the dome was defective, it did not render the defendant liable, because it had purchased said locomotive from a reputable manufactory, and had a right to rely upon its proper construction, and was not bound to make such examination as required tearing up the machine or dismantling it to the degree necessary to have determined that such defects did or did not exist. Defendant says that it made all reasonable tests, and it is specially denied that the locomotive was improperly handled, or that either the pop valve or the injector were out of order.

#### Findings and Report.

The special master, in determining the questions of fact, labors under the disadvantage of not having had the witnesses before him, and hearing and seeing them testify; but from the testimony some of the points at issue can be solved without difficulty; others with great difficulty. He finds and reports as follows: (1) The plaintiff, at the time of his injury, was in good health, was 26 years of age, and was earning \$45 per month. (2) At the time of his injury the plaintiff was head coupler for the engine of the Central Railroad on which he worked, and, at the time of his injury, was engaged in the performance of his duty, and was entirely free from fault. (3) The crew to which the plaintiff belonged were at a part of the railroad where they had a right to be, and were there by consent of defendant, to deliver cars to its road. (4) The defendant owed to the plaintiff ordinary care, and not that extraordinary care which it would owe to a passenger. (5) The dome ring or dome which exploded was carelessly and negligently constructed. The locomotive works which made it were negligent in making it, were negligent in not discovering the defects after it was made, and were negligent in delivering it to defendant to operate upon its line of road. (6) The evidence preponderates in favor of the proposition that competent servants of the locomotive works would or could have known that the method which they must have pursued in casting that particular dome would not have produced a good and safe job. In attempting to account for its defective condition, they assign a reason which other testimony proclaims an improper method. (7) The evidence shows that the defects could have been discovered by "sounding," when the polishing was done, and when the holes were bored for the rivets. (8) The testimony and examination of the exploded dome shows that the locomotive works did not subject the dome to proper tests, or it would then have given away. An examination of the broken parts is convincing of the fact that a test sufficient to determine that the dome ring and boiler were sound and properly constructed in all particulars would then have disclosed the defects that existed at the time it was finished. (9) After the locomotive was completed, and delivered to the defendant, the defects could not have been discovered from the outside, without such dismantling and tearing up as the defendant was not under the law bound to do, if bought from a reputable builder. (10) The proof shows that the parties from whom the locomotive was purchased were a reputable manufacturing establishment of such character and standing as authorized the defendant to rely upon the good

quality of their work, and defendant was authorized to use it, after making those ordinary and usual tests which railway companies can make to determine if locomotives are roadworthy, and in proper running order. (11) Ordinary care and diligence did not require the defendant to take out the dome cap and throttle valve. The testimony shows that explosions occur less frequently from that point than at other points, and a rule which would require this work of inspection, even at a cost of \$15, as stated by the witness Collier, would require such inspection and expense on the part of the master as to require the dismantling of complicated machinery, and the keeping of skilled and expensive labor for that service alone. A more reasonable provision would be to so amend the law as to render the factories which negligently construct dangerous machinery liable for the damages it may do, even to a stranger; that is, to one who stands in no privity of contact with them, but who is legally connected with its use. (12) These defects in the dome castings were not known to the defendant, and, not being bound to make such inspection of them as would have discovered them, the defendant is not liable therefor, if it exercised due care and diligence in other respects. (13) In the decision of this case by the supreme court, Judge Brewer, delivering the opinion, used the following language: "We do not mean to say that it is never the duty of the purchaser to make tests or examinations of his own, or that he can always and wholly rely upon the assumption that the manufacturer has fully and sufficiently tested. It may be, and doubtless is, his duty, when placing a machine in actual use, to subject it to ordinary tests for determining its strength and efficiency. Applying these rules, if the railroad company, after purchasing this engine, made such reasonable examination as was possible, without tearing the machinery to pieces, and subjected it fully to all the ordinary tests which are applied for determining the efficiency and strength of completed engines, and such examination tests had disclosed no defect, it cannot, in an action by one who is a stranger to the company, be adjudged guilty of negligence because there was a latent defect,—one which subsequently caused the destruction of the engine and injury to such party." 13 Sup. Ct. 837. Applying this rule to the question made by the plaintiff in this case, that the defendant was guilty of negligence in not making a test of this locomotive, the special master holds: If a railway company purchases a locomotive from a firm of locomotive builders of recognized high standing and reliability, its duty will be to see that it is reasonably safe, and suited to the uses for which it was purchased, and the trial trip made at Richmond, even in the manner and for the purpose testified to by the witness Gibbs in his examination as a witness in the case against the locomotive works, and the subsequent safe operation of it in active work over a distance of 7,000 miles and for a period of five or six months, was up to the measure of defendant's duty. It would be an unreasonable rule to require railway companies to keep on hand such mechanical contrivances and such experts as could make the highest tests, such as locomotive builders could, or to expose their employes who run and operate locomotives to the danger of applying very high pressure, over the amount necessary to be used, to see to what degree the machine could stand it. The special master does not understand the rule of the supreme court to mean more than that the locomotive should be tested, if bought from manufacturers of high repute, further than to see that it runs well, and is safe for the ordinary duty to be put upon it. (14) The question under consideration, in view of conclusions already reached, turns on the manner in which the locomotive was operated on the night the plaintiff was injured; and the plaintiff having shown that he was injured by the defendant, and that he was free from fault and in no way contributed to the injury, the burden is shifted to the defendant to show that it exercised all reasonable care and diligence. In respect to the defects in the boiler, the defendant has been found free from legal fault. Has it overcome the presumption of negligence as to the management and manipulation of the machine that night? The testimony preponderates that the pop valve, if in proper condition, would have relieved the pressure on the boiler, up to a standard at which the locomotive had been operated for several months, and over 7,000 miles of track it had traveled. It is fair to say that if it had been put to the gauge of 135 pounds, as the witness Cambea says, and had been in

good order, the boiler, defective as it was, would have still stood the pressure. It was making an unusual noise, plaintiff says. "On this particular night the pop cock was making a fluttering noise, as if it was trying to blow off steam, and got stuck." The witness Burnett says: "I am certain the engine was trying to 'pop off,' making a noise as if it was choked up. I never heard an engine make that sort of noise before." The witness Krogg (evidently referring to the noise made by the pop valve) says: "The noise I heard was unusual enough to attract my attention." The witness Postell says: "Before the explosion, the pop made a fizzing noise, as if it was stuck." All these witnesses were accustomed to locomotives, and familiar with the "popping off," and the ordinary noises proceeding therefrom. The witness Lewis swears that one minute before the explosion the steam gauge showed a pressure of 150 pounds, and, if this was true, and the pop valve was set at 135 pounds, it follows that it failed to do its duty. It is said that Lewis is inexperienced, but he undertakes to state a fact which any man could tell by sight, as well as an expert. This man's credit is affected by his interest in the suit involving the same questions. The witness Thrower says: "Just before the explosion the steam gauge showed 130 pounds." On cross-examination he says: "The pressure may have been 135 pounds." This discrepancy in the case shows a want of certainty and confidence on his part as to the exact situation. The witness Cambea says: "I adjusted the pop valve to what I knew was the proper pressure, and to my knowledge it popped off at 135 pounds, as I had screwed five pounds below the ordinary pressure, 140 pounds." This man seems, at that time, to have been just promoted from an apprentice to a journeyman, and hardly up to the standard of a skilled machinist. Considering the fact that this witness was an employé of the defendant, and responsible to the company for the proper setting of this safety valve, and for the destruction of a valuable piece of machinery, and the consequent injury of others, his credit is, to some extent, affected. (15) The special master concludes, and so reports, that the defendant has not overcome the presumption the law casts upon it, that the pop valve was out of order, and failed to do its duty, and that this defect caused the already defective dome to collapse at that particular time, and to inflict this injury upon the plaintiff. The defendant, through Cambea, who testifies that it was his duty to see that the pop valve was in order, was under legal, if not actual, notice of this defect, and it is therefore liable to the plaintiff. (16) The finding on the question of liability being for the plaintiff, the damages are assessed according to the agreement, and the special master reports and finds for the plaintiff the sum of \$10,000.

C. T. Ladson and George Westmoreland, for plaintiffs.  
Jackson & Leftwich, for defendant.

NEWMAN, District Judge (after stating the facts). No question of law is involved in this case, the simple question raised on argument by counsel for defendant being as to the sufficiency of evidence to support the master's report. Under the recognized rule on this subject, there is clearly sufficient evidence to sustain the report of the special master. The testimony of the witnesses he cites is certainly sufficient to justify his conclusion. The condition of the pop cock, whether it was in good working order, and whether its defective condition caused this explosion at the time, were questions of fact for the determination of the master, who has found them in favor of the plaintiff; and this court will not interfere with his finding, when it is sufficiently supported by evidence. The special master has set forth with so much care the questions before him, and his conclusion and reasons therefor are such, that further discussion of this case would be useless, and the exceptions to the master's report are overruled, and the report confirmed.



## UNITED STATES v. MacDONALD et al.

(District Court, E. D. Missouri, E. D. November 14, 1894.)

No. 3,864.

## CRIMINAL PLEADING — SUFFICIENCY OF INDICTMENT — SECTION 3894, REV. ST. U. S.

An indictment for violation of section 3894, Rev. St. U. S., imposing a penalty for depositing, in the mail, matter concerning a lottery, gift concert, or other similar enterprise which does not set out in its charging part, with particularity, distinctness, and completeness, the scheme in the carrying out of which such matter was deposited in the mail, is fatally defective.

This was an indictment against one MacDonald and others for a violation of section 3894, Rev. St. U. S. Defendants demur to the indictment.

Wm. H. Clopton, U. S. Atty.

Elisha Whittlesay, Chester H. Krum, and L. S. Metcalf, for defendants.

PRIEST, District Judge (orally). My time has been so occupied, I have had no opportunity to reduce to writing my views of the indictment. Defendants demurred to the indictment against them under section 3894, Rev. St. U. S., as amended. This statute excludes from the mails all matter concerning any lottery, gift concert, or other similar enterprise offering prizes dependent upon chance, and, having condemned all such matter as unmailable, imposes a penalty upon any person who shall knowingly deposit, or cause to be deposited, send, or cause to be sent, any such prohibited matter in or by the mail. The indictment contains three counts, which are not essentially different in their structure, except the second and third set forth in haec verba the letters or circulars which it is charged were sent by defendants through the mail. The first count charges the defendants with depositing, or causing to be deposited and sent, through the mails, divers letters and circulars concerning a lottery, to wit, the Guaranty Investment Company. The other counts are the same in form and substance, with the exception just noted. The defendants insist that the terms of the indictment, to withstand assault, must declare with particularity, distinctness, and completeness the scheme in the carrying out of which the letters or circulars were deposited in the mail, in order that they may know and the court may determine for itself whether the scheme was in fact, as well as in the judgment of the pleader, a lottery or gift concert, or in the nature of either. This contention, referring to the elementary and well-understood rules of criminal pleading, seems to the court to be well taken. Congress has enacted that certain matter which, in its judgment, has a tendency to corrupt public morals, shall be prohibited the use of the mails, and, in order to enforce these regulations, has imposed a penalty upon any person depositing such condemned matter in the post office, or causing it to be transmitted

through the mails. The gist of the offense is in the character of the scheme, coupled with the fact of mailing letters having reference to or concerning such a scheme. If the scheme be that of a lottery or in the nature of a gift concert, and that scheme be established at the hearing, any letter, however innocent upon its face, which the accused may deposit concerning that enterprise, would make a complete offense, and entitle the government to insist upon a conviction. The indictment, therefore, must clearly describe, in the opinion of the court, the character of the scheme, so that the court may know that the matter mailed related to that scheme which falls within the condemnation of the act of congress.

While it is conceded by the government, in this case, that neither count of the indictment, in its charging part, sets forth with particularity the elements which constitute the unlawful scheme, yet it is contended that in describing the letter which was mailed concerning the scheme, the letter having been set forth in full, it shows that the scheme was that of a lottery. That contention the court does not believe to be sustained by the authorities. The indictment is perhaps unnecessarily full and particular in describing the letter which was mailed concerning the scheme, but the pleader has no right to draw upon an exhibit concerning that element of the case, and insist that he can borrow from that sufficient material to supply the defect in the charging part of the indictment. Mr. Wharton, in his work on Criminal Procedure (section 323), speaking with reference to the element of certainty in an indictment, and after defining the different degrees of certainty, and stating that that of a middle certainty is all that is required in indictments, says that "the" middle certainty is not very distinctly defined in the books; yet the adjudications on points relating to it are multitudinous. An attempted definition is: As a rule for the indictment, it is that every fact in law essential to the punishment shall be plainly and directly stated, in terms sufficiently minute and technical to identify the offense and the offender, disclosing *prima facie* guilt, but not necessarily anticipating any defense. Thus, the omission of any fact or circumstance necessary to the constitution of the offense—in other words, made by law essential to the punishment—renders the indictment bad. Again, if it is equivocal what is meant,—as if the allegation is that the defendant did one or the other of two criminal things, or the language may be equally well construed to charge a civil wrong as a criminal one,—it is insufficient. Moreover, it must be direct and positive; as, if it states the facts as a mere legal conclusion from other facts alleged, or as a "belief" of the alleged party, it will be inadequate. And it must be sufficiently specific and descend sufficiently into detail to define the particular offense, transaction, and thing; in other words, to render them certain. No general words can inform the reader how specific and how much in detail it must be; this is matter to be gathered from the minuter discussions which will follow in their various appropriate places throughout these volumes, and from one's general reading of the cases.

A much more persuasive and binding authority upon this court

in this matter, and which I cannot disregard, is the opinion of the supreme court in the case of *U. S. v. Cruikshank*, 92 U. S. 557, wherein the court say:

"In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' \* \* \* In *U. S. v. Mills*, 7 Pet. 142, this was construed to mean that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged'; and in *U. S. v. Cook*, 17 Wall. 174, that 'every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. \* \* \* The object of the indictment is—First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

So, in this case, the scheme which the government alleges to be a lottery should be set forth with particularity, in order to enable the court to judge whether it is in fact a lottery or not; and, further,, to enable the defendant, if arranged subsequently for this offense, to say that "the particular scheme which is set forth in the indictment and shown upon the record is the identical one for which I was formerly put in jeopardy; and therefore I plead it as a bar against the charge." I will sustain the demurrer.

---

#### UNITED STATES v. GREVE.

(District Court, E. D. Missouri, E. D. November 15, 1894.)

No. 3,860.

#### 1. CRIMINAL PLEADING—SUFFICIENCY OF INDICTMENT—SECTION 5209, REV. ST. U. S.

An indictment under section 5209, Rev. St. U. S., for embezzlement, which charges that the defendant did have and receive "certain of the moneys and funds of said national banking association of the amount and value of \$5,723.93," is defective in not stating with sufficient definiteness what the property was which defendant is accused of misappropriating, "funds" being a word including several species of property.

#### 2. SAME.

Whether an indictment which charges that the defendant "wrongfully and unlawfully embezzled and converted to his own use" certain property, "with the intent then and there to injure," etc., but does not charge that the acts were "feloniously" done, is sufficient under section 5209, Rev. St. U. S., *quære*.

This was an indictment against E. H. Grevé for violation of section 5209, Rev. St. U. S. Defendant demurs to the indictment.

Wm. H. Clopton, U. S. Atty.

Lee & McKeighan and D. P. Dyer, for defendant.

PRIEST, District Judge (orally). In this case I have been compelled with great haste to reach a determination upon the demurrer to the indictment. Of course, a trial judge cannot, because of the pressing nature of his duties, give the same deliberate consideration to a case that is possible for an appellate tribunal. I think, in cases of this character, however, where the court entertains a substantial doubt as to the validity of an indictment, a demurrer ought to be sustained, because the error can at such a stage of the proceedings be remedied with less cost, and much more easily, than at any other. The defendant in this case, a clerk in the employment of the Fourth National Bank of St. Louis, is charged with having wrongfully and unlawfully embezzled and converted to his own use "certain of the moneys and funds of said national banking association of the amount and value of fifty-seven hundred and twenty-three dollars and ninety-three cents (\$5,723.93)," which came into his custody as such clerk. There are two counts. The second alleges that he "wrongfully and unlawfully embezzled and converted to his own use moneys and funds of said bank of the amount and value of forty-one hundred and nine dollars and twenty-one cents (\$4,109.21)." The sufficiency of both counts of the indictment is questioned by demurrer upon two grounds: First, that it is not charged that the acts were feloniously done; second, that "the moneys and funds" are not described with sufficient certainty.

As to the first ground. At this time, and upon the brief consideration I have been able to give to the subject, I am not prepared to hold that the indictment must charge that the embezzlement or conversion was felonious. It would unquestionably be the safest practice. It is seriously debatable whether an indictment omitting that word or its necessary and full equivalent is not defective. The federal courts, it is true, do not deal in their criminal jurisdiction with common-law offenses. They only recognize such as are created and defined by congress within its constitutional authority. However, in the enactment under consideration, congress has employed the word "embezzlement," and being technical, it must bear in the context that technical signification which it has usually borne, and, if it be a complex or component word, comprehending in the form of definition an offense, in charging such an offense by indictment the several elements must be separated, and specifically averred. Embezzlement, in its technical sense, and with respect to such punishment as the statute under consideration prescribes, most usually means a felonious appropriation by a servant of his master's property while it is in his keeping; and "feloniously" means with a deliberate intent to do a wrongful act. It is true, the indictment here charges that the embezzlement was done with "the intent then and there to injure," etc., but this does not express precisely the same meaning as "feloniously," because in the latter the element of deliberation is embraced. There would be no tautology in using both expressions.

As to the second ground, the language of the indictment is that "the defendant did have and receive," etc., "certain of the moneys and funds of said national banking association of the amount and value

of fifty-seven hundred and twenty-three dollars and ninety-three cents (\$5,723.93).” It is a question whether this is not too indefinite, as failing to state the kind of money embezzled,—that is, whether moneys of the United States or of some other nation; but it is not necessary to hold thus narrowly. The charge is the embezzlement of moneys and funds. The words “moneys and funds” are not of identical meaning. “Funds” includes moneys, and much more, such as notes, bills, checks, drafts, stocks, and bonds. Now, what was intended by the phrase “moneys and funds”? Was it intended to say “moneys and moneys”? The natural interpretation of the phrase is “moneys and some other species or character of funds.” The word “funds” is not used in the alternative as a synonym. It is used in the conjunctive. Its function is, as no doubt the purpose of its use was, to add something to the term “moneys.” The charge, then, is, in effect, that defendant did have and receive, etc., moneys and other funds, etc. Now, is this sufficiently definite? In the case of *People v. Cohen*, 8 Cal. 42, it is there said:

“There is another objection to the indictment, which is fatal. It does not state what was the property converted. The language is, ‘four hundred thousand dollars, moneys, goods, and chattels.’ How can the defendant know what he is charged with, or how prepare for his defense? How much money, what goods, and what chattels?”

If, in the case at bar, only money was embezzled, the indictment should charge the embezzlement of money only. If money and other funds were embezzled, the amount and value of the several species of the property taken should be stated. The words “and funds” cannot be rejected as surplusage, for the amount and value stated in the indictment applies to moneys and funds jointly, and, rejecting either, there is no suggestion in the indictment as to the amount or value of the other. The demurrer will be sustained.

---

#### UNITED STATES v. HARTMAN.

(District Court, E. D. Missouri, E. D. November 8, 1894.)

No. 3,847.

#### CRIMINAL LAW—SECTION 5421, REV. ST. U. S.—ELEMENTS OF THE OFFENSE.

The offense defined in the first clause of section 5421, Rev. St., relating to falsely making, altering, forging, or counterfeiting any deed, \* \* \* certificate, \* \* \* or other writing, for the purpose of obtaining \* \* \* from the government any sum or sums of money, includes not only the technical execution of such an instrument, but the making of an affidavit or certificate which is genuine itself, but contains false statements.

This was an indictment against A. K. Hartman for a violation of section 5421, Rev. St. U. S. Defendant demurs to the indictment.

Wm. H. Clopton, Dist. Atty.; for the United States.

Wm. H. Kinsey, for defendant.

PRIEST, District Judge. There are two counts to the indictment in this cause, each of which is challenged by a demurrer. In the first

the defendant is charged with falsely making, or procuring to be falsely made, and aiding and assisting in the false making of, a certain certificate and writing for the purpose of enabling one Ella Sweeney to obtain and receive from the United States, under the pension laws, the sum of \$10. The certificate of the notary appended to the declaration for a widow's pension recites, not only that Ella Sweeney had personally appeared before the notary, and sworn to the declaration set forth in the indictment, but that two attesting witnesses, Annie Osburg and Peter Roscoe, also personally appeared before the notary at the same time, and swore to the statements attributed to them respectively; whereas, in truth, neither of said persons in fact personally appeared before the notary; nor were they sworn by the said notary. The indictment is framed under section 5421, Rev. St. U. S. A careful reading of this section will disclose that three offenses of different character are enumerated, the first of which relates to falsely making, altering, forging, or counterfeiting any deed, power of attorney, order, certificate, receipt, or other writing, for the purpose of obtaining or receiving, or enabling any other person or persons to obtain or receive, from the government, any sum or sums of money; the second, to uttering or publishing as true, with intent to defraud the United States, knowing the same to be false, such an instrument as described in the first paragraph; and third, to the transmission or presentation at any office or to any officer of the government of the United States such an instrument, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited. Both counts of this indictment are framed under the first paragraph.

At the argument of this demurrer, my impression was that the offense defined consist in the technical execution of an instrument of the class defined in the statute, and not to the falsity of the statement of fact contained in such instrument. During the course of the opinion in the case of *U. S. v. Staats*, 8 How. 41, and rather in line of argument than tending to construe this paragraph of the section, the supreme court threw out an intimation, if not expressly deciding it, in confirmation of this thought. Upon more mature reflection, I am persuaded that this paragraph of the statute should have a wider scope. Indeed, I cannot conceive how any significance can be given to the words "falsely make" unless they shall be construed to mean the statements in a certificate which in fact are untrue. "Falsely" means in opposition to the truth. "Falsely makes" means to state in a certificate that which is not true, and, if this be done with the intent and knowledge which the statute condemns, it falls within the punishment; and this view, if it needs confirmation, is emphasized by section 5479 of the statute, which relates to forgeries only, and not to making an affidavit which is genuine itself, but containing untrue and false statements. The demurrer will therefore be overruled.

## UNITED STATES v. McSORLEY et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 54.

## CUSTOMS DUTIES—MEDALS.

Medals made of copper, washed with silver, commonly used for distribution as prizes to school children, but which have not been awarded as trophies or prizes, are not entitled to free entry, under the tariff act of October 1, 1890, as "medals of gold, silver or copper, such as trophies or prizes."

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by the United States for a review of the decision of the board of general appraisers concerning certain merchandise imported by J. A. McSorley & Co. The circuit court affirmed the decision of the board. The United States appeal.

Wallace Macfarlane, U. S. Atty., and Chas. Duane Baker, Asst. U. S. Atty., for the United States.

Hess, Townsend & McClelland, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The question in this case is whether medals made of copper, washed with silver, suitable for use as tokens, and commonly used for distribution as prizes to Catholic school children, but which have not been awarded as trophies or prizes, are enumerated in the free list of the tariff act of October 1, 1890, and entitled to free entry as "medals of gold, silver or copper, such as trophies or prizes." The board of general appraisers were of opinion that because the importations were suitable for use as prizes they were within the enumerated class; and the circuit court concurred in that opinion. We are constrained to adopt a contrary view. If congress had intended to admit free of duty all medals appropriate for use as prizes, there would have been no reason for employing the qualifying words "such as trophies or prizes." All medals are suitable for use as prizes, according to the lexicographers, and there is no evidence of a commercial meaning different from the ordinary meaning of the word "medal." We think the term of enumeration is to be read as though it were "such medals as are trophies or prizes," and be construed to include only such as belong to that category when imported, because they have been already awarded or won. Until then the medals are not, in an accurate sense, trophies or prizes. Any other construction would deprive the qualifying words of all effect, and is therefore inadmissible. The decision of the circuit court is reversed.

## NEW YORK DAILY NEWS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 69.

## CUSTOMS DUTIES—PERIODICALS.

A pictorial paper, containing current literature, wholly printed in Germany, and circulated as an extra to other publications, and imported to be used as a supplement to a New York paper, is exempt from duty as a periodical, under paragraph 657 of the tariff act of October 1, 1890.

This is an appeal from the decision of the circuit court, Southern district of New York (61 Fed. 647), reversing a decision of the board of general appraisers, which sustained the protest of the importers, and found the merchandise imported to be exempt from duty.

Stephen G. Clarke, for appellant.

Wallace Macfarlane, U. S. Atty., and James T. Vanrensselaer, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The board of appraisers found that "the merchandise is an eight-page pictorial paper, entitled 'New Yorker Lustige Blatter.' It contains stories, poems, selections of German humor, and other current literature of the day." It is imported to be used as a supplement to the German edition of the New York Sunday News. The collector classified it as "printed matter," under paragraph 423, Tariff Act Oct. 1, 1890, and assessed duty at 25 per cent. The importers protested, claiming that the merchandise was within the description of paragraph 657, and therefore free of duty. Paragraph 657, which is found in the free list, is as follows:

"Newspapers and periodicals; but the term 'periodicals' as herein used shall be understood to embrace only unbound or paper-covered publications, containing current literature of the day, and issued regularly, at stated periods, as weekly, monthly, or quarterly."

The only point in dispute is whether the publication was "issued" as a periodical before it reached the port of entry. The title "Lustige Blatter" means "funny paper." It is the trade mark or name of a paper which has for many years been prepared and published in Munich, appearing weekly. Its circulation is very large, the whole issue comprising about a million copies. It is circulated as an extra to other weekly publications,—some 20 or 30 of them, as the evidence shows,—appearing in Munich, Berlin, and elsewhere. The title or heading of each issue invariably contains the name "Lustige Blatter," but to that name there are added or prefixed other words or symbols, indicative of the particular periodical to which it is an extra or supplement. In every other respect all the copies of each issue are identical. The circuit court held that the copies in question had not been issued as periodicals before importation, but that they were "like patent insides or outsides of newspapers sold partly printed, to be completed for publication"; evidently being of the opinion that the publication reaches here without the title or heading. The evidence, however, indicates that the contrary is the fact; the heading



"New Yorker Lustige Blatter," and the cut of the Brooklyn Bridge, which differentiate the copies going to its readers here from those going to Berlin or elsewhere, being printed in Munich with the rest of the paper, which is complete when it reaches here. We are of the opinion that congress did not intend, by the proviso to paragraph 657, to restrict the privilege of free entry to such periodicals only as come here to individual subscribers. One hundred or one thousand or ten thousand copies of such a weekly paper as the Illustrated London News may surely be imported, under the terms of the paragraph, by a single newsdealer, and by him distributed to subscribers of whom the English publishers are wholly ignorant; and in such a case it would seem that the right to free entry would not be lost should the publishers stamp on all such copies the words, "For circulation abroad," or should prefix to the well-known title of their periodicals the words "New York Edition." The Lustige Blatter is, upon the evidence, a periodical issued weekly to its German readers, as an extra to other German papers, and to its readers here as an extra to the Sunday edition of the Daily News, and as such is entitled to free entry. The decision of the circuit court is reversed, and the ruling of the board of appraisers is sustained.

---

#### TIFFANY v. UNITED STATES.

(Circuit Court, S. D. New York. January 15, 1895.)

##### CUSTOMS DUTIES—CLASSIFICATION—BRONZE STATUARY—ACT OF OCTOBER 1, 1890.

Statuary cast from bronze, and touched up by hand, and made expressive after casting, under the supervision of the sculptor, is not "such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal," within the provisions of paragraph 465 of the tariff act of October 1, 1890, and is therefore not dutiable at 15 per cent. ad valorem under said paragraph, but is dutiable as a manufacture of metal, at 45 per cent. ad valorem, under paragraph 215 of said act.

At Law. Appeal by importer under act of June 10, 1890, from decision of board of United States general appraisers.

The imported merchandise consisted of bronze statuary, assessed by the collector for duty at 45 per cent. ad valorem, under paragraph 215, and claimed by the importer to be dutiable at 15 per cent. ad valorem, under paragraph 465, as statuary. It appeared by the testimony that bronze statuary was sometimes wholly made or wrought by hand by beating, but that the statuary in suit was made in a foundry by casting, and afterwards touched up, and the rough edges filed or smoothed off, under the supervision of the sculptor who had originally designed the clay model thereof. It also appeared that the statues in controversy were the first or original copies cast from the clay models of the sculptor, under his personal supervision and direction, and were works of art.

The assistant United States district attorney maintained that no bronze statuary was dutiable at 15 per cent. ad valorem, under the act of 1890, unless "wrought by hand"; that the act of 1890 changed and restricted the prior law in that respect (paragraph 470, Act March 3, 1883), and that only hand-made statuary was entitled to entry at that rate; that the statues of bronze made by "beating" are the only bronze statues wrought by hand; that the articles in suit were made or wrought by casting in molds, and not by hand; that, while the clay models of the statues were wrought by hand,

the clay models were not imported, but the cast statues were, and merchandise paid duty according to its condition when imported.

The importer's counsel contended that as the clay models were wrought by hand, and the cast statues were finished by hand, under the supervision of the artist, they were wrought by hand, within the meaning of paragraph 465.

Wm. B. Coughtry, for importer.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

WHEELER, District Judge (after stating the facts). These are small statues cast from bronze, and touched up and made expressive by the hands of sculptors. The tariff act of 1890 put a lower duty than was assessed on these statues on "such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal, and is the professional production of a statuary or sculptor only." These are claimed to be such statuary, because they are wrought somewhat by professional hands. But the requirement that they should be wrought from metal by hand is very strict, and these statues are wrought so slightly by hand that they do not now appear to fairly come within it. The decision of the board of United States general appraisers is affirmed.

#### UNITED STATES v. CUMMINGS et al.

(Circuit Court, S. D. New York. January 2, 1895.)

#### 1. CUSTOMS DUTIES — TARIFF ACT OCT. 1, 1890—WASTE COMPOSED IN PART OF WOOL—CLASSIFICATION.

Waste pieces of cloth, composed in part of rubber, cotton, and wool, held to be dutiable as "waste, composed in part of wool," at 30 per cent., under paragraph 388 of the tariff act of 1890, and not at 10 per cent., as "waste, not specially provided for in this act."

#### 2. SAME.

The fact that the wool therein was not utilized after importation does not affect the classification of the merchandise for duty.

At Law. Appeal by the United States from a decision of the board of United States general appraisers. Board reversed.

The imported merchandise consisted of waste pieces of cloth, left over in the manufacture of waterproof garments, from which, after importation, the rubber could be extracted and utilized. It could also be used in the manufacture of roofing paper. The collector classified it under paragraph 388 (26 Stat. 595). The importers sought a review by the board of general appraisers. The board sustained their protest, reversed the collector, and decided it was dutiable under paragraph 472. The collector, on behalf of the United States, applied for a review by the United States circuit court, under the provisions of section 15 of the act of June 10, 1890.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

Jarvis N. Atkinson, for importers.

Cited *Cruikshank v. U. S.*, 8 C. C. A. 171, 174, 59 Fed. 446; *U. S. v. Schoveling*, 146 U. S. 76, 13 Sup. Ct. 24; *Combs v. Erhardt*, 49 Fed. 635; *Worthington v. Robbins*, 139 U. S. 337, 11 Sup. Ct. 581.

**WHEELER, District Judge.** This importation was of waste pieces of cloth, composed of wool, cotton, and rubber, left over from the manufacture of waterproof garments. The wool cannot be profitably separated from the rubber. It was classified by the board of United States appraisers as "waste, not specially provided for," under paragraph 472 of the tariff act of 1890. But paragraph 388 provided for a duty on noils, shoddy, top waste, slubbing waste, roving waste, ring waste, yarn waste, garnetted waste, and all other wastes composed wholly or in part of wool. This waste is composed in part of wool, and falls within this description. It was none the less composed in part of wool because that part was not profitably available. *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. 279. Decision reversed.

---

**BREDT et al. v. UNITED STATES.**

(Circuit Court, S. D. New York, January 15, 1895.)

**CUSTOMS DUTIES—CLASSIFICATION—MACHINE BLANKETS—TARIFF ACT OF OCTOBER, 1890.**

Thick-woven, endless woolen belts or blankets, for paper or printing machines, held dutiable at 44 cents per pound and 50 per cent. ad valorem, under the provision of paragraph 392 of the tariff act of October 1, 1890, as a manufacture wholly or in part of wool, not specially provided for, and not at 38½ cents per pound and 40 per cent. ad valorem, under the provision of paragraph 393 of said act, for "blankets."

**At Law.** Review of decision of board of United States general appraisers, under the act of June 10, 1890. Affirmed.

The assistant district attorney contended that the articles in paragraph 393, such as "blankets, hats of wool, and flannels for underwear," were articles of wearing apparel, and the blankets therein specified referred to blankets to be worn or used for the covering of the person, and not to machinery; that machine blankets were not ejusdem generis (*Hollender v. Magone*, 149 U. S. 586, 589, 13 Sup. Ct. 932; *Magone v. Trading Co.*, 6 C. C. A. 407, 57 Fed. 394), and constituted a part of the machinery; that belts or felts for paper or printing machines, as well as blankets, had been provided for eo nomine in the act of March 2, 1867, and in every tariff act since that date, up to the act of 1890, showing they had always been recognized by congress as different articles for duty purposes. Where an article has become known to congress by a legal or statutory definition, as shown by its use in former statutes for revenue purposes, such a legal or statutory definition will control. *De Forest v. Lawrence*, 13 How. 274.

The importers' counsel claimed the word "blankets" was used in its ordinary meaning in paragraph 393, which was broad enough to cover the articles in suit.

Stephen G. Clarke, for plaintiffs.

Wallace Macfarlane, U. S. Atty., and Henry C. Platt, Asst. U. S. Atty.

**WHEELER, District Judge.** These articles are woven from wool into continuous webs for use in printing presses, as parts of the machinery, and in that art, when so used, are called "blankets." They were assessed under paragraph 392 of the tariff act of 1890, which provided for duties on "all manufactures of every description made wholly or in part of wool," and are claimed to have been dutiable

under paragraph 393, which provided for different duties "on blankets, hats of wool, and flannels for underwear, composed wholly or in part of wool." Blankets, in general, are used as coverings for protection against outer temperature and influences, and, in common speech, would be understood to refer to things so used, and not to these having that special name in those particular machines; and especially would this be so when the term is used in the tariff law among other words expressing other such coverings in pointing out subjects for particular duties. As this word is so used here, it is understood to refer to blankets in this general sense. The word "pins" seems to have been so understood as to exclude hair pins, in *Robertson v. Rosenthal*, 132 U. S. 460, 10 Sup. Ct. 120.

Decision of board affirmed.

---

GARY, Collector, v. COCKLEY.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1895.)

No. 210.

**CUSTOMS DUTIES—STEEL.**

Billets of metal produced from iron or its ores, containing 20 per cent. of carbon and smaller percentages, ranging from .002 to .081 of silicon, manganese, phosphorus, and sulphur, which is granular in structure, malleable, and which, at any stage of the process of production, has been cast, by being run into molds, is within the definition of "steel," as given in paragraph 150 of the tariff act of October 1, 1890, and is properly classified as such.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This was an application by David L. Cockley for a review of the decision of the board of general appraisers concerning certain merchandise imported by him. The circuit court reversed the decision of the board. A motion for a new trial was made and denied. The attorney general appeals.

This is a customs case. On the 22d day of July, 1892, certain merchandise, described as hollow steel billets, was entered at the port of Cleveland, Ohio, from Sandviken, Sweden, by one D. L. Cockley, the appellee, who imported the same for the Shelby Steel-Tube Company. Upon the return of the appraiser, the collector of customs at the port of Cleveland, Marco B. Gary, assessed the duty upon these billets at one and six-tenths cents per pound, classifying them as hollow steel billets. This classification and rate of duty thus assessed was in accordance with paragraph 146 of the tariff law of October 1, 1890. That paragraph provides that "steel ingots, cogged ingots, blooms and slabs, by whatever process made; die blocks or blanks; billets and bars and tapered or beveled bars; \* \* \* all descriptions and shapes of dry sand, loam, or iron molded steel castings; sheets and plates not specially provided for in this act; and steel in all forms and shapes not specially provided for in this act, when valued above three cents and not above four cents per pound, shall pay a duty of one and six-tenths cents per pound." The valuation of these billets was fixed by the appraiser at above three cents, and not above four cents, per pound, and this valuation is not disputed.

The protest filed by the importer was in the following words:

"New York, July 28, 1892.

"To Marco B. Gary, Collector of Customs, Cleveland, Ohio: On the 4th day of February, 1892, the undersigned imported from Sandvik, Sweden, fifty  
v.65F.no.5—32

(50) tons of hollow steel billets, and on the 22d day of July, 1892, entered the same for consumption, entry No. 94, and paid duty thereon at the rate of 10 per cent. ad valorem, amounting to the sum of (\$447.10) four hundred and forty-seven and 10/100 dollars. The appraiser has classified the same, and you have collected additional duty thereon accordingly, under paragraph 146 of the metal schedule in the so-called 'McKinley Tariff Bill,' as steel of all forms of a value less than four cents and more than three cents a pound, at the rate of 1 6/10 of a cent a pound, amounting in the aggregate to the sum of (\$1,791.88) seventeen hundred and ninety-one and 88/100 dollars, or \$1,344.78 additional duty, which the undersigned has paid, but against which payment he most respectfully protests, and claims: (1) That the merchandise in question is not enumerated or provided for in said act, except it is provided for in section 4 of said act, and, if not dutiable under said section at 10 per cent., it is dutiable under said section at 20 per cent. ad valorem. (2) That, if not properly classified under said section 4 of said act, it certainly comes under the provisions of section 5 of said act, and, if it comes under the provisions of section 5 of said act, then the undersigned claims: (a) That it most resembles, in the respects named in section 5, unwrought metal, that is mentioned in paragraph 202 of said metal schedule, and is dutiable at the rate of 20 per cent. ad valorem, and (b) that if it does not most resemble unwrought metal, mentioned in paragraph 202 of said metal schedule, then it most resembles, in the respects named and referred to in said section 5, the article referred to in last clause of paragraph 136 of the metal schedule and last proviso therein, that shall not pay a less rate of duty than \$22.00 per ton. I most respectfully submit the above for your earnest consideration. 16,791 B.

"David L. Cockley.

"David L. Cockley.

"P."

Upon the filing of this protest, an appeal was taken by the importer from the decision of the collector to the board of the United States general appraisers, under the provisions of the customs act of June 10, 1890, which board affirmed the classification made by the appraiser. Application was then made by the importer, under section 15 of the act approved June 10, 1890 (26 Stat. 138), being an act entitled "An act to simplify the laws in relation to the collection of the revenue," and styled the "Customs Administrative Act," for the review of the decision of the board of the United States general appraisers. Thereupon the record, evidence, and facts were returned by the United States appraisers to the circuit court of the United States for the Northern district of Ohio. Upon the order of the court further testimony was taken in behalf of the importer and the government, which fully appears in the record. The circuit court, upon the evidence submitted, reversed the classification of the board of general appraisers, and held that the imported metal was not a cast metal, and was therefore not steel, within the definition given by the act of congress of 1890, and that the metal fell under the classification given in the last clause of paragraph 136 of that act, which provides "that all iron bars, blooms, billets, or sizes or shapes of any kind, in the manufacture of which charcoal is used as fuel, shall be subject to a duty of not less than twenty-two dollars per ton." Being thus classified, the court found that the applicant had paid, against his protest, a duty at the rate of 1 6/10 cents per pound, amounting to the sum of \$3,544.78, while he should have paid at the rate of \$22 per ton, making \$2,200, and that the said D. L. Cockley, the applicant, was entitled to recover the difference, amounting to \$1,344.78. A motion for a new trial was entered and overruled. Whereupon errors were assigned, and an appeal allowed, on application of the attorney general, to this court.

Allan T. Brinsmade, U. S. Atty., for appellant.

Orestes C. Pinney, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

In the view we have of the merits of this case, it becomes unnecessary to pass upon the definiteness or sufficiency of the protest and claim filed with the collector. Were the hollow billets imported by appellee steel or iron? They were imported from Sandviken, Sweden. The invoice described them as "hollow steel billets," and they were so entered at the collector's office. They are described in the record as metal billets, tubular in form, about 18 inches in length, having a diameter of  $3\frac{1}{4}$  inches, the wall of the cylinder having a thickness of about three-eighths of an inch. The Shelby Steel-Tube Company, for whom these billets were imported, manufactured from them cold-drawn weldless or seamless steel tubes, which are used in the manufacture of bicycles or boiler tubes, tubes for surgical uses, and other tubes where strength and lightness is desirable with small bulk. The articles thus made are advertised and sold as steel tubes. These billets were the first of the kind imported, and were in form unknown to the trade of this country at the passage of the McKinley act of 1890. The contention of the appellee is that it is immaterial whether they were sold and bought as steel billets, or that the tubes made from them are sold as steel tubes, or that the material is such as in trade is known as "steel." His contention is that "steel," within the meaning of the tariff act, is defined by the act itself, and that these billets are not "steel," within the definition of paragraph 150 of the McKinley act. In *Twine Co. v. Worthington*, 141 U. S. 468-471, 12 Sup. Ct. 55, the question involved was the rate of duty upon an article defined in the tariff as "gilling twine." Mr. Justice Brown said in that case:

"It is a cardinal rule of this court that, in fixing the classification of goods for the payment of duties, the name or designation of the goods is to be understood in its known commercial sense, and that their denomination in the market when the law was passed will control their classification, without regard to their scientific designation, the material of which they may be made, or the use to which they may be applied."

For this proposition he cites a number of authorities.

The case at bar is altogether different, and not within the principle so clearly stated in the paragraph just cited. "Gilling twine" was not defined in the act. Where the act undertakes particularly and definitely to define what is meant by an article upon which a specific duty is levied, such definition is at least very persuasive in ascertaining the intent of the lawmakers. *Suth. St. Const.* § 327; *End. Interp. St. par.* 365. A manifest distinction exists between definite interpretation clauses which are special and those which are general. The provisions defining the legislative meaning of a particular word used in the act containing the interpretation clause may well be regarded as a part of the law itself, and construed accordingly. *Suth. St. Const.* § 231, and case so cited. Undoubtedly cases may arise, as observed by Lord Denman, in which interpretation clauses will rather embarrass the court than afford assistance, inasmuch as the interpretation clause must itself be interpreted, and may itself

become matter of controversy. *Nutter v. Board of Health*, 4 Q. B. Div. 375; *Reg. v. Justices*, 7 Adol. & E. 480.

That the billets in question have all the physical characteristics of steel in strength, elasticity, and homogeneity of character is abundantly shown by the evidence. In chemical composition this metal also responds to approved tests for steel. The difficulty is to draw a distinction between certain grades of malleable iron and grades of mild or soft steel. Iron and steel shade into each other, and the known chemical and physical tests furnish no absolute guide by which we may always determine just when iron ceases to be iron or steel ceases to be steel. In *Greenwood on Iron and Steel*, a work regarded by all the experts who have been examined in this case as of very high authority, it is said of malleable or wrought iron, that it was "formerly described as iron in the lowest degree of carburization; but, with the advance which has happened in late years in the manufacture of steel, all attempts to frame a definition of 'malleable iron' upon a chemical basis have been futile, since in its lowest per cent. of carbon, comparative freedom from such impurities as silicon, sulphur, phosphorus, etc., occurring so largely in pig iron, it is rivalled and even excelled by the mild steels produced by the Siemens and the Bessemer processes. Definitions based upon its mechanical qualities are also equally unsuccessful, for the superior qualities of malleability, tensile strength, ductility, and welding, which, until a comparatively recent date, were considered to be the special attributes of malleable iron, are all possessed in an equal number or superior degree by the mild steels now produced in such large quantities, and with the utmost uniformity and regularity, by the processes above mentioned." "Steel" he defines to be "a compound of pure iron, with small percentages, ranging usually from .1 to 1.25 per cent. of carbon, existing not as graphite, but either as combined or dissolved carbon, the latter view now receiving influential support." "All other elements, although several are invariably present in greater or less proportion, must still be regarded as impurities in the steel, notwithstanding that it may be advantageous to introduce some of them to impart special qualities to the metal, or to neutralize the effect of the presence of other of them." His own definition of "wrought iron," as well as of "steel," he bases upon the mode of production. Thus, he says malleable or wrought iron "would embrace the commercial varieties obtained either as the result of the decarburization, and more or less complete separation of several of the impurities of pig iron during the process of puddling, or as the product of the direct treatment of certain ores in the Catalan bloomery, Siemens rotary, or other furnace, in which a semi-fused product is obtained, possessing the malleability of wrought iron." The term "steel," "embracing also what is known as 'ingot iron,'" "would be reserved to distinguish such varieties of iron as are delivered in a state of fusion, allowing of the metal being cast at once into a malleable ingot from the furnace, crucible, or other vessel in which it is produced." *Greenw. Iron & Steel* (4th Ed.) 203.

This definition of "steel" is supported by some of the experts examined by the importer. It is evident that congress has adopted a

definition of "steel" which is based in part upon the mode of production. That definition is found in paragraph 150 of the McKinley act, and is in these words:

"All metal produced from iron or its ores, which is cast and malleable, of whatever description or form, without regard to the percentage of carbon contained therein, whether produced by cementation, or converted, cast, or made from iron or its ores, by the crucible, Bessemer, Clapp-Griffiths, pneumatic, Thomas-Gilchrist, basic, Siemens-Martin, or open hearth process, or by the equivalent of either, or by a combination of two or more of the processes, of their equivalents, or by any fusion or other process which produces from iron or its ores a metal either granular or fibrous in structure, which is cast and malleable, excepting what is known as 'malleable-iron castings,' shall be classed and denominated as 'steel.'" 26 Stat. 577.

The affirmative provisions of the definition which must exist to justify classification for dutiable purposes are these: (1) That it shall be a metal produced from iron or its ores. (2) That it shall be a cast metal. (3) That it shall be malleable. (4) If these conditions exist, and it is not what was known to the trade and commerce of the country at the time of the adoption of the act as "malleable iron castings," then the statute requires that it shall be classified as "steel," irrespective of the process by which it was made, or the per cent. of carbon contained, or whether it be granular or fibrous. That the metal in question is a compound of iron "produced from iron or its ores" is not controverted. The contents, other than iron, found by chemical analysis, are:

Combined carbon.....	.20
Silicon .....	.023
Manganese .....	.081
Phosphorus .....	.045
Sulphur .....	.002

That it is granular in structure is practically undisputed. That it is malleable is conceded on all sides. The controverted question is as to whether it has been "cast." The fact of casting does not make it steel, it being entirely possible to make steel without casting. We do not understand that this proposition is controverted by any of the experts or by any of the authoritative writers upon the manufacture of steel. The capability of being "cast" is doubtless a test of some value in determining the value of the metal and the extent of the impurities contained. The definition of "cast," as given by Mr. Webster, is: "To form into a particular shape, by pouring liquids into a mold." The Century Dictionary defines it as "that which is formed by founding; anything shaped in or as if in a mold." The only direct evidence delivered by any witness, from actual knowledge of the method of production adopted by the Sandviken manufacturers of these billets, was that of Mr. Belcher, through whom the appellee bought this metal and made his importation. Mr. Belcher was a witness for the importer, and testified that he had visited Sandviken, and has seen billets of this kind made. That witness said:

"It is first made from the iron ore by what is called the 'direct method,'—'Sandviken direct process.' Charcoal is used as a fuel. It is then decarbonized, and run into molds. There is an intermediate process, now, Mr. Greenwood. The process is not the subject of patents. It is a secret process; it is a privilege that I had to see it. I must object to telling the intermediate



process. I will tell you the final one. It is taken from these molds to a rolling mill. It is rolled or squeezed into pieces about ten feet long. Q. Circular? A. Just in the same form as you see it, and as I have described,—cylindrical. It is then taken to a kind of table, where there are saws at sixteen or eighteen inches apart, and it is pushed against these saws, you know, just as quick as we can say it, and it is sawed into this shape, lengths, sixteen or eighteen inches apart.”

This uncontradicted evidence would seem to conclusively establish that these billets were composed of a metal which had, at one stage of the manufacture, been cast. The statutory definition of “steel” does not limit it to a metal which has been cast as a result of but one stage in its production. If as a first result the iron in the ore is reduced to a metallic sponge or pasty mass, and in that condition delivered from the furnace, and then, by a second operation, melted and “run into molds,” it is clearly a “cast steel,” within the meaning of the act. The definition furnishes no authority for an arbitrary limitation to a metal cast at once upon delivery from the reduction furnace.

The learned counsel for appellee has very strenuously urged that steel produced by a “direct process” is never cast, and that, when his witness Belcher said that this metal had been “run into molds” at one stage of its production, he did not mean that it had been “cast.” He has urged that by the direct processes the iron is reduced from its ores to a spongy ball or mass, and in that condition hammered into a bloom, or by other pressure squeezed into a mold or form, and that Belcher’s statement that the Sandviken manufacturer produced the metal here involved by direct reduction of the ores, using charcoal as a fuel, is the controlling fact stated by him, and that which he further said is to be understood in the light of the theory that the “direct processes” are all inconsistent with casting. This theory is, to some extent, supported by one of the expert witnesses who testified for the importer, who expresses the opinion that these billets were never cast, but produced as wrought iron as at the bloomery furnaces of this country. Mr. Greenwood describes steel as produced in three ways: First, directly from certain pure iron ores; second, by the decarburization of malleable iron; or, third, by the decarburization of pig iron. Greenw. Iron & Steel, par. 677. The same author says, at paragraph 678, that “the direct reduction of iron ores for the production of steel embraces the reduction in the Catalan forge, in the Siemens rotator, by the Chenot process, etc., in each of which processes rich ores of iron, such as the purer oxides, are heated along with charcoal or carbonaceous matters, and thereby either steel or a hard steely iron is produced.” By “steely iron” we understand to be described a grade of mild or soft steel which approaches so closely in physical and chemical characteristics the metal known as “malleable wrought iron” as to be difficult to distinguish the one from the other, or a grade of wrought iron so nearly approaching steel as to be almost undistinguishable. Mr. H. De B. Parsons, an expert of marked intelligence, declares the term “steely iron” to be unscientific, and one which should not be used. He says that the point when a metal ceases to be wrought iron and reaches a grade known

as steel is difficult of definition, in that "they fade away, one class to the other, as daylight to darkness." But he gives it as his opinion that, when the physical and chemical qualities are given, the metal should always be classed as the one or the other, and that only when doubt exists is the term "steely iron" employed. The method of production he denominates the "Sandviken direct process." "It is made," he says, "by what is known as the 'direct process,' straight from the ore." There seems, from Mr. Belcher's meager description of the method of manufacture adopted by the Sandviken people, to be three stages or steps in the process. The first is the reduction of the ores, charcoal being used as a fuel. Whether this reduction operates to liquefy the iron contents of the ores, or to reduce it simply to a spongy or pasty ball, he does not say. The third and last stage he describes as occurring after the metal is taken from the molds into which it has been poured. "It is taken," he says, "from these molds to a rolling mill; it is rolled or squeezed into pieces about ten feet long," of a cylindrical character. These pieces are then sawed into lengths of eighteen inches, and the billet as exported is complete. The second or intermediate process, he says, is a secret process, and he declines to explain it. It is, however, very clear that this intermediate process was one by which the metal was decarbonized, and is a step which occurred before the metal was "run into molds." If it be true, as this witness deposes, that, at one stage of the production of this Sandviken metal, the metal was "run into molds," then we clearly have a "cast steel."

It is wholly immaterial, under the statutory definition of "steel," whether the metal be cast when first delivered from the furnace, or cast after a second operation, by which, after removal from the furnace as a pasty or spongy mass, it was melted and decarbonized. The "secret process" which is described as an intermediate process by Belcher, and which he declines to divulge, probably consisted in the means used to decarbonize the metal before running it into molds. Certain it is that the metal was rendered so plastic as to enable it to be run into molds, for the direct evidence of the witness is that it was "run into molds," before the final process by which it was rolled into the shape we find it in commerce. Under this positive evidence it is impossible to assume that the witness meant, by running into molds, that the metal as a spongy mass was either hammered into a bloom or squeezed into a form. Neither is this evidence in conflict with the other statement of the witness that the metal was produced from the ore direct. It is true that a steel is made direct from the ores without casting by some of the direct methods, but it is not true that all the "direct" methods exclude casting. A rude form of steel making is that of the Catalan furnace. By the Catalan method, the iron in a spongy mass, as described by Greenwood, is withdrawn from the furnace, "to be shingled under the steel hammer for the expulsion of the slag and extraneous matter, together with the consolidation of the mass by welding together the spongy granular mass into a more solid bloom." Wrought iron is made in the same way in bloomery furnaces. Another "direct" method is described by Greenwood as the "Chenot process." This involves two

operations, "in the first of which," says Mr. Greenwood, "a metallic sponge is obtained, and in the second operation this sponge is melted in crucible along with carbonaceous matters." The spongy mass, when thus decarbonized and reduced to a plastic condition, is cast into ingots. Greenw. Iron & Steel, pars. 685, 686. Another direct method described by the same author is called the "Siemens direct process." By that method the metal is produced from the ores direct, and, when reduced to a mass of spongy consistence, "is shingled under the hammer, or pressed in squeezers or other apparatus," in the same manner as by the Catalan process or bloomery methods, before mentioned. "But," says Mr. Greenwood, "the process, as now applied to the manufacture of steel, is generally used only as a preliminary stage in the production of steel in the open-hearth steel-melting furnaces, to which furnace the balls of metallic sponge, or the shingled blooms from the same, are at once transferred from the rotator for fusion with the other materials of the ordinary charge of the steel-melting furnace." Paragraph 678. In determining whether these billets are composed of a cast steel, nothing material can be predicated of the absence of cast marks, or of their hollow cylindrical form, for the only direct evidence in the record shows that this form was the result of a rolling-mill process, subsequent to the removal of the metal from molds into which it had been run. The great weight of expert evidence contained in this record, based upon physical structure and characteristics and chemical composition, is in harmony with the opinion of the general board of appraisers. The opinion of expert Gray, so much relied upon by the appellee, that this metal shows too little manganese to have permitted rolling if made by any of the processes he names, and too little silicon to have been made by a crucible process, is not supported by the other expert evidence in the record, much of which comes from witnesses of the highest intelligence, wholly disinterested. Phosphorus, sulphur, and silicon seem to be regarded as impurities in steel. Manganese is an antidote which serves to minimize the evil effects of their presence. The fact that these impurities were present in very small quantities rendered the use of but very little manganese necessary. Thus the weight of expert opinion and the only direct evidence in the record concur in establishing the fact that these billets, at one stage of their manufacture, have been cast. Having all the other requisites of steel, we are constrained to reverse the judgment of the circuit court, and sustain the classification of the general board of appraisers. The cause will be remanded, with directions to enter judgment in accordance with this opinion.

## BENNETT et al. v. McKINLEY et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

## TRADE-MARK—"INSTANTANEOUS" TAPIOCA.

The word "Instantaneous" is not a valid trade-mark, as applied to a preparation of tapioca which is distinguished from other preparations of that article by reason of its adaptability for immediate use, without the preliminary soaking required by other preparations.

Appeal from the Circuit Court of the United States for the Eastern District of New York.

This was a suit by William S. McKinley and others against William D. Bennett and others to restrain the infringement of complainants' alleged trade-mark. The circuit court granted a preliminary injunction. Defendants appeal.

Brewster Kissam (Geo. H. Fletcher, of counsel), for appellants.  
Chas. G. Coe, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The question in this case is whether the word "Instantaneous" constitutes a valid trade-mark, when applied to a preparation of tapioca which is distinguished from other preparations of that article by reason of its adaptability for immediate use without the preliminary soaking required by other preparations. According to the theory of the complainants, the tapioca sold in this country prior to 1891 was of three varieties,—the flake, pearl, and granulated,—and, in either form, required a prolonged soaking in water, lasting from three to six hours, to prepare it for table use; and one of the complainants, after experimenting to ascertain whether tapioca could not be so treated that this prolonged soaking might be dispensed with, discovered that it could be, by grinding the tapioca to a further degree of fineness. In the fall of 1893 the complainants commenced to manufacture the finely-ground article, and since then have advertised and sold it under the name of "Instantaneous Tapioca." Upon the packages in which it is sold by them is printed this notice: "Requires no soaking, but softens instantly." According to the theory of the defendants, the finely-ground article did not originate with the complainants, but had been imported from France, and had been largely and continuously sold in this country, prior to the enactment of the so-called "McKinley Tariff Act," by the name of "Tapioca Exotique"; and subsequently, induced by the high rate of duty imposed upon it by the McKinley tariff act, the defendants began to manufacture and sell the article in this country. Their article is sold under the name of "Instantaneous Cassava Tapioca." Upon their packages, among others, is printed the following statement: "This substance is soluble in water, forms a nourishing food, and can be prepared instantaneously—without soaking—into puddings, custards, blanc mange, griddle cakes, &c."

There is a marked dissimilarity in the symbols used upon their

packages by the respective parties, and each print their own names upon their own packages, in conspicuous type, as the manufacturers. If the most casual inspection of the packages would not lead a purchaser to discriminate immediately, the difference in their appearance is certainly sufficient to preclude any inference that the defendants have attempted to palm off their article upon the public for the article manufactured by the complainants. It is plain that the complainants are not entitled to relief on the ground of unfair competition. Their case must be determined solely upon the law of trade-mark. No principle of the law of trade-mark is more familiar than that which denies protection to any word or name which is descriptive of the qualities, ingredients, or characteristics of the article to which it is applied. An exclusive right to the use of such a word, as a trade-mark, when applied to a particular article or class of articles, cannot be acquired by the prior appropriation of it, because all persons who are entitled to produce and vend similar articles are entitled to describe them, and to employ any appropriate terms for that purpose. Whether a word claimed as a trade-mark is available because it is a fanciful or arbitrary name, or whether it is obnoxious to the objection of being descriptive, must depend upon the circumstances of each case. The word which would be fanciful or arbitrary when applied to one article may be descriptive when applied to another. If it is so apt, and legitimately significant of some quality of the article to which it is sought to be applied, that its exclusive concession to one person would tend to restrict others from properly describing their own similar articles, it cannot be the subject of a monopoly. On the other hand, if it is merely suggestive, or is figurative only, it may be a good trade-mark, notwithstanding it is also indirectly or remotely descriptive. Of the numerous adjudications which illustrate the application of the rule, it will suffice to refer to a few. In *Raggett v. Findlater*, L. R. 17 Eq. 29, the name "Nourishing Stout," as applied to a malt liquor, was held to be descriptive. That case was cited with approval by the supreme court in *Manufacturing Co. v. Trainer*, 101 U. S. 51. In the recent case of *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, the supreme court held that the words "Iron Bitters," applied to a medicine, were descriptive. In *Davis v. Kendall*, 2 R. I. 566, the name "Pain Killer," as applied to a medicine, was held to be fanciful. The same view was taken of the name "Sliced Animals," as applied to toys consisting of pictures of animals cut into strips or pieces, in *Selchow v. Baker*, 93 N. Y. 59, and of the words "Lightning Hay Knife," as applied to a knife, in *Holt Co. v. Wadsworth*, 41 Fed. 34.

Applying the rule to the facts of the present case, we think the word "Instantaneous," as applied to the kind of tapioca dealt in by the parties, is descriptive, and consequently not a valid trade-mark. It not only is aptly and truthfully descriptive of one of the properties of the article to which it is sought to be applied, but it is especially appropriate to point out concisely and accurately the peculiar characteristic which distinguishes the particular tapioca from

other varieties. The order granting an injunction is reversed, and the cause remanded to the circuit court, with instructions to vacate the injunction.

NEWARK WATCH-CASE MATERIAL CO. v. WILMOT & HOBBS  
MANUF'G CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

1. PATENTS—INVENTION—WATCH PROTECTORS.

There is no invention in protecting watches from electrical influences by means of a box or receptacle of sheet iron, or other highly-magnetic metal, made large enough to contain the watch case; it appearing that the same result had previously been accomplished by means of an internal case of like material, as well as by making the watch case itself of such metal, and that external safety boxes of metal and leather were also old. 60 Fed. 614, affirmed.

2. SAME.

Patent No. 413,644, to Benfield, Aufhauser & Milne, for a watch protector, is void for want of invention. 60 Fed. 614, affirmed.

Appeal from the Circuit Court of the United States for the District of Connecticut.

This was a suit in equity by the Newark Watch-Case Material Company against the Wilmot & Hobbs Manufacturing Company for infringement of a patent for a watch protector. The circuit court dismissed the bill (60 Fed. 614), and complainant appealed.

George Cook, for complainant.

A. M. Wooster, for defendant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The bill of complaint in this case was founded upon the infringement of letters patent No. 413,644, dated October 29, 1889, and issued to Thomas Benfield, Samuel Aufhauser, and Alexander Milne, for a watch protector. Upon final hearing the circuit court of the United States for the district of Connecticut dismissed the bill, and thereupon the complainant appealed to this court.

The principal object of the invention was to provide a device which would prevent the movements of watches which were worn by electricians, or persons employed in electrical work, from being magnetized or influenced by magnetic currents when brought near dynamos or other electrical apparatus. The patentees stated in their specification the state of the art at the time of their invention, with respect to means for obviating this injury to watches, as follows:

"Heretofore this object has been accomplished by securing within the watch case a box, receptacle, or shield entirely surrounding and inclosing the watch movement; such box or shield being constructed of highly-magnetic metal, and which becomes, when placed within the case, a permanent part thereof. The same object has also been accomplished, or partially so, by constructing the watch case wholly or partially of highly-magnetic metal; the effect, in both instances, being that the shield or watch case will act as a reservoir for receiving and storing the magnetic or electric currents, and prevent

them from affecting or influencing the watch movement inclosed within the same. Many objections, however, have been urged against the above-described means; it being obviously impossible, in many instances, to alter a watch to allow the box or shield to be inserted, and in other cases it has been found to be an item of too great expense to make such alteration or change."

Protection to the watch, from being scratched or disfigured, was another alleged object of the invention, which consisted substantially "of a box or receptacle made of sheet iron, or other highly-magnetic metal, of the same, or approximately the same, shape as a watch case, and of such size as to nicely and snugly contain the same; an opening being made in the two sections of the receptacle for the stem or pendent of the watch; the interior of said receptacle being lined with plush, chamois skin, or other soft, nonmagnetic material, and the outer surface covered with paint, japan, leather, or other dressing, to impart to the article a neat and finished appearance." In one form of the device the center of one lid or section was cut out, so that the face of an open-faced watch, within the protector, could be seen without raising the lid. The invention further consisted in the method of the construction of the hinge which connected the two sections. The claim was as follows:

"As a new article of manufacture, a watch protector adapted to contain or hold a watch, and constructed of sheet iron, in two sections, B, B; the latter being provided with the projections, b, and joined together by means of a coiled-spring hinge, consisting of the pintle, c, and spring, d, protected by the leather or other material, l, allowing said protector to be opened, and the watch consulted, without removing said watch from the protector; the inner surfaces of said sections, B, being covered with plush or other fabric, and the outer surfaces with japan, paint, or other like substance,—substantially as set forth."

It thus appears that the invention was an external box, of highly-magnetic metal, which inclosed a watch, instead of a box of the same metal, within the watch case, which inclosed the watch movement, or instead of a watch case wholly or partially made of such metal; and it is obvious that an external, removable box has advantages over a nonremovable box within the case. An external, removable safety case or hinged box, made of two pieces of sheet brass or other metal, cut in a circular form, to receive a watch, and to be secured in the pocket by the aid of loops or eyes upon the rear side, by which it is attached to the interior side of the pocket, so as to protect the watch against loss by accident or theft, was described in letters patent No. 56,014, dated July 3, 1866, to William W. Covell, Jr. This device had apparently never been made use of by the public. Its object was protection against robbery, and, in the absence of robbery, it would have been an inconvenient contrivance; but it shows that the idea of an external removable case was not original with the patentees of the Milne patent. The ordinary pocket or case of chamois leather is well known. No anticipatory, removable watch protector was shown in the record, but the question is one of patentability, and is whether an internal case of magnetic metal and a watch case of the same material being old, and an external safety box of metal and leather pocket having been known, was there any invention in making an

external, removable box or case of magnetic metal, in which the watch could be placed when exposed to the influence of a dynamo? The statement of the question seems to carry its own answer. The idea was a natural and obvious one. It naturally met and obviated the danger to which the watches of electricians were subject. The arrangement of the details, the hinge, with its spring, the plush lining, and the dressing of the outer surface, all required mechanical skill, so as to make the article attractive as well as convenient, but in these details the mind of an inventor was not needed. We concur in the conclusions of the circuit court with respect to the patentable character of the invention, and its decree is affirmed, with costs.

---

STANDARD PAINT CO. v. BIRD et al.

(Circuit Court, D. New Jersey. June 23, 1894.)

1. PATENTS—MALTHA COATED PAPER—INFRINGEMENT.

The Pearce and Beardsley patent No. 378,520, a new article of manufacture and commerce, consisting of paper coated or saturated with maltha, as therein set forth, the substance called "maltha," and used by the patentees, being described in the specifications of the patent as the solid residuum obtained in the distillation of the heavier grades of petroleum, is infringed by defendant's use of "petrocite," which is the same thing as the patentees' maltha, though it is obtained from other substances than that which they mentioned, and though the patentees were ignorant that it was so obtainable.

2. SAME—ANTICIPATION.

Though said patent could not, in view of the prior state of the art, be sustained as for the use of any kind of bituminous material whatever, its claim being limited to the maltha particularly described, and this having never before been used for the purpose for which patentees used it, the patent is valid.

3. SAME—INJUNCTION.

In a suit against R. and B. for infringement of a patent for paper coated with maltha, it appearing that R. rented part of his factory to B., and that B. coated the paper; that R. manufactured and sold to B. all the paper which was to be coated by B.; that R. got an extra price for his paper to compensate him for looking after the filling of orders for B., and supplying money for and paying off B.'s help, when B. was away,—injunction will issue against both, though when it comes to an accounting complainant must prove that R. is liable to him in profits or damages, under risk of what the court may possibly order concerning costs.

Suit by the Standard Paint Company against Bird and others for infringement of patent.

Willard Parker Butler, for complainant.

Thadiaz B. Wakeman, for defendants.

DALLAS, Circuit Judge. This suit is brought upon patent No. 378,520, granted to Truman J. Pearce and Melvin W. Beardsley, assignors, etc., the sole claim whereof is as follows: "As a new article of manufacture and of commerce, paper coated or saturated with maltha, substantially as herein set forth." Several of the de-



fenses suggested by the record, though considered, need not be separately discussed. No brief on behalf of the defendants was furnished until a considerable time after the hearing. Such postponements are not unusual, but are very unsatisfactory. The argument of 82 printed pages, which has now been submitted, may, however, be safely accepted as finally presenting and enforcing the grounds of defense which are relied upon. For this reason, and because they clearly present what seem to be the real questions in the cause, I will deal only with the two propositions which are affirmed in the defendants' brief, as follows:

"Our position is twofold: (1) That complainant's patent covers only the use of the 'maltha,' as defined and described, and is restricted thereto; and that said maltha is not an ingredient used by Bird. (2) That, if it be held to include the said ingredients used by Bird, it is unsustainable and void, as neither new, nor useful, nor properly and lawfully granted."

The first limb of the first of these propositions may be granted. To state it somewhat differently, the complainant's patent is for the article of manufacture claimed, when produced by coating or saturating paper with "maltha," as defined. But how is the "maltha" referred to defined? The correct answer to this question must be sought at the threshold of the case; but it is not hard to find. It is manifest from the evidence that the patentees employed this term without possessing exact knowledge of its meaning, and the counsel who prepared their application appears to have doubted the propriety of using it to designate the substance which was in contemplation. But there is no reason to suspect that any inexactness in this matter was intentional, or was resorted to for the purpose of deception; and, in fact, no person has been misled by it. Under these circumstances, the meaning of the word "maltha" may fairly and justly be taken to be that which the patentees attached to it when they adopted it, and that meaning appears from the history of the invention, and, especially, in the specification of the patent in suit, where it is said:

"The product and substance known as 'maltha,' which we employ and utilize in the manufacture of our improved paper, is the solid residuum obtained in the distillation of the heavier grades of petroleum, and, as procured from oil refineries in many localities, it is sufficiently free from earthy and other foreign solid matter to be used without any preparatory treatment; but, where it is found and procured in a more or less unclean condition, it is necessary to eliminate the sand and other impurities mixed with it before it is suitable for this purpose."

Resort being had to this description of the substance intended, all difficulty arising from the inapt use of the name "maltha" in the claim is removed, for the latter may be read as if the defining language of the specification was contained in the claim itself. By doing this the claim is neither added to nor subtracted from. It is explained by interpretation of its language in accordance with the true intent of the patentees, as expressed in another part of the same instrument. Reference to the specification for such a purpose is not objectionable, and in this case it renders unimportant the expert

testimony which has been taken for the purpose of showing what would be generally understood to be "maltha" by those who are well instructed with respect to the true sense of that term. Now, it being conceded that the patent covers only the use of the substance thus defined, regardless of the name by which it should be designated, the defendants insist that the claim is, in consequence, so restricted as not to be inclusive of "an ingredient used by Bird"; but the ingenious argument of counsel in support of this contention is not convincing. Mr. Bird, it appears, employs a material which is known as "petrocite." He adds to it certain other substances, but the petrocite is the essential component of his mixture, and by its use he produces the complainant's patented article. Much expert testimony has been adduced upon, and the arguments have been largely directed to, the question of identity of petrocite with the maltha of the patent; but it is unnecessary to particularly refer to this evidence, or to attempt a review of the publications which have been cited in connection with it. It is sufficient to say that, upon careful consideration of the whole matter, I have arrived at the conclusion that petrocite and maltha, as described by the patentees, are the same thing. They are not produced in precisely, though they are in substantially, the same manner; and the defendants' "solid residuum" is obtained, not "in the distillation of the heavier grades of petroleum," but from the lighter grades of the oil regions of the eastern portion of the United States. Yet, as has been said, the products, however and from whatever produced, are the same, and, by the use of either, the same manufactured article is created; and this, in the sense of the patent law, constitutes identity. It is still urged, however, that the patentees had no knowledge of petrocite; that they described the residuum they had in mind as that which is obtained in the distillation of the heavier grades of petroleum, and that therefore they should be held to be restricted to a residuum so obtained. I am unable to assent to this. It may well be that the patentees were ignorant of the fact that the material which they referred to was obtainable from other substances than that which they mentioned, but such ignorance does not have the supposed restrictive consequence. The material itself, not the substance from which it may be obtained, is the gist of the matter, and "a patented manufacture is infringed by the making, use, or sale of any manufacture which possesses the same essential characteristics."

The proposition that the views which have been expressed with respect to the scope of the patent in suit require that it should be held to be "unsustainable and void" involves, I think, a misconception of the construction which has been adopted. Investigation of the prior state of the art, as shown by this record, does disclose that the patent now in question could not be sustained as for the use of any kind of bituminous material whatever; but the claim, as I have interpreted it, is limited to the solid residuum particularly described. It is because the defendants have used this same material that they have infringed; and it is because it had never been used before as and for the purpose for which the patentees employed it that the

patent which they obtained is impregnable to assault on the ground of anticipation.

The learned counsel of the defendants has suggested that "this suit should be dismissed as to the defendant Reynolds," because, as is averred in the amended answer, he "has no interest in said business, except as a creditor, landlord, and keeper, and he denies that he ever sold or manufactured paper, as is alleged as to him in said bill of complaint." Mr. Reynolds' connection with the infringing business seems, however, to have been closer and more extensive than this language indicates. This appears from his whole testimony, but the following extract from it will suffice to explain what the character of his participation in the production and sale of the infringing paper really was:

"XQ. 28. Did Mr. Bird begin to manufacture paper at this factory as soon as the machinery was up? A. He commenced to coat it. XQ. 29. Was all the paper which was coated by Mr. Bird, at the factory which you rented him, from the time that the machinery was first put up, made by you? A. Yes, sir. XQ. 30. Mr. Bird was frequently absent, was he not, on business trips? A. Yes, sir. XQ. 31. Did you ever go into that part of the factory occupied by him during his absence? Yes, sir. XQ. 32. Ever give any instruction to anybody there? A. Not as far as coating paper. XQ. 33. But as far as what did you give instructions? A. For instance, I made the men put it on the trucks, and shipped it. XQ. 34. Why did you do that? A. If a man sends me an order, I ship it. XQ. 35. Then, as I understand, it was still your habit, in the part of the factory rented by you to Mr. Bird, to ship paper for his account, which had previously been coated by him. A. Yes. XQ. 36. What other thing have you done in that part of the factory that you rented to Mr. Bird, at any time after this machinery was set up? A. Nothing to speak of. XQ. 37. Who paid off the men when Mr. Bird was gone? A. That arrangement was made with me to pay the men, and charge it to him. XQ. 38. Who supplied the money for that? A. I did; the same as I supplied the paper. XQ. 39. Was any paper coated while Mr. Bird was gone? A. Yes. XQ. 40. Who attended to that? A. He had a man there to attend to business. XQ. 41. Did you ever give that man any instructions of any sort? A. No. XQ. 42. Did you ever supply any money for any other purpose than for paying wages while Mr. Bird was gone? A. No. XQ. 43. Who paid for any coating material that came while Mr. Bird was gone? A. I might have paid for some of it, but most of it was left until he came, and he settled it himself. XQ. 44. Now, did you ever sell any coated paper while Mr. Bird was gone? A. I never solicited an order. XQ. 45. (Question repeated.) A. If parties came there, I gave them the price, and I believe one party bought some. XQ. 46. Did that party pay the money to you? A. Yes. XQ. 47. Did you fill any orders for Mr. Bird that came in while he was gone? A. Yes. XQ. 48. From the very commencement of his coating paper? A. Yes. XQ. 49. Did you take the money that came in during Mr. Bird's absence from orders that had been filled? A. Yes. XQ. 50. I understand that you took, at the commencement of the operation with H. J. Bird & Co., all the receipts of the firm from the sales of coated paper, for the purpose of protecting yourself in some manner. Is that correct? A. It was for my own benefit to pay for the paper and the help that I gave. XQ. 51. What did you charge Mr. Bird for looking after his business while he was gone? A. That was made in the price of paper. He was to pay me so much for the paper, and I was to see it shipped. XQ. 52. Then, as I understand you, you gave Mr. Bird a price which covered you for the additional labor and trouble that you were put to in looking out for his business while he was away? A. Yes. XQ. 53. Did you figure the paper for Mr. Bird at a larger price than you figured it to other customers, for the purpose of compensating yourself in this way? A. Yes. XQ. 54. Did you sell more paper or less paper during the year after Mr. Bird began to coat

paper than you had done the year before? A. I have always sold the whole capacity of my mill, even before I saw Bird. XQ. 55. But you sold, after he began operations, the full capacity, at somewhat better price to yourself. did you not? A. Yes."

The facts do not, in my opinion, call for the dismissal of the bill as to the defendant Reynolds; but it is not impossible that it may hereafter appear that the following remarks, made by the court in *Starrett v. Machine Co.*, *infra*, are pertinent to this case. Judge Lowell there said:

"I think an injunction should go against all the defendants; but, when it comes to the accounting, the plaintiff must prove before the master that the company is liable to him in profits or damages, under risk of what the court may order concerning costs." 14 Fed. 910; *Jennings v. Dolan*, 29 Fed. 861; *Jackson v. Nagle*, 47 Fed. 703.

A decree for the plaintiff, in the usual form, will be entered.

---

GRISWOLD v. WAGNER et al.

(Circuit Court, S. D. Ohio, W. D. January 21, 1895.)

No. 4,596.

**PATENTS—ANTICIPATION—INVENTION—WAFFLE IRONS.**

The Griswold patent, No. 229,280, for an improvement in waffle irons, "consisting in a novel construction of the hinge, connecting the two parts of the divided pan," was anticipated, as to claims 1 and 2, by the Harrington and Tower coffee-roaster patents (Nos. 24,024 and 21,858, respectively), and is void as to claim 3 for want of invention. *Griswold v. Harker*, 10 C. C. A. 435, 62 Fed. 389, distinguished.

This was a bill by Mathew Griswold against W. H. Wagner and others for infringement of a patent.

A. H. Johnson and J. C. Sturgeon, for complainant.  
Harrison Wilson and Foraker & Prior, for defendants.

SAGE, District Judge. The complainant sues for the infringement of the first, second, and third claims of patent No. 229,280, dated June 29, 1880, for waffle irons. The improvement consists (so it is set forth by the inventor in the specification) "in a novel construction of the hinge connecting the two parts of the divided pan, whereby one of the pivots or journals on which the pan rotates is made to form a part of said hinge, the hinge and pivot being thus brought together, while the opposite pivot or journal on which the pan rotates is formed on the divided handle, by means of which the pan is rotated, and either portion which for the time being is uppermost is lifted for opening the pan."

It further consists, as is set forth in the specification, "in a novel construction and arrangement of the socket in the rim or supporting ring for the reception of the hinge and pivot, whereby the tilting or dumping of the pan is prevented when the cover is raised."

There are six claims, of which the first, second, and third are as follows:

(1) "In a waffle iron, the hinge upon which the pan opens, provided with one of the journals or pivots on which the pan is rotated."

(2) "The journals or pivots on which the pan rotates, formed upon or connected, one with the hinge upon which the pan opens, and the other on the handle for rotating and opening said pan."

(3) "The waffle-iron frame or ring provided with the enlargement or projection on one side, as described, forming the socket for the hinge of the pan and a support for the lid when raised, substantially as described."

The first two claims were sustained by the circuit court of appeals (Eighth circuit, June 25, 1894) in the case of *Griswold v. Harker*, 10 C. C. A. 435, 62 Fed. 389. No oral testimony was taken on behalf of the defendants in the case at bar, the defense resting wholly upon the state of the art as shown by patents, to which reference will hereinafter be made. Upon the hearing, it was stipulated by the parties in open court that in the case of *Griswold v. Harker*, above referred to, what is known as the "Harrington Model" was not before the circuit court of appeals; also, that letters patent of the United States (No. 21,387) were granted August 31, 1858, to S. Tower, for a coffee roaster; and that the same shall be treated as though having been pleaded in the answer, and offered in evidence by the defendants; and that the model representing the same shall be considered as in evidence; and that neither this patent nor model was before the court below or the court of appeals in the case of *Griswold v. Harker*, above referred to; also, that on the 6th day of July, 1893, letters patent of the United States (No. 502,086) were issued to David Shields; and that the complainant in this case became the purchaser and assignee of the same; and that, since he became such purchaser and assignee, he has constructed waffle irons in accordance therewith, reference being had in this connection, specifically, to the form of hinge in said letters patent described. It was also agreed that said letters patent should be considered as in evidence.

The Harrington patent, No. 24,024 (May 17, 1859), is for a coffee roaster, consisting of a hollow, divided ball of iron, which is the roaster, and has a projecting handle, made hollow, for the sake of lightness, to which a crank is attached. This ball rests in vertical bearings attached to a plate, which is designed to be placed over the hole of a cook stove when the roaster is in use, and, when removed from the stove, to be placed upon a trivet provided with feet of sufficient length to afford it a steady support, and keep it out of contact with whatever may be beneath. The handle is divided, consisting of two sections, each corresponding to the other, so that, when united, they form a cylindrical and complete whole. The section of the handle attached to the lower half of the ball is shorter than that attached to the upper half. At its outer end it is made square, so that, when the ball is closed, the crank fits upon the square portion of the handle. The crank can be slipped backward and forward, but is prevented from being entirely detached by means of a washer at the outer end of its upper part. By slipping the

crank into position upon the square portion of the handle, the two halves of the ball are held securely together, and the ball may be then conveniently rotated. When it is desired to open the ball, either to charge it or to empty out its contents, the crank is slipped back against the washer, when the upper half of the ball may be lifted by the upper half of the handle, and by means of a joint or hinge upon the opposite side of the ball, and constructed of an iron pin cast upon the side of the ball opposite the handle, and passing through a slot in a jaw cast upon the lower half of the ball, at a point opposite the lower half of the handle, into which slot the curved jaw of the upper half of the ball passes, being passed in beneath a pin, shown in Fig. 1 of the patent. A hinge is thus formed, which may be readily taken apart by lifting and removing the upper half of the ball. When the ball is closed, and the hinge is in position for use in roasting coffee, it forms one of the journals or pivots on which the ball is rotated, and the united handle forms the other journal or pivot. There is here a complete anticipation of the hinge described in the first claim of complainant's patent, and of the journals or pivots described in the second claim. The principle and plan of construction are identical, the only difference being an immaterial modification of the shape of the pin and the slot. Essentially they are the same. There is no invention in the slight mechanical change which appears in the complainant's construction. This patent is referred to in the opinion of the court in *Griswold v. Harker*, but it now appears that the model was not before that court. It is stated in the brief of defendants' counsel that, between the hearing of that case in the circuit court and the court of appeals, the model was broken, and mended in such form that, when produced in the court of appeals, it was excluded, because not true to the requirements of the patent, and it was not considered by the court. It is stated in the opinion that neither the patent to Harrington nor any of the patents cited or offered in anticipation in that case is provided with any hinge at all, and that the *sine qua non* of a waffle iron is a hinge which will hold the divided halves of the pan continuously together during all the operations of opening, filling, emptying, and closing it, so that all these operations can be conveniently and quickly performed. It is also stated that, the moment the halves of the rotating parts of the Harrington device are open, they become detached, and must again be attached to each other before they can be turned or operated. In the specification of the Harrington patent the hinge is not spoken of as a hinge, but as a joint; and the drawings are such that, without a model, the conclusion stated by the court was one likely to be reached. But with the model it is impossible to regard the joint as anything else than a hinge, or to fail to see that the conclusion arrived at by the court in *Griswold v. Harker* was altogether wrong; for it is not true that, the moment the halves were opened, they became detached, and had to be again attached to each other before they could be turned or operated.

The defendants' hinge is identical in construction with the hinge shown in Tower's coffee roaster, patent No. 21,387 (August 31, 1858), the drawings only of which are before this court. They show a coffee roaster in general shape and construction like Harrington's. The handle is in two parts, which fit together when the roaster is in use. The hinge is formed by a cylindrical pin, projecting from the inner surface of one-half of the handle, and fitting into a hole in the inner side of the other half of the handle. This patent was not before the court in *Griswold v. Harker*. It is here for the first time presented. Whenever the roaster in that device or the waffle iron in the defendants' device is lifted from its resting place, there is nothing to hold the halves together, and they become detached. The complainant's expert testified in *Griswold v. Harker*, and reiterates the statement in this case, that the essence of the complainant's invention and its substantive feature is the bringing of the hinge and the pivot or the axis of the pan into a given line; and the details by which this is effected are the nonessential and immaterial features of the invention. This feature is clearly and fully comprised in the Harrington and Tower devices above described. The mere fact that their devices were spherical roasters, and not waffle irons, cuts no figure, as there would be no invention in substituting flat pans for pans spherical. The first two claims must be held invalid for want of novelty.

This leaves for consideration the third and only other claim upon which infringement is charged. This claim embraces nothing more than a ring having an enlargement or projection on one side, possessed of no functions in and of itself. It cannot be made to serve any useful purpose excepting in combination with the pans having the journals and hinge. It does not rise to the dignity of an invention. Given the other parts of the combination, and the necessity for a support for the lid when raised, any intelligent artisan ought to be competent, in the exercise of the ordinary skill of his craft, to suggest the enlargement or projection covered by the claim. It would be carrying the doctrine of allowing a claim limited to the precise form or construction beyond the utmost verge to sustain this claim on that ground. But, if it could be so sustained, the defendants' construction is so different in form—being merely the socket in which the spherical end of the handle of their device, or the ball, rests, to form a ball and socket joint, which is old—that they could not be held to be infringers.

The bill will be dismissed, at the complainant's costs.

## GEORGE ERTEL CO. v. STAHL.

(Circuit Court of Appeals, Seventh Circuit. January 18, 1895.)

No. 201.

**PATENTS—INFRINGEMENT—INJUNCTION PENDENTE LITE.**

An injunction pendente lite to enjoin infringement of a patent should not be granted, the fact of infringement not being clear from doubt, and defendant being financially responsible.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Suit by one Stahl against the George Ertel Company to enjoin infringement of a patent for an improvement for regulating mechanism for incubators. From an order allowing an injunction pendente lite, defendants appeal.

George H. Knight and Melville Church, for appellants.

L. H. Berger and Sprigg, Anderson & Vandeverter, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge. This is an appeal from an order allowing an injunction pendente lite, upon bill filed to enjoin the alleged infringement of the second claim of patent No. 210,559, issued November 11, 1878, to Edward S. Renwick, for "improvement in regulating mechanism for incubators," etc. The invention relates to a mechanism for opening and closing heat-controlling valves by which the temperature of the chamber of the incubator is regulated. The mechanism is controlled by the expansion and contraction of thermostatic bars arranged within, and influenced by the temperature of, the chamber. The thermostatic device described in the specification consists of two horizontal bars, each composed of materials of different thermostatic capacity, arranged horizontally, and supported at their ends. The bars are connected by a system of levers by which, upon expansion or contraction, they communicate motion to the other parts of the mechanism, whereby the valves admitting heat to the chamber are closed or opened. The two thermostatic bars are connected by a lever, the bearing of the fulcrum shaft of which is carried by the upper bar, while the arm of the lever is connected by a pivot and rod with the lower thermostatic bar. The specification asserts that it is preferred to arrange the thermostatic bars over each other and horizontally flatwise, and in such case it is preferred to counterpoise a portion of the weight of one or both bars, by means of the counterpoise described, adjustable along the arm of the counterpoise lever, connecting the counterpoise with the upper thermostatic bar. The practical effect of this counterpoise—so speaks the specification—is to prevent the weight of the bars themselves from materially affecting their curvature, and of rendering their curvature, by variation of temperature, more free. The inventor declares that a single thermostatic bar or thermometer may



be employed in the place of two combined bars, if the combination of thermostatic bars and connecting lever be not used. The second claim of the patent, which is alone here involved, is as follows: "The combination, substantially as before set forth, of a thermostatic bar arranged horizontally with a counterpoise weight."

The appellants' alleged infringing device is constructed in accordance with patent No. 518,522, dated April 17, 1894, issued to George Ertel. There the single thermostatic bar consists of a strip of rubber fastened at either end. A rod attached to the middle of the bar extends upward through the top of the egg chamber to, and passes freely through, a lever, and is suitably engaged therewith by a nut on the threaded end of the rod. The free end of this lever is connected by a link with another lever having a knife-edged bar on supports, and carrying at its free end an adjustable weight. The forward end of this lever is connected by a rod to a valve forming a cover for the upper end of the heat flue of the incubator. This valve, when closed, forces the heat into the egg chamber; when opened, permits its escape to reduce the temperature of the chamber.

It is contended by the appellants that this device in no proper sense infringes the claim of the patent in suit; that it is not applied to counteract the tendency of the thermostatic bar to sag, and that it performs a function wholly different from the counterpoise weight of the patent in suit; that the function of the one is to counteract the sag of the bars; of the other, to tilt the lever and raise the heat valve when, through the operation of the thermostatic bars, the lever is released. Upon the other hand, it is insisted that with a single thermostatic bar the function of the counterpoise weight is to take up the expansion of the bar, and transmit it to the lever, and that the function of the weight is the same in both devices.

In *Standard Elevator Co. v. Crane Elevator Co.*, 9 U. S. App. 556, 6 C. C. A. 100, and 56 Fed. 718, we declared the principles which should govern in granting injunctions in patent cases *pendente lite*. We are satisfied that this case falls within the principles there asserted. We do not deem it proper here and now to say more than this: that the fact of infringement is not clear from doubt. The issuance of the patent for the device of the appellants raises a certain presumption that it does not infringe the prior patent of the appellee. That presumption has not, for the purpose of an injunction before decree, been overcome to such extent that we can say the fact of infringement is not doubtful. There has been no adjudication sustaining the validity of the patent in suit. The public acquiescence asserted we regard of doubtful character; as referred to the particular device alleged to be here infringed, neither clearly stated nor well sustained by proof. If, however, the fact were otherwise respecting the question of public acquiescence, and the validity of the patent may be said to be conclusively established, we should regard the question of infringement to rest in such doubt that, within the principles governing the granting of preliminary injunctions, we think the restraining order here ought not to have issued. The pecuniary ability of the appellants to respond in damages, if they shall

ultimately be adjudged infringers, is not impugned. Within the settled doctrine of this court, the injunction was improvidently granted, and the order appealed from must be reversed.

---

GEORGE ERTEL CO. v. STAHL.

(Circuit Court of Appeals, Seventh Circuit. January 18, 1895.)

No. 202.

PATENTS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Pending suit to restrain infringement of a patent, injunction should not be granted, the validity of the patent in suit being assailed, and there never having been any adjudication sustaining it, there being no satisfactory showing of its having received public acquiescence, and its infringement being denied.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Suit by one Stahl against the George Ertel Company to enjoin infringement of a patent for an improvement in chicken brooders. From an order allowing an injunction pendente lite, defendant appeals. Reversed.

George H. Knight and Melville Church, for appellant.

L. H. Berger and Sprigg, Anderson & Vandeventer, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge. This is a suit brought to restrain the alleged infringement of letters patent No. 215,070, issued May 6, 1879, to Edward S. Renwick, for "improvement in chicken brooders," and of another patent, not here involved. The court below, on the 4th day of August, 1894, issued an injunction pendente lite, restraining the appellant from manufacturing or selling or offering for sale or advertising its "Improved Victor Brooder," declared to infringe the device patented to Renwick. The propriety of the restraint thus imposed is brought before us for review by this appeal. The patent is a combination patent. The leading features of the invention are stated by the patentee to be a warm floor for the chickens to rest upon in place of the cold floor of former devices, and the ventilation of the brooding chamber with warm air, in place of the lack of ventilation in older devices. This result he assumes to accomplish by means of a hot air chamber placed beneath the floor, and wherein the air is heated by artificial means, and is permitted to enter the brooding chamber through the perforated floor forming in whole or in part the bottom of the brooding chamber. In other words, the artificially heated air passes into the chamber in substantially the same manner that heated air is admitted into a room in a house, by means of a register in the floor. The four claims of the patent each embrace the perforated floor in combination with different parts of the device. The alleged infringing device is constructed under and

in conformity with letters patent No. 501,775, issued July 18, 1893, to George Ertel for "brooder." This latter device furnishes warm air to the brooding chamber in the following manner: Fresh air is caused to pass over a water tank containing water artificially heated, and is thereby warmed, and is thence conducted into a drum, which extends from the tank into the brooding chamber, and through openings in the top of the drum escapes into the chamber. The appellant contends that the principle of the Renwick patent is to keep the feet of the chicken warm by means of heat entering the chamber through the perforated floor; while, on the other hand, the appellant's invention is bottomed upon a principle, asserted to be in accordance with natural law, of keeping the feet of the chicken cool and the head warm, accomplished by introducing the warm air at the top of the brooding chamber, and that, therefore, there is no infringement. It is also insisted that Renwick's invention is anticipated by the patent to Napoleon E. Guerin, No. 3,019, dated March 30, 1843, for an artificial method of raising chickens. Upon the other hand, it is insisted that the appellant's device is a mere evasion; that the floor of appellant's brooder is made of thin board, which absorbs and radiates the heat communicated to it from the water tank beneath; that while in the one the perforations are flush with the floor, and in the other are at the top of the closed drum, the operation and function are the same, because the heated air, ascending through the perforated floor, in large degree naturally rises to the top of the chamber before diffusing; the difference in the two devices being that in the one the warm air is discharged into the brooding chamber at the floor, and passes upward; in the other it is carried by the perforated drum a short distance above the floor before it is discharged into the chamber.

This patent has never passed the ordeal of judicial scrutiny. It is, however, claimed to have received continuous public acquiescence for years. This assertion is predicated upon user and licenses to three rival manufacturers of brooders. There is no evidence in the record of any manufacture or sale or license under this patent until the assignment to the appellee in July, 1892, except that the appellee asserts, upon his information and belief, that over 1,000 of the devices were placed upon the market by the inventor between 1879 and 1892. How many of these were sold is not declared. Mr. Renwick, the inventor who files an affidavit in the case, does not speak to the subject. The appellee avers that since July, 1892, he has "manufactured and sold and placed upon the market" over 5,000 brooders made in conformity with the Renwick patent. There is a manifest distinction between selling and placing upon the market for sale. We are without information of the number actually sold. As the duty devolved upon the appellee to establish the fact of public acquiescence, so it became his duty to exhibit fully to the court the number actually sold, as distinguished from the number placed upon the market. The extent of the sale of a patented invention might characterize the degree of public acquiescence. The mere manufacture and placing upon the market for sale does not indicate acquiescence by the public. But one of the licensees speaks in behalf of

the appellee to the question of license. He declares that he is manufacturing and selling under license from the appellee. But it appears that such license covers not only the patent in suit, but another patent, not exhibited in the record. The license is asserted in mere general terms. The facts connected therewith, and touching the manufacture thereunder, are not clearly stated; so that we are unable to say to what extent we may justly give weight to this license upon the subject of acquiescence. With respect to another one of the three licensees, the Reliable Incubator & Brooder Company, it is disclosed that the company has never manufactured brooders under the license, but under several other patents stated, and that the license in question was taken by the company under threat of litigation, and to avoid the anticipated attending annoyance and expense, and that the license fee paid was but one-half the license fee demanded. We are satisfied that the testimony does not disclose public acquiescence to the extent required. There would seem to have been but trifling operation under this patent from the date of its issue, May, 1879, until it passed into the ownership of the appellee, in 1892. During those 13 years the invention may be said to have lain dormant. It was galvanized into life and activity by the energy and persistence of the appellee. Prior to this suit but three licenses were issued, and those under circumstances not altogether reassuring as concerns the question of public acquiescence. The special presumption of the validity of the patent arising from public acquiescence is not indulged unless such acquiescence exist, when it would not be for the interest of manufacturers and users that it should be yielded, and so exhibiting a genuine conviction of the validity of the patent, based upon investigation, and continuing for such length of time that it may be said the conviction was generally entertained. We are of the opinion that the case exhibited falls far short of the requirement of the law. The validity of the patent is strongly assailed; its infringement is vigorously denied. We deem it improper to express an opinion upon either subject. We think it clear, within the ruling of *Standard Elevator Co. v. Crane Elevator Co.*, 9 U. S. App. 556, 6 C. C. A. 100, and 56 Fed. 718, and of *George Ertel Co. v. Stahl* (herewith decided) 65 Fed. 517, that the preliminary restraining order should not have been granted. The order appealed from will be reversed.

---

## FRANK v. WM. P. MOCKRIDGE MANUF'G CO.

(Circuit Court, D. New Jersey. January 5, 1895.)

## PATENTS—CUFF FASTENER—INFRINGEMENT.

The Frank patent No. 397,119, for an improvement in cuff fasteners, in view of its claims and the prior state of the art, covers only the specific form of hook therein described, and is not infringed by defendant's fastener.

This was a bill by Henry C. Frank against the Wm. P. Mockridge Manufacturing Company for infringement of a patent for cuff fasteners.

William P. Preble, Jr., for complainant.  
Lanphear H. Scott, for defendant.

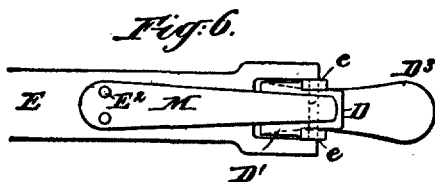
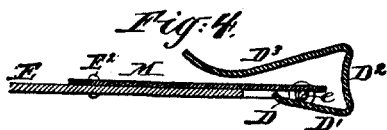
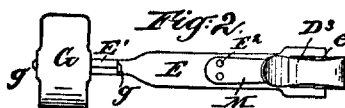
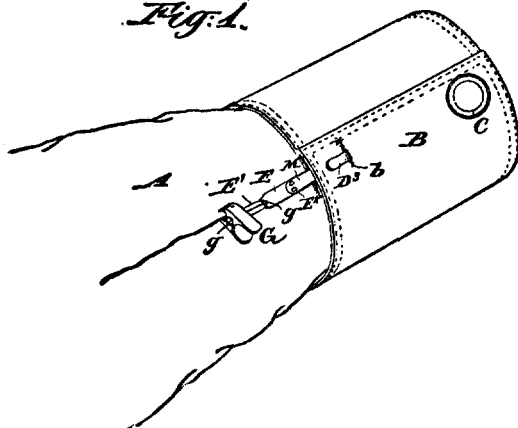
ACHESON, Circuit Judge. The bill charges the defendant with the infringement of the claims of letters patent No. 397,119, dated February 5, 1889, granted to Henry C. Frank, the plaintiff, for an improvement in cuff fasteners. The claims are as follows:

(1) In a cuff fastener, the hinged hook, D, D<sup>1</sup>, D<sup>2</sup>, D<sup>3</sup>, and shank, E, in combination with each other and with the spring, M, and clasp, G, arranged for joint operation as herein specified. (2) In a cuff fastener, the swivel, E<sup>1</sup>, formed on a rigid extension of the shank, E, in combination with the hook, D, D<sup>1</sup>, D<sup>2</sup>, D<sup>3</sup>, and with the spring clasp, G, the fastener being adapted to serve right or left at will, while holding itself rigid longitudinally, as herein specified.

Upon the face of the specification it appears that this alleged invention is an improvement in a cuff fastener previously devised and patented by the plaintiff, which consisted of a spring clasp to take hold of the edge of the opening in the shirt sleeve, a rigid hook to engage with the buttonhole of the cuff, and a flexible connection, by means of a chain, between the clasp and the hook. The improvement consists in substituting for the flexible connection a rigid connection by means of a shank, and a hinged hook actuated by a spring in lieu of the rigid hook; the clasp turning upon the shank by a swivel joint. The proofs show that all the elements of the two claims in suit were old in this particular art. The prior patents relating to cuff holders, in evidence, show a swiveled spring clasp, a rigid shank, and a spring-actuated hinged hook, each acting in the same manner, and performing the same function, as the like part in the patent in suit, although not met with in the identical combination of this patent. In view of the prior devices, it is extremely difficult to sustain the patent in suit under the decisions of the supreme court. *Hendy v. Iron Works*, 127 U. S. 370, 375, 8 Sup. Ct. 1275; *Burt v. Ivory*, 133 U. S. 349, 359, 10 Sup. Ct. 394; *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. 20; *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81. If, however, it can be affirmed that a combination involving invention in a patentable sense is here shown, the claims must be narrowly construed. Not only does the prior state of the art require this, but the terms of the claims and the proceedings in the patent office imperatively demand a limited construction. In his specification the plaintiff describes his hinged hook thus:

"A hinge, e, connects the shank, E, to a hook, D, D<sup>1</sup>, D<sup>2</sup>, D<sup>3</sup>. When the device is engaged with a cuff, and conditioned for use, the part D<sup>1</sup> extends nearly or exactly in line with the part E. The part D<sup>2</sup> extends nearly at right angles to D<sup>3</sup>, and the part D extends in the general direction toward the clasp, G, curved as shown. A short arm, D, extends from the hinge, e, nearly in the plane of the shank, E. This arm, D, is subject to the force of a flat spring, M, which is strongly and stiffly held on the inner face of the shank, E, by rivets E<sup>2</sup>. \* \* \* Figs. 7 and 8 show modifications in the form of the hook in the part D<sup>2</sup>. Either form may be used. I prefer that shown in Figs. 4 and 5."

*Fig. 1.*



"The hook, D, D<sup>1</sup>, D<sup>2</sup>, D<sup>3</sup>," is a specified constituent of each claim. Its form, as we have seen, is described with great particularity in the specification, and the relation of the several parts to each other set forth. Special mention is made of the position of the part D<sup>1</sup> with respect to the shank, E, "when the device is engaged with a cuff, and conditioned for use." It will be perceived that the suggested modifications are "in the form of the hook in the part D<sup>2</sup>." Those modifications do not involve any change in the position of the part D<sup>1</sup> with respect to the shank, E, nor in the relation of the four different parts of the hook to each other. It is impossible to read the specification and claims, especially in the light afforded by the prior patents, without discerning that it was understood both by the applicant and the patent office that the peculiarly formed hook designated by the letters D, D<sup>1</sup>, D<sup>2</sup>, D<sup>3</sup> entered into the invention as patented. The proposed modifications in the form of "the part D<sup>2</sup>" rebut the idea that the patentee contemplated any other changes in the described hook. *Snow v. Railway Co.*, 121 U. S. 617, 630, 7 Sup. Ct. 1343. A patentee, in a suit upon his patent, is bound by the claim therein set forth, and cannot go beyond it. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274. It was, therefore, in that case held that a claim for "the construction of the lower chords of truss bridges of series of wide and thin drilled eye bars, C, C, applied on edge between ribs, S, S, on the bottoms of the posts, and connected by pins, P, P, supported in the diagonal tension braces, D and E, all substantially as herein described," only covered eye bars wide and thin, and applied on edge, and was not infringed by bars cylindrical in form, only flattened at the eye for insertion between the ribs or projections of the posts. It is needless to multiply authorities upon this point. The patentee, at the most, made here a very slight advance in this art, and he must be confined to a construction of the precise form and arrangement shown and claimed by him. *Bragg v. Fitch*, 121 U. S. 478, 7 Sup. Ct. 978; *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. 1343.

There is still another reason for holding the patentee strictly to his specified hook. As originally framed, claim 2 was in these words:

"In a cuff fastener, the rigid swivel, E<sup>1</sup>, connecting the shank, E, of a long hook, with a spring clasp, G, so as to allow of the fastener being adapted to serve right or left at will, while holding itself rigid longitudinally, as herein specified."

The office having rejected this claim, the applicant changed it to its present form. The term "long hook" was eliminated, and "the hook, D, D<sup>1</sup>, D<sup>2</sup>, D<sup>3</sup>," introduced as an element of that claim, as it already was of the other allowed claim. The effect of this is to preclude the patentee from so reading his claims as to embrace therein other distinct forms of hooks. *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021; *Roemer v. Peddie*, 132 U. S. 313, 10 Sup. Ct. 98; *Knapp v. Morss*, 150 U. S. 221, 229, 14 Sup. Ct. 81. The plaintiff's patent being thus construed as covering only the specific form of hook therein described and claimed, it is clear that the defendant does not infringe. The defendant does not use the form of hook described

in the patent, but a bent lever of a substantially different form. Comparing the devices of the patentee and of the defendant, Mr. Stetson, the plaintiff's expert, states:

"There is a substantial difference in the hooks in the fact that the complainant's hook has a part D<sup>1</sup>, which extends from the axis of motion away from the point, then has a part D<sup>2</sup>, which extends up to a sufficient height to allow for two thicknesses of cuff, and then extends to the point by a long arm, D<sup>3</sup>, while defendant's hook omits the part D<sup>1</sup>, and extends from the center upwards, corresponding to the part D<sup>2</sup>, and thence forward to the point corresponding to the part D<sup>3</sup>."

Mr. Stetson further states that the peculiar form of hook of the patent "gives a quality of enduring very hard pulls," but that this feature is not important in this device for holding cuffs to shirt sleeves, and that the part D<sup>1</sup> is not essential. The patentee, however, seems to have been of a different opinion. At any rate, he has made D<sup>1</sup> a material part of his hook. Waiving the question of patentability, we sustain the defense of noninfringement. Let a decree be drawn dismissing the bill, with costs.

---

ABRAHAMSON v. THE CANONICUS.

(District Court, E. D. New York. January 8, 1895.)

PAYMENT TO ATTORNEY.

Payment of \$250 by the owner of a ship to an attorney employed to collect a bill against the ship, for which amount the attorney at the time gave a receipt on account of the bill, is payment of that amount on the bill, though the attorney paid only \$100 thereof to his client, and some weeks thereafter gave the owner of the ship another receipt for the \$250, stating that \$100 of the \$250 was for services as attorney of the owner of the ship.

Libel by Andrew Abrahamson against the steamship Canonicus.

Foley & Wray, for libelant.

George E. Kent, for claimants.

BENEDICT, District Judge. The payment on June 2, 1893, of \$250 by the owner of the ship to Francis S. Turner, an attorney at law employed by the libelant to collect the bill now sued for, for which sum the attorney then gave a receipt on account of this bill, was, in my opinion, payment pro tanto of the bill sued on, notwithstanding the fact that only \$100 of the \$250 was paid over by the attorney to the libelant, and that, some two weeks after the \$250 was so paid to the attorney, he gave to the owner of the ship another receipt for the \$250, which stated that \$100 of the \$250 was for services as attorney of the owner of the ship. The claimants are, in my opinion, entitled to have \$250 credited on the bill sued for. This being the only question presented for decision, the decree must be for the libelant, for the amount of the bill, with interest, after crediting \$250 as paid on June 2, 1893. The recovery must be without costs.



## MOORE et al. v. CLARK et al.

(Circuit Court, S. D. New York. June 29, 1894.)

## PATENTS—NOVELTY.

Patent No. 236,905, granted to Charles H. Moore, in claim 10, which is for a water-closet bowl formed into a square at the top, and having but one serviceable outlet, does not show patentable novelty. *Burt v. Evory*, 10 Sup. Ct. 394, 133 U. S. 349, followed.

This was a suit in equity by Carrie L. Moore and another against Alexander Clark and another for the infringement of the tenth claim of letters patent No. 236,905, granted January 25, 1881, to Charles H. Moore for an improved water-closet bowl.

Frank J. Mather, for plaintiffs.

W. P. Preble, Jr., for defendants.

WHEELER, District Judge. This suit is brought upon the tenth claim of patent No. 236,905, dated January 25, 1881, and granted to Charles H. Moore, with 12 claims for a water-closet, consisting of various suitable devices, including a bowl. The other claims are for various arrangements of these devices. This is for:

"(10) A water-closet bowl formed into a square shape at the top by the corners, b, b, b, b, of the bowl, and having but one serviceable outlet."

One figure of the drawings shows a plan view of the bowl, marked "A," in square form, but with rounded corners at the top, becoming more circular downward, having the sloping parts from the corners inward, each marked "b." The specification states one object to be "to provide a bowl of a form at the top to answer as a urinal and slop sink"; that "the closet can be made in separate parts, but I prefer making it in one jointless piece, of any suitable material"; and that in the drawings "A represents a closet bowl, formed into a square shape at the top by the lips, b, b, b, b." These are the only parts of the specification and drawings referring in any manner to the bowl. Before this water-closet bowls had been made with circular and oval tops and one "serviceable" outlet, and slop sinks had been made with square tops. Quite obviously this claim rests upon the square top of the bowl as an improvement upon the circular or oval tops. The carrying out of the top from a circular or oval to a square form altered the form, but did not affect the operation, of the bowl. The change was in degree only, and not in principle, and the form produced had no new function. The advantages claimed are due more to dispensing with a slop tray and to the other changes in the form of the bowl than to the change in the top. In view of *Burt v. Evory*, 133 U. S. 349, 10 Sup. Ct. 394, this square top does not appear to be patentable, and, as this claim covers nothing else, it does not appear to be valid. Bill dismissed.

## McCaldin v. THE EDGEWATER.

ELLIS et al. v. THE McCaldin Bros.

(District Court, E. D. New York. January 15, 1895.)

## COLLISION—STEAMERS—NEGLIGENCE—STARBOARD-HAND RULE.

As a tug moved from her pier to cross the river, two tows were passing, one up, the other down. Having stopped and waited for these to pass, she, without giving any warning signal, rang her jingle to go ahead at full speed, as soon as there was space between the tows, and was immediately placed where collision with a steamer, coming down stream at full speed just outside the upgoing tow, was inevitable. The steamer carried a mast more than 50 feet high, which, with proper care, could have been seen over the tow. *Held*, that the collision was caused solely by the fault of the tug, though it would not have happened had the steamer been keeping the middle of the stream, as required by statute; and that the starboard-hand rule did not apply, the unwarranted action of the tug having made it impossible for the steamer to avoid her.

Libels, one by James McCaldin against the steam lighter Edgewater, the other by George A. Ellis and others against the steamtug McCaldin Bros.

Goodrich, Deady & Goodrich, for the McCaldin Bros.  
Wing, Shoudy & Putnam, for the Edgewater.

BENEDICT, District Judge. In my opinion, the collision in question was caused solely by the fault of the tug McCaldin Bros. When she moved out of pier 4, East river, to cross to Brooklyn, two tows were passing outside of her, one bound up and the other down the river. The libel of the McCaldin states: That she stopped and waited for these tows to pass, the westward-bound tow passing first, and the eastward-bound tow afterwards. That as soon as there came a space between the two tows, the McCaldin rang a jingle to go ahead at full speed. This carried the McCaldin under the stern of the east-bound tow, within 30 feet thereof, and at full speed. At this time the steam lighter Edgewater was proceeding at full speed down the river, just outside of the up-bound tow. She was not seen by the McCaldin until the McCaldin passed by the stern of the east-bound tow, and was then within 30 or 40 feet, so that it was impossible for either vessel to avoid collision. It was broad daylight. The Edgewater carried a mast more than 50 feet high, and with proper care could have been seen over the east-bound tow. It was fault in the McCaldin not to have seen the lighter sooner. If she had done so, she would not have rung her jingle when she did. By her jingle she changed from a drifting vessel to one going at full speed, and she did this without any signal, and it carried her at full speed across the bows of the Edgewater, and so near that the collision was imminent as soon as the jingle rang. The starboard-hand rule does not apply in such a case, when, by the unwarranted action of the tug, it was rendered impossible for the Edgewater to avoid her. The Edgewater was not keeping the middle of the river, as required by statute, but that in no way tended to produce the collision. Of

course, there would have been no collision with the Edgewater if the Edgewater had not been where she was; but the position of the Edgewater did not cause the McCaldin to ring her jingle, nor prevent the Edgewater from being seen by the McCaldin if a proper lookout had been kept. There must be a decree for the libellant in the action of *Ellis v. The McCaldin Bros.*, with an order of reference to ascertain the damages, and the libel of McCaldin must be dismissed, with costs.

---

THE MARY L. CUSHING.

KOCH et al. v. CUSHING et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 28.

COLLISION—INEVITABLE ACCIDENT—MOORED VESSEL—INSUFFICIENCY OF SPILE.

Appeal from the District Court of the United States for the Southern District of New York.

This suit was brought by the owners of the ship *Eolus* for damage sustained by the breaking adrift of the ship *Mary L. Cushing*, which was lying in the same slip. The district judge dismissed the libel on the ground that the disaster was due to inevitable accident. 60 Fed. 110.

Chas. C. Burlingham, for appellants.

Henry W. Goodrich, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We concur in the opinion of the district judge, viz. that the *Cushing* was moored in a manner proper and reasonable, under the circumstances, such as is usual in similar cases, and has been found by experience to be sufficient to answer the end in view, and that she broke loose "in consequence of the insufficiency of a spile, of which the ship could have no knowledge, in conjunction with a very high tide and an extraordinary gale, shifting to a quarter which bore most heavily upon the ship." It is unnecessary to discuss the evidence, which is sufficiently referred to in the opinion of the learned district judge. Decree affirmed, with costs.

## ANGLO-FLORIDA PHOSPHATE CO. v. McKIBBEN.

(Circuit Court of Appeals, Fifth Circuit. November 27, 1894.)

**1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—SUPPLEMENTAL OR ANCILLARY BILLS.**

M., a citizen of Florida, brought suit in the U. S. circuit court against S. and G., citizens of Georgia and Illinois, respectively, to establish a partnership with S. in buying and selling lands, in which suit a decree was entered in his favor, adjudging him a partner, and entitled to one-half the lands and the profits of the partnership. M. then filed a bill, which he called a "supplemental bill," against S. and G. and sundry others, not parties to the first suit, including the A. Co., a Florida corporation, alleging collusion to defeat the execution of the first decree; that certain lands conveyed to the A. Co. were, at the time, held in trust for M. as to his interest as a partner, of which the A. Co. had notice; and praying, among other things, that M. be decreed to have a vendor's lien for his half interest in such land. *Held*, that such bill did not fall within any rule applicable to supplemental or ancillary bills of which jurisdiction could be entertained without regard to the citizenship of the parties, since new parties were brought in, and new matter charged as a basis of relief, not litigated in the first suit by the same parties standing in the same interests.

**2. JUDGMENT AND DECREE—HOW FAR BINDING.**

*Held*, further, that the decree in the first suit, which adjudged plaintiff entitled to share in the assets of the partnership, but did not adjudicate upon the title to any particular land, could not affect the title to lands belonging to the partnership, which had been conveyed, before the commencement of that suit, to third persons, not made parties to it.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

This was a suit by John C. McKibben against the Anglo-Florida Phosphate Company and others for the enforcement of a decree. An injunction was granted by an interlocutory order of the circuit court, from which the Anglo-Florida Phosphate Company appeals.

Thomas A. Banning and George L. Paddock, for appellant.

John H. Burchell and Bisbee & Rinehart, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

BRUCE, District Judge. The bill was filed February 14, 1894. The appellant company, defendant in the court below, appeared and interposed demurrers to the bill, raising the question of jurisdiction of the court, after which the writ of injunction complained of was allowed.

The first assignment of error is in granting an injunction against this defendant in the interlocutory order or decree of May 4, 1894, when it appears on the face of the bill of complaint that this court had no jurisdiction of this defendant, because it appears that the defendant is a citizen of the same state as the complainant. The appeal is prayed for by the Anglo-Florida Phosphate Company alone, and there is an order of severance in the record. The allegation in the bill is that John C. McKibben, who resides in the county of Marion, state of Florida, brings this, his supplemental bill, for the enforcement of a decree against George C. Stevens, of the city of

Atlanta, state of Georgia, Henry H. Graham, of the city of Chicago, state of Illinois, and a large number of defendants named, among whom is the appellant company. He alleges that on or about the 21st day of September, 1892, he filed his bill of complaint in this court against George C. Stevens and Henry H. Graham, two of the defendants named in the supplemental bill, for the enforcement of a decree wherein "your orator charged that your orator and said defendant George C. Stevens had entered into a copartnership for the purpose of buying, selling, and negotiating sales of phosphate lands located in the state of Florida, by which contract your orator and said defendant George C. Stevens were to share equally in the proceeds to be realized from the business of said copartnership." It is charged that profits had been realized from the business of the copartnership, but that orator had been excluded from participation therein, and he prays for a decree that an account may be taken, and that the partnership may be dissolved, and for general relief. It is alleged that the defendants Stevens and Graham appeared and answered the bill; that testimony was taken, and on the 13th day of February, 1894, decree was entered in said cause, decreeing, among other things, that "your orator, John C. McKibben, was a partner with the said George C. Stevens, and as such partner was entitled to one-half of all the lands, assets, and profits arising from the copartnership dealings between the said copartners." It is charged that Stevens and Graham have conspired and colluded with the other defendants to this bill for the purpose of depriving orator of his just and equitable rights, and for the purpose of hindering and delaying him in obtaining execution of the said decree; and the prayer is that the defendants answer the bill, and abide and perform such order and decree in the premises as to the court may seem meet and equitable. The bill is called a supplemental bill for the enforcement of decree against George C. Stevens of the city of Atlanta, Ga., and Henry H. Graham, of the city of Chicago, and state of Illinois. The citizenship of complainant is not stated in the bill, and the proposition is that the jurisdiction of the court exists without regard to the citizenship of the parties thereto, on the ground that the bill is not an original, but a supplemental, bill. The appellant company, defendant in the suit below, is alleged in the bill to be a corporation organized and existing under the laws of the state of Florida, with its principal offices in the city of Ocala, county of Marion, and state of Florida, so that it is a citizen of the same state as the complainant. Process was prayed against it, with a number of other defendants, and it, with other defendants, appeared, and interposed demurrers to the bill, raising the question of the jurisdiction of the court, and other questions as well.

The appellant company contends that upon the face of the bill the controversy is between citizens of the same state, and that the bill is not in any proper or legal sense a supplemental or ancillary bill, and that the jurisdiction of the court cannot be maintained on that ground. In *Fost. Fed. Prac.* p. 141, § 64, it is said:

"Original bills are those which relate to some matters not before litigated in the court of equity by the same parties standing in the same interests. Bills

not original are those which relate to some matter already litigated in the court of equity by the same parties, or their representatives, and which are either an addition to or a continuance of an original bill, or both,"—citing authorities.

We are furnished with a pretty full citation of authorities in decided cases, among which is the case of *Dunn v. Clarke*, 8 Pet. 2, which is a leading case, and has been cited and followed many times in adjudicated cases. A brief examination of the bill is necessary in order to determine whether, in the light of the adjudications upon the subject, it falls within the rule as to supplemental or ancillary bills. The first bill was filed September 21, 1892, and its scope and purpose were to establish a partnership, and obtain an account and share of alleged profits of the copartnership. And in this litigation complainant succeeded in obtaining the decree of February 13, 1894, which, as stated in the bill in this case, is "that your orator, John C. McKibben, was a partner with said George C. Stevens, and as such partner entitled to one-half of all the lands, assets, and profits arising from the copartnership dealings between the said copartners." There is nothing in this decree adjudicating title to any particular tract of land, and it could not affect title to lands which had theretofore been conveyed to third parties at a time prior to the filing of the bill, and who were not parties to the suit nor had their day in court. In the fifteenth paragraph of the bill it is charged that on or about the 8th day of October, 1891,—the date of the said deed from the said defendants Stevens and Graham to the said defendants Ephraim Banning and S. M. Meek, as trustees for the Anglo-Florida Phosphate Company,—the title to the said 1,300 acres of land described in said deed was held by the said defendants Stevens and Graham as part of the assets of the said copartnership between complainant and defendant Stevens, and in trust for your orator as to his one-half interest therein, or the proceeds of any sale thereof by the said defendants Ephraim Banning and S. M. Meek, as trustees, as aforesaid; and that the said defendant corporation the Anglo-Phosphate Company took the title to said lands with full notice of said interest of your orator in the said lands, and subject to the trust for his benefit therein. But how can this decree of February 13, 1894, affect the sale and transfer of the 1,300 acres of land made by Stevens and Graham to Banning and Meek, as trustees for the Anglo-Florida Phosphate Company, which transaction, as alleged, was made prior to the filing of the bill, and to which bill the appellant company was not a party? And again, if it was the purpose of that bill to call in question the title to the lands purchased by the appellant company, why was it not made a party defendant in that suit? If it had been made a party defendant, the suit would have been between citizens of the same state, and the jurisdiction could not have been maintained; and, that being so, it follows that the jurisdiction of the court cannot be maintained on this bill on any theory or ground that it is supplementary or ancillary to the first bill. It seems clear that this bill cannot fall within any rule applicable to supplemental bills as to appellant company. New parties are brought in as defendants, and new matter charged as a basis and ground of relief which was

not litigated in the first suit by the same parties standing in the same interests. In the prayer of the bill, among other things, it is asked that complainant be decreed to have a vendor's lien for an undivided one-half interest in and to the 1,300 acres of land which it is alleged was conveyed to trustees for the benefit of the appellant company. This is not a matter for a supplemental bill. There was nothing of this kind in the first bill, and if, upon the facts stated, there is anything in such a claim for a vendor's lien in favor of complainant upon an undivided one-half or on any interest in the lands in question, it did not arise subsequent to the filing of the original bill, and is not within rule 57 of the equity rules of the supreme court of the United States. A reference to the case made in the bill as to the defendants other than Stevens and Graham, who do not herein join in the appeal, makes it still more clear that the bill, no matter what it may be called, is essentially an original bill, and that jurisdiction cannot be maintained.

Other questions were discussed at the hearing. The equity of the bill was attacked, but, being of opinion that the court is without jurisdiction, we do not deem it necessary to go further. The injunction must fall with the bill, and the case is remanded, with direction to dissolve the writ, and dismiss the bill as to appellant company.

---

#### WILLS v. BALTIMORE & O. R. CO.

(Circuit Court, S. D. Ohio, E. D. January 28, 1895.)

No. 696.

#### REMOVAL—ERROR OF CLERK OF STATE COURT.

When a petition for the removal of a cause from a state to a United States court, showing on its face a good case for removal, is filed in due time in the state court, and is marked as filed by the clerk, the jurisdiction of the state court ceases eo instanti; and it is not material that the clerk of such court makes a wrong entry of the filing in the record, or otherwise wrongly disposes of the petition.

This was an action by Henry W. Wills against the Baltimore & Ohio Railroad Company, which was commenced in a court of the state of Ohio. The defendant removed the cause to this court. Plaintiff moves to remand.

John Logan, for plaintiff.

Maynard & Dougherty and J. H. Collins, for defendant.

SAGE, District Judge. The plaintiff commenced an action in the court of common pleas of Fayette county, Ohio, on the 3d of January, 1894. Summons was issued on the 6th day of January, returnable on the 15th. The answer day was the 3d of February. On the 26th of January the defendant entered a special appearance for the purpose of filing a motion to set aside the summons, and on the 27th of January filed its petition for removal to this court, on the ground that the plaintiff is a citizen of the state of Ohio, and the defendant a corporation and citizen of the state of Maryland. The petition shows upon its face a good cause for removal. The case of Stone

v. South Carolina, 117 U. S. 430, 6 Sup. Ct. 799, is therefore not in point. The jurisdiction of the state court was ousted by the filing of the petition. The transcript, which was filed in time, shows that the petition was filed on the date above stated. There is filed a paper, prepared as an affidavit to be made and signed by the clerk of the state court, which sets forth that the petition for removal was handed to him on the 27th of January, 1894, by the local attorney for the defendant, who directed that it be filed; that the clerk thereupon marked the petition with the filing stamp of the office, and, having no other instruction as to the disposition to be made of it, entered a minute of the filing on the appearance docket of the court of common pleas of Fayette county, but not among the entries in the case sought to be removed, which was numbered 11,011. He indorsed the petition as No. 11,030, and treated it as a separate proceeding, making the entry on the appearance docket under that number. This paper was not signed or sworn to. It is now claimed that this was not a filing in the action. This claim is altogether untenable, even if the court were to recognize the facts set forth in the unsigned affidavit. A party seeking to remove a cause is not answerable for the blunders of the clerk of the state court. When the petition was received by him, and stamped "Filed," in proper form, showing upon its face a case for removal, the jurisdiction of the state court ceased eo instanti. It is not material what disposition the clerk afterwards makes of the petition. The motion to remand is overruled.

---

**CABOT v. McMASTER.**

(Circuit Court of Appeals, Seventh Circuit. January 18, 1895.)

No. 207.

**CIRCUIT COURTS OF APPEALS—REVIEW OF QUESTIONS OF JURISDICTION.**

When, upon writ of error, the only question presented by the record goes to the jurisdiction of the court below, a review of the determination of that question can only be had in the supreme court.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This was an action by Samuel Cabot against William I. McMaster upon a bond executed by defendant to secure the performance of a certain contract on the part of one Edwin A. Mason. At the trial the action was dismissed for want of jurisdiction. 61 Fed. 129. Plaintiff sued out a writ of error.

Thomas Dent and Russell Whitman, for plaintiff in error.

J. P. Hand, Thomas E. Milchrist, and Ben. M. Smith, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge. The plaintiff brought suit in the court below in debt upon a bond in the penalty of \$6,000, averring breaches to his damage \$6,000, etc. The defendant pleaded (1) nil debet; (2)



a traverse of the breaches assigned; (3) performance and payment. Issue was joined by similitur to the first plea, and by replications concluding to the country as to the other pleas. At the trial before the court without a jury, the plaintiff put in evidence the bond and the agreement therein referred to, and gave evidence tending to prove an indebtedness thereunder of \$1,496. The defendant gave evidence tending to prove an extension of time of credit to the person for whom the plaintiff was bound, and the plaintiff, in rebuttal, gave evidence tending to prove that such extension was with the knowledge and concurrence of the defendant. The court thereupon, without passing upon the merits of the controversy, dismissed the cause for want of jurisdiction, upon the ground that the amount in controversy was less than the minimum amount necessary to give jurisdiction to the court. *Cabot v. McMaster*, 61 Fed. 129.

We are without jurisdiction to entertain this writ of error. The dismissal of the suit proceeded solely upon the ground of want of jurisdiction, and there was no adjudication upon the merits. We have held in *Manufacturing Co. v. Barber*, 18 U. S. App. —, 9 C. C. A. 79, and 60 Fed. 465, that, when the only question presented by the record goes to the jurisdiction of the court below, a review of the determination of that question can only be had in the supreme court. See, also, *Railroad Co. v. Meyers*, 18 U. S. App. —, 10 C. C. A. 485, and 62 Fed. 367. The writ of error is dismissed for want of jurisdiction.

#### INDIANAPOLIS WATER CO. v. AMERICAN STRAW-BOARD CO.

(Circuit Court, D. Indiana. February 6, 1895.)

##### 1. ATTORNEYS—FEES—DEPOSITIONS.

A deposition is taken in a cause, and admitted in evidence therein, within Rev. St. § 824, allowing attorneys a fee of \$2.50 "for each deposition taken and admitted in evidence in a cause," where it was taken for use on motion for preliminary injunction, and though not used thereon, by reason of the withdrawal of the motion, was used on final hearing, under stipulation that it be treated as taken after issue joined.

##### 2. SAME.

Though there are objections to an instrument introduced in evidence as a deposition which could have been raised to its introduction, these having been waived by allowing it to be used, it is a deposition, within Rev. St. § 824.

##### 3. SPECIAL EXAMINER—COMPENSATION.

Where testimony is taken in a case in a federal court by a stenographer of a state court, appointed by the federal court, at the instance of the parties, as a special examiner in chancery, and selected because he was a stenographer, there being no statutory rule of compensation, and there having been no contract for fees, he will be allowed the established rate of stenographers' charges in the courts of the state.

Suit by the Indianapolis Water Company against the American Strawboard Company. Heard on motion to retax costs and disbursements.

Baker & Daniels, for complainant.  
John W. Kern, for defendant.

**BAKER**, District Judge. Section 824 of the Revised Statutes of the United States allows to attorneys a fee of \$2.50 "for each deposition taken and admitted in evidence in a cause." To entitle an attorney to this fee, there must be a concurrence of three things, viz. (1) there must be a deposition; (2) it must have been taken in a cause; and (3) it must have been admitted in evidence therein. In this case the testimony of the witnesses was taken by a special examiner, who was appointed by the court for the purpose of taking it for use upon the hearing of a motion for a preliminary injunction; but the motion was subsequently withdrawn, and the testimony was not used for that purpose. It was afterwards agreed that the testimony which was so taken should be "treated as taken after issue joined," and read in evidence upon the final hearing of the cause in which it was taken, and it was so treated and used. There is no controversy about these facts, and the statement of them establishes the second and third elements of the claim to these fees, for the testimony of the witnesses was both taken and admitted in evidence in a cause. It only remains to be ascertained whether the testimony which was so taken and admitted in evidence may be properly described as "depositions," within the meaning of the statute.

Primarily, a deposition is simply written testimony. It is testimony that is deposited or laid down in writing. There are only two modes of producing the testimony of a witness before a court upon the trial or hearing of a cause. It may be produced by reading his deposition, or it may be produced orally; and the "oral examination of a witness," within the meaning of the sixty-seventh rule in equity, is not synonymous with the "oral testimony of a witness." *Ferguson v. Dent*, 46 Fed. 89, 90. The rule provides for taking depositions upon "oral examination," instead of written interrogatories. Oral testimony on the trial or hearing of a cause must be spoken and delivered by the witness in the presence of the court. Depositions are a substitute for it. Testimony that is orally delivered before any person who is authorized to receive it, and reduced to writing for use in a court, becomes a deposition. But, in order to render it admissible as evidence in a court, it must be taken according to law. A legal deposition, according to *Bouvier* is "the testimony of a witness, reduced to writing, in due form of law, by virtue of a commission or other authority of a competent tribunal, or according to the provision of some statute law, to be used on the trial of some question of fact in a court of justice." 1 *Bouv. Law Dic.* tit. "Deposition." In *Nail Factory v. Corning*, 7 *Blatchf.* 16, *Fed. Cas. No.* 14,197, it was said by *Nelson, J.*, that it is "testimony taken out of court under an authority which will entitle it to be read as evidence in court, and has no relation to oral testimony taken in court, or before a master. It applies in cases at common law where depositions are given in evidence on the trial, and in suits in equity where depositions are read at the hearing." See, also, *Stimpson v. Brooks*, 3 *Blatchf.* 456, *Fed. Cas. No.* 13,454. The signing of a deposition is a mode of authentication only. If the witness refuses to sign his deposition, it may be signed by the special master

who has taken it, under the sixty-seventh rule in equity. Its authentication, and the observance of other legal formalities in the taking of it, are necessary only to procure its admission in evidence in a court. A neglect or omission of these formalities affects its admissibility only. An observance of them makes it admissible against any objections on that account. But these objections may be waived. A failure to interpose such objections at the time the deposition is offered in evidence is a waiver of them. In this case there was an express waiver of any objections to the depositions, by the terms of the agreement under which they were used. When depositions are admitted in evidence on the trial or hearing of a cause, and have performed the office and function of depositions, they are, so far as the court in which they were used is concerned, legal depositions, as fully and completely as if every technical formality had been accurately observed in the taking of them. In *Stimpson v. Brooks*, supra, *Betts, J.*, stated it as his opinion that affidavits are taxable as depositions, if used in evidence by agreement on a final hearing; and in *Wooster v. Handy*, 23 Fed. 49, it was held by *Blatchford, J.*, that depositions which were entitled and read in evidence in several cases were taxable in each of them, although they were taken and reduced to writing only once. In the case under consideration, where it must be and is conceded that the testimony of the witnesses was taken and reduced to writing under and by competent authority, and their written testimony has fully performed the office and function of depositions on the final hearing of the cause, it is useless, in determining the compensation of the officer before whom it was taken, and of the attorneys for their services in connection therewith, to inquire whether it had every technical requirement of legal depositions that was necessary to secure their admission as evidence. The waiver supplied any defect. The taxation of attorney's fees on each of the depositions herein is therefore approved. *Evans v. Hetlich*, 7 Wheat. 453; *Shutte v. Thompson*, 15 Wall. 151; *Howard v. Manufacturing Co.*, 139 U. S. 204, 11 Sup. Ct. 500; *Hake v. Brown*, 44 Fed. 734; *Jernan v. Stewart*, 12 Fed. 271; *Ferguson v. Dent*, supra; *Ingham v. Pierce*, 37 Fed. 647.

The testimony in this case was taken by one of the stenographers in the courts of the state, under an appointment of this court as a special examiner in chancery. He was selected by the parties for appointment, and was appointed at their instance. Examiners are appointed under the equity rules, like special masters. There is no statutory rule of compensation or schedule of fees that is expressly applicable to them. The compensation of special masters is fixed by the allowance of the court. In making an allowance to an examiner, the fees of clerks and commissioners for taking depositions might furnish analogies for the guidance of the court. On the other hand, stenographers in the courts of the state have an established rate of charges for their services, and the claim and taxation of compensation for the examiner in this case are founded thereon. There does not appear to have been any contract between the examiner and the parties. Their attorneys were practicing in the courts of the state, and presumably were acquainted with the estab-

lished rate of charges among stenographers. The examiner was selected because he was a stenographer. If the parties considered the known and established rate of charges exorbitant, they should have made a special contract with him. In the absence of any special contract, the examiner had a right to expect that the established rate of charges in the state courts would govern. By accepting the appointment of examiner, he did not agree to accept a less compensation for his services as a stenographer than he was accustomed and entitled to receive for the like services in the state courts. It is not denied that his claim, and the taxation thereon of \$1,668.05, are in accordance with the established rate of charges among the stenographers in the state courts. But there is no reason why the per diem charge should be twice as large in the United States courts as in the courts of the state. It is \$5 in the courts of the state, and it ought to be the same here. The charge of \$320 for per diem, therefore, will be reduced to the sum of \$160, and the examiner will be allowed for his services the sum of \$1,508.05. Except as herein modified, the motion to retax is overruled.

---

MUHLENBURG COUNTY v. CITIZENS' NAT. BANK.

(Circuit Court, D. Kentucky. November 17, 1894.)

No. 6,360.

**1. PRACTICE—SUBSTITUTED SERVICE—ON WHAT BILLS ALLOWED.**

A motion for substituted service of the subpoena to answer a bill in equity should not be granted, unless on the face of the bill there be some legal or equitable merit.

**2. SAME.**

The C. Bank, an Indiana corporation, in 1889, recovered a judgment in the United States circuit court in Kentucky against M. county, upon certain coupons of county bonds. This judgment was paid, under mandamus proceedings, in 1893. After such payment, the county filed a bill in equity against the bank, alleging that the coupons were not owned in good faith by it, but belonged to a citizen of Kentucky, and that the court was without jurisdiction of the action, and praying that the judgment be set aside, and the money paid thereon refunded. There was no allegation of any meritorious defense to the action. Upon this bill the county asked the court to direct substituted service on the bank. *Held* that, as the objection to jurisdiction had not been raised during the pendency of the action at law, and the relief was sought, not to remedy any injustice, but to supply the neglect of the defendant in the action at law to raise the objection to jurisdiction, the bill did not state such a meritorious cause of action as would justify an order for substituted service.

This was a bill in equity by Muhlenburg county against the Citizens' National Bank of Evansville, Ind., to set aside a judgment at law. The complainant moves for an order directing substituted service of the subpoena.

Jonson & Wickleffe, Wm. H. Yost, Jr., D. W. Sanders, and Wm. B. Thomas, for complainant.  
Humphrey & Davie, for defendant.

**BARR, District Judge.** This case comes to me on complainant's motion to file an amended bill, and on motion to direct a subpoena issued on the bill as amended against the Citizens' National Bank of Evansville, Ind., be executed on E. H. Brown and D. M. Rodman, who, it alleges, were the attorneys of said bank in obtaining and collecting the common-law judgment which is sought to be set aside in the bill. It is alleged in the bill as amended that on July 2, 1887, the Citizens' National Bank of Evansville brought suit against the complainant, the county of Muhlenburg, in this court, on certain matured coupons on the bonds of said county, and that a common-law judgment was rendered September 10, 1889, thereon for the sum of \$4,689.32 and costs; that execution was issued on said judgment, and was returned by the marshal of this district, "No property found," and subsequently mandamus proceedings were taken, and said judgment collected, together with a large amount of costs. It appears that these proceedings were commenced in September, 1889, and a tax levied by the county judge of said county, and the judgment was finally collected under the mandamus proceedings, together with the costs, which costs were paid June 30, 1893. It is alleged that said national bank was never the real and bona fide owner of said coupons, but they were owned by one Charles L. Morehead, who was then, and still is, a citizen of the state of Kentucky, and that bank loaned the use of its name for the institution of said suit and its prosecution for the purpose of obtaining jurisdiction of this court, and that said bank had not at the institution of the suit or any subsequent period any bona fide interest in said coupons. This is alleged to be a fraud upon the court and the legal rights of said county, and that the officers of said county had no knowledge or information during the pendency of said suit before judgment or during the pendency of the mandamus proceedings, after the judgment, and before its payment, that said bank was not the real and bona fide owner of said coupons or judgment. It is also alleged that, as soon as the county found out the said bank was not the real and bona fide owner of said coupons and judgment, the county instituted this suit, and that the Citizens' National Bank of Evansville was organized and is doing business in the state of Indiana. It alleged in amended bill—which should be filed, and is considered as filed in disposing of the motion for substituted service—that E. H. Brown and D. M. Rodman were the attorneys of record in said common-law suit and in the collection of said judgment. There is no allegation or suggestion that the county was not justly indebted in the amount of the unpaid coupons, or that, if Morehead was the true owner thereof, there would have been or is any valid defense upon the part of the county; nor is there any allegation that there was an issue made as to the ownership of the coupons, or that the judgment was obtained through false testimony. The bill, stripped of redundancy and epithets, simply seeks the setting aside of the common-law judgment which was taken by default on the 10th September, 1889, and the repayment of the amount of said judgment, together with the costs, because the plaintiff in that suit was not the true and bona fide owner of the coupons sued

on, and a citizen and resident of the state of Kentucky was the owner.

If all of the allegations be taken as true, the bill does nothing more than seek to have the present judgment set aside, and defendant be allowed to raise an issue as to the ownership of the coupons, with a view to deprive this court of jurisdiction. This is not sought because any injustice has been done the complainant in obtaining the judgment, or because, if this judgment be set aside, another judgment of a like import should not be entered by another court, but because the defendant in the common-law suit has neglected its suit, and has not made the issue of ownership of the coupons by a plea to the jurisdiction, and produced testimony on the issue thus made to sustain it. If this kind of practice was tolerated, there would never be an end of litigation. This bill is not before me on demurrer, but it should be considered on the motion to allow substituted service on it, so as to bring the Evansville National Bank before this court. On such a motion the court should not allow a party to be brought before it on substituted service, unless on the face of the bill there be some legal or equitable merit. Prior to the act of 1875, if the diverse citizenship of the plaintiff and defendant was properly alleged by the plaintiff, the jurisdictional question could only be raised by plea in abatement, and, if there was no such plea, the question could not be raised at all. Congress, by the fifth section of the act of 1875, gives the court authority to dismiss the suit at any time during its pendency, if it appeared the requisite diverse citizenship did not exist, or that the title in the plaintiff was only colorable, to give the court jurisdiction. Broad as the language of this section is, it does not extend beyond the pendency of the suit, or after judgment; hence does not aid the purpose of this bill. This view makes it unnecessary to consider whether substituted service of the subpoena against the Citizens' National Bank of Evansville should be had by its execution upon Messrs. Brown & Rodman, who presumably ceased to be the attorneys of said bank when the judgment was collected and paid over. The motion to file amendment to bill will be sustained, but the motion to direct subpoena to be executed on Brown & Rodman will be overruled.

---

FRONT ST. CABLE RY. CO. v. DRAKE, Marshal, et al.

(Circuit Court, D. Washington, N. D. January 21, 1895.)

No. 469.

1. EXECUTION—REAL ESTATE—RIGHT OF POSSESSION.

As, under the laws of Washington, a levy of execution on real estate gives no right of possession, where an officer levies on and takes possession of all the property of a street railway, its real estate as well as the personal property used in connection therewith, the levy will be considered an entirety and wholly wrong; and the operation of the road being stopped, and the franchise therefore being in danger of forfeiture, and the company being insolvent, all the property will be taken from the officer's possession.

**2. JURISDICTION—FEDERAL QUESTION.**

Where a United States marshal, under authority assumed by virtue of his office, and under an execution from a United States court, wrongfully takes possession of real estate, a federal court has jurisdiction of a suit to redress the wrong, as a case arising under the laws of the United States.

Suit by the Front Street Cable Railway Company against James C. Drake, marshal, and others.

Joslin, Denny & Bailey, for complainant.  
Shank & Smith, for defendants.

HANFORD, District Judge. The bill shows that the complainant is a street-railway corporation; that it was granted a franchise for operating a cable road in the streets of the city of Seattle; that it is the owner of a street railway, a power plant, and rolling stock, and was, up to the time of the levy of the execution, operating a street railway with that property and under that franchise. Under a writ of execution issued in favor of the defendant the Washburn & Moen Manufacturing Company out of this court, for the satisfaction of a judgment of this court, in favor of said manufacturing company, the marshal made a levy on all this property. The bill then goes on to allege that, assuming the right by virtue of that levy, the marshal took possession of all this property, and dispossessed the complainant of its power house and its street railway, as well as its rolling stock, and stopped the operation of the road. The bill shows that there is a prior lien on all this property under a mortgage given to secure a bonded indebtedness of \$300,000. The corporation has other creditors, and is unable to pay its debts; and it shows that it is practically in a condition of insolvency, and unable to help itself, with this property in the hands of the marshal. Now, the laws of this state are invoked by this judgment creditor, and we are told that the court has no right to set aside the statutes of this state, which give the creditor the right to have its execution levied, and to sell the interest of the judgment debtor in the property. Conceding that proposition, a party invoking the laws of the state must be judged by the laws of the state. This case may be rested upon the laws as to the right of possession of this property; and, instead of this court having disregarded the laws of this state in wresting the property from the possession of the marshal, the marshal has gone contrary to law in taking immediate and forcible possession of the property from the corporation. That invasion of the rights of the corporation is ground of complaint, upon which it may come into this court, and ask for protection; and the duty of the corporation to its bonded creditors and its unsecured creditors requires that it should seek for proper relief, because, by seizing its property, the marshal jeopardized their interests, which are not subject to execution for the debt of the corporation. One effect of stopping the railway is likely to be a forfeiture of the franchise for use of the public streets of the city, which means a total destruction of the most valuable part of the security of the bondholders, as well as great inconvenience to the public. The main part of this prop-

erty consists of real estate. The power house and street railway is certainly real estate, and it is a question that I will not assume to decide now whether the rolling stock is real estate or not; but it is certain that only a small fragment of the property that has been taken from the possession of the corporation by the marshal (according to the allegations of the bill) consists of personal property, which the marshal had the right to take into his possession, and dispossess the corporation of, in making a levy. The law of this state prescribes that the manner of making a levy under a writ of execution shall be the same as that prescribed for making a levy under a writ of attachment. Under a writ of attachment, a levy on real estate is made by filing a copy of the writ, and a description of the property attached, with the county auditor. After such levy by virtue of an execution the officer can sell the interest of the judgment debtor in the property, and, after the sale, if the interest sold includes a right to the possession, the purchaser becomes entitled to possession from the day of the sale. An execution upon a judgment against the owner of a building would not require nor authorize the officer, in making a levy on such real estate, to take actual possession and interrupt the business of tenants occupying stores and offices therein by closing their doors. Such a proceeding would not be tolerated. By reason of this unlawful invasion of the complainant's right of possession in the property, there is a cause of complaint. The amount and value involved is sufficient to bring the case within the jurisdiction of this court. It is a case arising under the laws of the United States, because the wrong was done by an officer of the United States, under authority assumed by virtue of his office and process from the United States court. All the facts essential to give jurisdiction are stated in the bill of complaint. If the defendants have any ground of complaint at all, it is in going to the extent of taking out of the marshal's hands personal property which could have been properly levied upon, by taking possession. But all the personal property is connected with the real estate, and I think, in view of the wrongful proceedings of the marshal, the court is justified in treating the levy as an entirety, and wholly wrong. On that ground the court is warranted in exercising its power to the extent of dispossessing the marshal entirely of all he took under the writ, and putting it into the hands of the receiver for the benefit of whoever has any right, whether the bondholders or other creditors or the Washburn & Moen Manufacturing Company. If they are entitled to have this property sold, upon a proper showing the court will sell it, and distribute the proceeds to whoever has the right to take it under the law. If they have acquired any lien by this levy, that lien has been protected so far, and will be; but the case is one that appeals strongly to the conscience of the court on account of the manifest destruction that is imminent if, under the levy of this writ, the marshal should be allowed to continue in possession, and, by stopping the operation of the railway, work a forfeiture of the franchise, and then sell this plant and the cars and tools for what



they will bring as old junk. The demurrer will be overruled, and the petition to repay the complainant its disbursements for fees of the clerk and marshal will be granted. The receiver will be directed to pay all the clerk's fees and marshal's fees charged in connection with the commencement and prosecution of this case up to this time.

---

GERMAN SAV. & LOAN SOC. v. CANNON et al.

(Circuit Court, D. Washington, E. D. January 28, 1895.)

1. MORTGAGE—DEATH OF MORTGAGOR—RIGHTS OF EXECUTOR AND MORTGAGEE.  
The rights of a mortgagee, under a mortgage making special provisions for foreclosure and a receiver, are not affected by death of the mortgagor, but may be enforced against the executor.

2. COMMUNITY PROPERTY—DEATH OF WIFE—ADMINISTRATION.

As property mortgaged by husband and wife will, in the absence of any claim that it was the separate property of either, be presumed to have been their community property, and as, under the decisions of Washington, on the death of a married woman administration of her separate property is distinct from that of the community property of deceased and her husband, it will not be presumed that her administrator has acquired lawful authority over the property thus mortgaged and presumed to be their community property, or that a court through its proceedings in admitting her will to probate, and in administering her estate, has drawn such property into its custody.

In Equity. Suit by the German Savings & Loan Society, a corporation, to foreclose a real-estate mortgage. Heard on application for the appointment of a receiver. Application granted.

Cyrus Happy, for complainant.

George Turner, for defendants.

HANFORD, District Judge. The complainant shows, as ground for the appointment of a receiver, that in May, 1892, it loaned to the defendant A. M. Cannon, and his wife, Jennie F. Cannon, \$80,000, and they gave, as security therefor, their promissory note and a mortgage upon real estate situated in the city of Spokane, whereby they promised to repay the amount of said loan, and to pay interest thereon at the rate of 7 per cent. per annum, quarterly, and to pay all taxes on the mortgaged property, and to keep the improvements insured for the benefit of complainant for at least \$40,000, and agreed that, in case of default in the payment of any quarterly installment of interest, the whole debt should become due if the mortgagee should elect to have it so, and that, in case of a foreclosure suit being commenced, the court should appoint a receiver, to take immediate possession, collect the income from said property, and apply the same in payment, pro tanto, of said debt; that complainant has been compelled to pay off a prior incumbrance upon the property amounting to \$886.46; that taxes on said property amounting to \$1,980.30 have become delinquent, and the same, with accrued interest, remains unpaid; that complainant has been compelled to pay the insurance premiums, and has not received the interest on

said loan which has accrued since May 27, 1893; that the defendant A. M. Cannon is insolvent, Jennie F. Cannon is dead, and the mortgage is but scant security for said loan. It is also averred in the bill of complaint that the last will and testament of said Jennie F. Cannon has been duly admitted to probate in the superior court for Spokane county; that letters testamentary thereon have been duly issued by said court to the persons named therein as executors, and by virtue thereof the defendant H. E. Houghton, as one of said executors, is now, under the direction and control of said court, administering the estate of said decedent, and he is an occupant of one of the buildings situated upon the said mortgaged premises.

The present application is opposed by the defendant Houghton, on the assumed ground that it sufficiently appears that the mortgaged property is part of the assets of the estate which he is administering, and therefore in the custody of the superior court of Spokane county, and this court cannot disturb the possession of the executor without an infraction of the rule of comity established by the decisions and practice of the federal courts, in obedience to which they refuse to interfere with property in the custody of a state court. The grounds for this contention do not appear affirmatively from the showing made by the complainant, and there is no answer or affidavit on file controverting the bill of complaint, or alleging additional facts. As it is not claimed by either party that the mortgaged property was the separate property of the defendant Cannon, or his deceased wife, it must be presumed to have been their community property, and under the laws of this state, as declared by its supreme court, when Mrs. Cannon died, the community property became subject to administration. But the supreme court of the state has also expressed the opinion that upon the death of a married person administration of the separate estate of the deceased should be distinct from administration of the community estate of the deceased and the surviving spouse. In *re Hill's Estate*, 6 Wash. 289, 33 Pac. 585. I hold therefore that, in the absence of any averment or testimony to that effect, no presumption can be indulged that the defendant Houghton, as executor of Mrs. Cannon's will, has acquired lawful authority, or assumed the right to take into his possession the community property, nor that the superior court has, through its proceedings in admitting said will to probate, and the administration of the estate of said deceased, drawn this mortgaged property into its custody. If the facts upon which the defendant's argument is founded were made to appear affirmatively by the record, I should nevertheless hold that the complainant is, by virtue of the lien created by the contract made in the lifetime of the deceased, entitled to have the income of the mortgaged property applied specifically to the payment of taxes, and for the preservation of the security, instead of being diverted as it has been since Mrs. Cannon's death; and, to enforce that right, this court is bound to appoint a receiver, as stipulated in the mortgage.

The decision of the supreme court in the case of *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, in so far as it denies the authority of a circuit court of the United States to interfere with property in the

hands of an administrator, follows previous decisions of that court holding that a judgment which does not establish a prior lien or right to satisfaction out of the assets of an insolvent estate in preference to other creditors does not entitle the judgment creditor to take in execution property of the deceased. In view of the final determination of the supreme court in that case, and the facts which were passed upon, I cannot understand from the decision that the supreme court intended to overrule *Erwin v. Lowry*, 7 How. 172. That was an action by a curator to recover possession of land and slaves, in the state of Louisiana, from a purchaser thereof at a foreclosure sale under a judgment and writ of seizure and sale issued from the circuit court of the United States for the Eastern district of Louisiana against the testamentary executor of a deceased mortgagor, the property being at the time in the course of administration in the probate court. The position then taken by the supreme court is stated in the opinion as follows:

"That no jurisdiction existed in the United States circuit court was held in the case before us, and so it had been held by the supreme court of Louisiana in previous cases. But in 1847 that court reviewed its previous decisions in the case of *Dupuy v. Bemiss*, 2 La. Ann. 509. In the opinion there given, the jurisdiction of the federal court held in Louisiana is so accurately and cogently set forth, and the relative powers and duties of the state and federal judiciaries are so justly appreciated as to relieve us from all further anxiety and embarrassment on the delicate question of conflict arising in the case of *Collier v. Stanbrough* [6 How. 14], and again in this cause. It was held in the case of *Dupuy v. Bemiss* that where a lien existed on property by a special mortgage before the debtor's death, and the property passed by death and succession, with the lien attached, into the hands of a curator, and was in the course of administration in the probate court, the circuit court of the United States had jurisdiction, notwithstanding, to proceed against the property, and to enforce the creditor's lien, and to decree a sale of the property, and that such sale was valid. We accord to this adjudication our decided approbation; but take occasion to say that, had we unfortunately been compelled to decide the question without this aid, our judgment would have been that the decision of the supreme court of Louisiana in the cause under consideration was erroneous."

The lien created by a special mortgage seems to have been considered by the supreme court paramount to the executor's right of possession. And the jurisdiction of the circuit court to give effect to the lien, by a proceeding in rem, to the full extent of dispossessing the executor, is firmly asserted. The several excerpts from decisions of the supreme court quoted by Mr. Justice Brewer in *Byers v. McAuley* indicate that want of a prior lien was considered by the supreme court a substantial part of the reason given for denying the right to levy an execution on property in gremio legis, and the court must have intended to distinguish the case from *Erwin v. Lowry* by the difference in the facts rather than to make a conflicting decision; for Mr. Justice Brewer cites *Peale v. Phipps*, 14 How. 368, in which Chief Justice Taney makes the following comment:

"In the case of *Erwin v. Lowry*, 7 How. 172, 181, referred to in the argument of the counsel for the defendants in error, the proceedings in the court of the United States were merely to enforce a lien created by the testator in his lifetime, and consequently could not interfere with the duties of the curator, or the authority of the state court, under which he was acting, and to which he was bound to account."

From *Erwin v. Lowry*, considering the decision itself, the references which have been made to it in the later decisions of the court, and the reasons and general principles upon which it rests, I think that a special rule is fairly deducible as follows: A lien upon specific property entitling the lienholder to a special remedy is not impaired by the death of the owner, and such special remedy may be applied in proceedings against his executor or administrator. This rule requires the court to enforce the complainant's rights as mortgagee by subjecting the mortgaged property, and the rents and income therefrom during the pendency of this suit, to the uses stipulated in the mortgage. The application for the appointment of a receiver will be granted.

---

COTTING et al. v. GRANT ST. ELECTRIC RY. CO. et al.

(Circuit Court, D. Washington, N. D. January 25, 1895.)

CORPORATION—CONTRACT MADE BY OFFICER.

Where a contract, though made in the individual name of the president of a corporation, is made for its use and benefit, and is so understood by its officers, and it, with full knowledge of the terms of the contract, assumes the payment stipulated therein, and alone profits thereby, it will be liable for the contract price.

Suit by Charles E. Coting and others against the Grant Street Electric Railway Company and others. Heard on petition of the receiver to vacate an order.

Burke, Shepard & Woods, for complainants.

Blaine & DeVries, for defendants.

HANFORD, District Judge. In this case the receiver of this court, in possession of the property of the Grant Street Railway Company, hereinafter referred to as the defendant corporation, has petitioned the court to vacate an order heretofore made, requiring him to perform the conditions of a contract by which the defendant corporation became bound to pay for the electric current for lighting the residence of Mr. G. E. M. Pratt, which order was made by the court upon the petition of Mr. Fred E. Sander, president of the defendant corporation, setting forth the contract and the obligation of the defendant corporation thereunder. Although said petition was granted upon a hearing after notice to the receiver, and after his counsel had been heard to make an argument in opposition, the present petition to vacate the order is upon the ground that the allegations of Mr. Sander's petition are untrue in fact, and that the defendant corporation never contracted or became obligated to pay for the electric lights in Mr. Pratt's residence. All the difficulties in this matter are due to an apparent attempt to follow the fashion, now prevalent, of transacting business not by or through the agency of a corporation simply, but through families of corporations.

I find that the defendant corporation owned machinery and appliances for creating electricity for lighting purposes, which it could not utilize without obtaining a license or permission from the city of

Seattle to place poles and wires in the streets and alleys of the city. Mr. Pratt had acquired ownership of a franchise granted by the city for such purpose. The principal defendant is a close corporation. Mr. Sander and his wife, owning most of the stock, are each trustees, and they, together with Mr. Bruns, constitute the board of trustees. Mr. Sander is president, and, by resolution of the board of trustees, endowed with unlimited power, as manager of the corporation, to transact all its financial business, and to bind the corporation by any and all contracts which he may enter into for its benefit or in its behalf. Mr. Sander is also president and factotum of another corporation, bearing the corporate name of "Fred E. Sander, Incorporated." Mr. Sander, in his individual name, entered into an executory contract with Mr. Pratt, by which he agreed to purchase the aforesaid franchise, and to pay therefor the sum of \$500, and also to furnish electric current sufficient for a specified number of electric lights in Mr. Pratt's residence for a period of five years, and to make the connections necessary for supplying such current free of expense to Mr. Pratt. Pursuant to that executory contract, the defendant corporation paid said sum of \$500 directly to Mr. Pratt, by a check for that amount drawn upon the bank of Dexter, Horton & Co.; and the defendant corporation, until it went into the hands of the receiver, paid the bills for electricity furnished for lighting Mr. Pratt's residence monthly, and, in consideration of said payments, Mr. Pratt, by an instrument in writing, assigned and transferred his franchise to the Fred E. Sander, Incorporated. This last-named corporation never paid anything on account of said contract, nor made any use of said franchise, other than to assign and transfer it, along with other property and franchises, to the defendant corporation. Mr. Sander and Mr. Bruns have filed affidavits in which they testify positively and unequivocally that the contract with Mr. Pratt, although made in the name of Fred E. Sander, as an individual, was in fact made for the use and benefit of the defendant corporation, and was so understood by the officers of said defendant at the time, and that the defendant corporation, with full knowledge of the terms of the contract and the manner in which it was made, did actually assume the payments stipulated in said contract, and that the defendant alone has profited by the acquisition of said franchise.

Upon these facts, there can be no question but what the defendant corporation was the principal contracting party, and Mr. Sander but an agent, in making the contract with Mr. Pratt. The defendant, therefore, would not be permitted to deny its liability to pay the contract price for the franchise right acquired by said contract. The idea that, where two parties co-operate in a business transaction, one may acquire and retain all the benefits, while the other, without financial ability to respond, is alone burdened with all the liabilities incurred, can receive no support in a court of justice. The defendant, while permitted to manage its own affairs, never disputed or sought to shirk its responsibility under this contract; and I hold that the receiver, who now acts in place of the manager and board of trustees, shall not be permitted to do so.

## COVINGTON CITY NAT. BANK v. COMMERCIAL BANK OF CINCINNATI et al.

(Circuit Court, S. D. Ohio, W. D. February 4, 1895.)

No. 4,624.

## 1. BANKS—LIEN ON STOCK FOR DEBT OF HOLDER—CERTIFICATE—CUSTOM—NOTICE.

Where there is a custom between brokers and bankers that, on application of a broker, a bank will certify as to whether it has any lien on certain of its stock by reason of the holder thereof being indebted to it, a bank, by being asked by a broker to give such a certificate, is thereby put on inquiry, and charged with notice, as much as though told that a loan for a certain amount had been or was to be made to the holder of the stock by a certain person.

## 2. SAME—WHO ENTITLED TO BENEFIT OF CERTIFICATE.

Such a certificate, obtained by a broker on behalf of one who had already made a loan to the holder of the stock on his note and the stock as security, does not inure to the benefit of a subsequent transferee of the note, who takes it relying on the personal responsibility of the maker and the security of the stock, without knowledge of the certificate.

## 3. MARSHALING SECURITIES.

Where a bank, a money loaner, and a broker have, in the order named, liens on stock of the bank, and the bank has an exclusive lien for its claim on other security, the bank will be compelled to resort first to the latter security.

Suit by the Covington City National Bank against the Commercial Bank of Cincinnati and others to determine the right of lien on certain stock in defendant bank.

Ramsey, Maxwell & Ramsey, for complainant.

Swing & Morse, E. R. Donohue, and Matthews & Cleveland, for respondents.

SAGE, District Judge. On the 28th of November, 1888, H. B. Morehead & Co., brokers, procured from the Amazon Insurance Company, of Cincinnati, Ohio, a loan of \$4,500 to Charles W. Short, for which he gave his demand note, payable to his own order, indorsed by him, and secured by the pledge of 100 shares, of the par value of \$50 each, of the capital stock of the defendant the Commercial Bank of Cincinnati. The note bears date October 1, 1887; and the stock certificate, November 28, 1888. The explanation is that Short had a call loan, placed by H. B. Morehead & Co., for \$15,000, secured by 300 shares of Commercial Bank stock. Two hundred shares were sold by Morehead & Co.; the amount of the loan reduced to \$4,500; the original note taken up and canceled; a new call note executed therefor by Short, of the same date and description as the original note. The loan was then—that is to say, on the 28th of November, 1888—placed with the Amazon Insurance Company, where it remained until July 28, 1890; it then went to another party, where it remained until December 11, 1890; then to another party, where it remained until December 26, 1890; then to another, where it remained until March 30, 1892; then to still another, where it remained until August 5, 1892; and then to the complainant. The

names of the holders, above referred to, of the note, are not disclosed. The testimony is that the names of the lenders in such cases are regarded as confidential by the brokers, and not made known even to the borrowers. The successive transfers were in accordance with the usual course of business in such transactions. When a loan is "called," to use the current expression, the broker, if possible, finds a new taker for the note, and the transfer may be accomplished without notice to, or the knowledge of, the borrower.

Shortly after the loan was placed with the Amazon Insurance Company, the defendant Ballman, then representing Morehead & Co., at the instance of the president of the Amazon Insurance Company, notified Short that a certificate from the Commercial Bank, that he was not indebted to the bank, was necessary to continue the loan. Short suggested that Ballman call upon the bank, which he did, and, according to his testimony, notified Mr. Campbell that Morehead & Co. had on their books a loan to Short of \$4,500, secured by 100 shares of the stock of the bank, and that it was necessary to have from the bank an acknowledgment in writing that Short was in no way indebted to the bank. This, the witness testifies, was in the usual course of business with the bank, and such applications had been repeatedly made and granted upon similar occasions. Mr. Campbell, as cashier, thereupon gave to Mr. Ballman a certificate in writing, upon a letter head of the Commercial Bank, as follows: "This is to certify that Mr. Charles W. Short is in no way indebted to this bank, and that we have no lien upon his certificate for one hundred shares of Commercial Bank stock." It was signed "W. H. Campbell, Cashier," and delivered to Mr. Ballman. The certificate has been lost. Its precise date is not given in the testimony. The only designation of time is that it was shortly after the acceptance of the loan by the Amazon Insurance Company. The fact was as stated in the certificate; that is to say, at that time Short was not indebted to the bank. There was no inquiry or request concerning the release of any lien the bank might have for any future indebtedness, nor was anything said on that subject. The cashier testifies that he was not told why, or for whose benefit, the statement was wanted, and that he had no knowledge or information what use Ballman intended to make of it, and, further, that he was not told of the loan. No other notice was given to the bank. At that time Short was quoted or "rated on the street" as being a millionaire, and Mr. Ballman testifies that so small an amount as \$4,500 was not considered anything to have Short's signature attached to. The complainant never had possession or any knowledge of the certificate until after it called the loan. It took the loan upon its reliance on the note of Short, and the certificate of stock as collateral thereto. That certificate contains a clause which declares that the stock is subject, with all dividends thereon, for any debts or demands due from the holder, said Charles W. Short, to the Commercial Bank, which clause is in accordance with the provision of the statute under which the stock was issued.

The president of the complainant testifies that on the 5th of August, 1892, when he purchased the note for the complainant, he went

to the office of Irwin, Ellis & Ballman, successors to H. B. Morehead's successors, seeking for investments for the complainant, and was shown a slip of paper, with Charles W. Short's note, and collateral of 100 shares of stock of the Commercial Bank of Cincinnati, at 4 per cent, payable on demand. He agreed to take it. He did not look at the note or the collateral. It remained at 4 per cent. until December 28, 1892, when he called it up to 6 per cent. Soon afterwards—the exact date is not stated, but shortly before the assignment of Short, the date of which does not appear in the testimony, but is averred in the bill to be “on or about January, 1893”—the complainant called the note. Short had then become insolvent, and was on the eve of making an assignment under the state law of Ohio. The note was not paid. A sale of the stock was negotiated by Irwin, Ellis & Ballman, but, the Commercial Bank refusing to transfer the stock, the sale fell through. Short was then, and for some time prior thereto, but subsequent to the date of the certificate hereinbefore referred to, had been, indebted to the Commercial Bank, as will be more particularly set forth hereinafter. A claim is made by cross bill in favor of Irwin, Ellis & Ballman, upon facts which will be stated in connection with the consideration thereof. There is some slight discrepancy between Ballman and Campbell as to what was said when the certificate was asked for by Ballman, and they do not agree precisely as to the contents of the certificate. Mr. Campbell does not remember that Mr. Ballman referred to any loan. Their difference with reference to the contents of the certificate is not material, and it is not necessary to enter further into details with regard to it. The testimony of Ballman that it was the custom of brokers, known to the banks, to call upon them for certificates such as he called for on this occasion, and that they were for the advice of their customers, is not in dispute. The objection that the notice to the bank was insufficient because it did not specify that there was a loan, or who was the lender, is not well founded. Accepting the version of the facts given by the cashier, and admitting for the sake of the argument that nothing was communicated to him concerning the loan, what took place, construed in the light of the custom, was sufficient at least to put the Commercial Bank upon inquiry. It must therefore be held chargeable with notice of all the facts it might have learned by pursuing the inquiry. Who was the holder of the loan, and the stock as security, is not material. The bank could have easily ascertained the amount, and that the loan was payable on call. Mr. Ballman testifies that he stated the amount. It must be assumed, therefore, that the bank had notice, and was bound to conduct itself accordingly. But the request for the certificate was made on behalf of the Amazon Insurance Company, after that company had accepted the loan. The certificate had no relation whatever to the negotiation or acceptance of the loan. It may have been that the loan would have been called if the bank had included, in terms, in the certificate, a reservation of its lien for any future indebtedness from Short to it. That circumstance was enough to make the certificate binding upon the bank. The real question is whether the subsequent transfers of the note, of which



there were four, extending over a period of more than two years before the transfer to the complainant, carried with them the benefit of the certificate given by the bank upon the solicitation of the president of the Amazon Insurance Company, to enable him to determine whether he should call the note or continue to hold it. The testimony offered on behalf of the complainant shows that Short, when the certificate was called for, was reputed possessed of great wealth, so that, to quote from the testimony, "the amount of this note would be regarded as a trifling indebtedness, for him." The certificate was lost or mislaid. It does not appear that it passed into the hands of the intermediate holders of the note. The testimony is silent upon that point, but it is significant that not one of those holders was called as a witness. Not only did the complainant bank not take the loan in reliance upon the certificate, but, in addition, it had no knowledge of its existence until after it had called the loan. It then learned that the bank claimed a lien for the amount of Short's indebtedness to it. I am unable to concur in the view of counsel that the certificate inures to the benefit of the complainant. It was no part of the original transaction. It was given to the president of the Amazon Insurance Company to enable him to determine whether to call the note. It served its purpose, was lost or mislaid, and seems to have been regarded of so little consequence that its loss was not discovered until years afterwards. No further mention was made of it. It was apparently treated as *functus officio*. The giving of it was a collateral incident, in which the complainant was not interested, and with which it is not in privity. The equity of the case in this behalf is with the defendant.

It appears in the testimony that the Commercial Bank is a creditor of Short on his demand note of December 23, 1891, for \$7,500, with interest at 7 per cent. from January 1, 1893, and on a note for \$800, dated March 8, 1892, drawn to his order, and by him indorsed, with interest from June 11, 1892. For the \$7,500 note, the bank holds as collateral 16 bonds of the Southern Marble Company, of the face value of \$500 each. It also holds as collateral for both of said notes a promissory note for \$3,500 drawn in favor of the order of Short, payable two years after date, and secured by mortgage on real estate.

The defendants Irwin, Ellis & Ballman set up by cross bill that there is due them \$957.35, with interest from October 30, 1892, on account of interest paid by them for Short, and for advances and commissions made in respect to the loan in question, prior to that time. The cross bill sets up that, by the custom of bankers and brokers in the city of Cincinnati and elsewhere, a lien arises in favor of brokers for the amount of interest, commissions, and advances on account of loans placed by them, and of the character of the loan in question in this case. This custom is admitted by the defendant the Commercial Bank. It is also in testimony, and undisputed, that it is always understood that the payment of interest by the broker for the maker of the note entitles him to a lien. That lien also will be recognized. The first lien is in favor of the Commercial Bank, the second is in favor of the complainant, and the third in favor of Irwin, Ellis & Ballman. The complainant and the defendants Irwin, Ellis

& Ballman are entitled to have the securities marshaled; that is to say, the Commercial Bank, having the exclusive benefit of the securities, aside from the capital stock owned by Short, and held by the complainant as collateral, will be entitled to resort to any or all of its securities for payment. If there be anything left of the securities held by it exclusively, after the payment of its claims, the defendants will be entitled to subrogation in the order of their liens.

---

PHILADELPHIA TRUST, SAFE-DEPOSIT & INSURANCE CO. et al. v.  
EDISON ELECTRIC LIGHT CO. OF NEW YORK et al.

(Circuit Court of Appeals, Third Circuit. January 11, 1895.)

NC. 21.

1. EQUITY—PRELIMINARY INJUNCTION—PATENT CASES.

Upon applications for preliminary injunctions to restrain infringements of patent rights, the general rule is that, where the validity of the patent has been sustained by prior adjudication, and especially after arduous litigation, the only question open is that of infringement; the consideration of other defenses being postponed until final hearing, except where there is new evidence of such a conclusive character that, if it had been introduced in the former case, it would probably have led to a different conclusion, the burden of establishing which is on the defendant. *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.*, 54 Fed. 678, followed.

2. SAME.

Upon an application for a preliminary injunction to restrain the use by defendant of electric lamps infringing plaintiff's patent, it appeared that the validity of the patent had been sustained in suits against several other infringers, but that in a suit against a certain manufacturer a preliminary injunction had been denied, on his giving security for damages, on the ground that a defense not set up in the prior litigation might defeat the suit, which defense, however, was set up and overruled in a subsequent case. *Held*, that the lamps made by the manufacturer who had not been enjoined should not be exempted from the operation of the injunction to be issued against the use by defendant of lamps infringing plaintiff's patent.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit by the Edison Electric Light Company of New York and the Edison Electric Light Company of Pennsylvania against the Philadelphia Trust, Safe-Deposit & Insurance Company, trustee under the will of John Crump, owner of the Colonade Hotel, and George R. Crump and Henry J. Crump, to restrain the infringement of a patent. From an order granting a preliminary injunction (60 Fed. 397), defendants appeal.

Paul D. Cravath, for appellants.

Samuel B. Huey and C. E. Mitchell, for appellees.

Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

WALES, District Judge. This is an appeal from the order of the circuit court of the United States for the Eastern district of Pennsylvania granting a preliminary injunction against the defendants,

and enjoining them from using certain electric lamps, which are alleged to infringe the second claim of letters patent No. 223,898, dated January 27, 1880, issued to Thomas A. Edison, and generally known as the "Edison Filament Patent." The second claim reads as follows:

"The combination of carbon filaments with a receiver made entirely of glass, and conductors passing through the glass, from which receiver the air is exhausted, for the purposes set forth."

The validity of the patent had already been sustained in the circuit courts of the United States in other districts. *Edison Electric Light Co. v. United States Electric Lighting Co.*, 47 Fed. 454; affirmed by the United States circuit court of appeals for the Second circuit, 3 C. C. A. 83, 52 Fed. 300; *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 3 C. C. A. 605, 53 Fed. 592; *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.*, 54 Fed. 678. In the present suit the validity of the patent was not directly assailed. It was admitted that the lamps used by the defendants infringed the second claim, and that the complainants were entitled to the injunction, provided that certain lamps should be exempted from the operation of the writ, namely, the lamps which were manufactured by the Columbia Incandescent Lamp Company, of Missouri. The ground on which this exemption was demanded was that in the suit of the Edison Electric Light Co. v. Columbia Incandescent Lamp Co. (in the United States circuit court for the Eastern district of Missouri) 56 Fed. 496, a motion for a preliminary injunction had been refused, for the reason that the court entertained a doubt of the novelty of the Edison invention, notwithstanding the prior adjudications in its favor. The defense in that case was that Henry Goebel had, long before the date of the Edison patent, made an incandescent lamp, different in form, but in all essential features the same as that now in general use; and it was on the strength of this claim, which the court said was supported by "a fair preponderance of testimony," that the motion was denied, on the defendants giving a bond in \$20,000, with approved surety, conditioned for the payment of such sum, if any, which might be decreed against them on final hearing. The same identical defense had been made before in the suit by the same complainants against Beacon Vacuum Pump & Electrical Co., supra, and, after a protracted trial and investigation, had been discredited and overruled. The Goebel defense was also set up in the subsequent case of *Edison Electric Light Co. v. Electric Manuf'g Co.*, 57 Fed. 616, and was again overruled, and the decree in that case has been in all respects affirmed by the United States circuit court of appeals for the Seventh circuit. *Electric Manuf'g Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834.

In the proceedings now under review, no evidence relative to the Goebel claim of anticipation was submitted to the court; consequently we have nothing to do with the merits of that defense here. We cannot, however, fail to observe that such a defense comes at a late day, after the patent had been repeatedly sustained by the courts, and when its term is about expiring, and should therefore be received with the utmost caution. Our present inquiry is to ascertain the rule

of practice which has been generally followed in disposing of motions for preliminary injunctions against persons who are charged with the infringements of patents. In the Missouri case the court held that "complainants must show a clear right in support of a preliminary writ, and a defense which puts a case in doubt is sufficient to defeat the application." That is the rule which governs all applications where the patent has not undergone prior judicial investigation and been sustained; but in cases similar to the one before us "the general rule is that where the validity of the patent has been sustained by prior adjudication, and especially after a long, arduous, and expensive litigation, the only question open, on motion for a preliminary injunction, in a subsequent suit against another defendant, is the question of infringement, the consideration of the other defenses being postponed until final hearing. \* \* \* The only exception to this general rule seems to be where the new evidence is of such a conclusive character that if it had been introduced in the former case it would probably have led to a different conclusion. The burden is on the defendant to establish this, and every reasonable doubt must be resolved against him." *Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co.*, supra. This rule, with its exception, was followed in *Edison Electric Light Co. v. Electric Manuf'g Co.*, supra. In *Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, the supreme court, in dealing with unpatented devices, claimed to be complete anticipations of the patent in suit, the existence and use of which were proved only by oral testimony, used the following language:

"In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt."

A fortiori should such proof be exacted from infringers who attack a patent which has passed successfully through several previous contests. In the Missouri case, the court, in declining to recognize as of binding authority the prior decision of the circuit court of appeals for the Second circuit, said:

"No doubt is entertained as to the conclusive effect of that decree, here and elsewhere, as to all matters in issue in that cause; for, although the respondent was not a party to that litigation, the court would not, on a preliminary motion, consider any matter which passed to judgment in that suit. But the Goebel defense was not made in that suit, and therefore the case has not the authority on this motion which has been ascribed to it."

It may be justly inferred from this statement that, if the subsequent decision of the circuit court of appeals for the Seventh circuit, which rejected the Goebel claim of anticipation, had been rendered at the time when the application for a preliminary injunction against the Columbia Incandescent Lamp Company was made, the writ would have been granted without controversy.

This conclusion would seem to be sufficient to dispose of the present appeal, but the appellants have urged some objections against the order appealed from which may be briefly noticed. One of these

is that the Edison Electric Light Company of Philadelphia will be protected by the bond given to the complainants in the suit against the Columbia Company in Missouri. To this it may be answered that the Philadelphia Company is not a party to the suit in the Missouri district, and could not sue on the bond of the complainants therein, should the latter succeed in obtaining a decree for damages. The Philadelphia Company is a licensee, and the damages which it may suffer from the loss of profits by the use of the infringing lamps can be recovered only from the defendants and other infringers in the city of Philadelphia. Another objection is that the Edison Electric Light Company, by bringing its suit against the Columbia Incandescent Lamp Company, thereby practically made that company its licensee. But since *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244, the law has been settled that the recovery of damages from a defendant, for manufacturing and selling, will not prevent the recovery of other substantial damages from the defendants' vendees, for their profits upon reselling the patented articles. *Kelley v. Manufacturing Co.*, 44 Fed. 19; *Tuttle v. Matthews*, 28 Fed. 98. It has been often repeated that a patentee has three distinctive rights,—the right to make, the right to sell, and the right to use his patented articles,—and that whoever invades any one of these rights is an infringer, and liable for damages. We have seen that the rule which was adopted by the circuit court for the Eastern district of Missouri is applicable only in those cases where the patent has not been sustained by prior adjudication, and that in cases of the character of the one before us, the uniform practice has been to require the defendant to place himself within the exception requiring him to prove his defense beyond a reasonable doubt; and we are clearly of the opinion that the court below, in refusing to modify its order, and exempt from the writ of injunction the lamps made by the Columbia Incandescent Lamp Company, acted in accordance with the established practice, and in the observance of that rule of comity which has always prevailed in the courts of the United States in like cases. *Sessions v. Gould*, 49 Fed. 855; *Electrical Accumulation Co. v. Julien Electric Co.*, 47 Fed. 892; *Cary v. Spring-Bed Co.*, 27 Fed. 299; *Coburn v. Clark*, 15 Fed. 804; *Siebert Cylinder Oil Cup Co. v. Michigan Co.*, 34 Fed. 33; *Ladd v. Cameron*, 25 Fed. 37. The decree of the circuit court is affirmed.

---

#### COLBY v. VILLAGE OF LA GRANGE.

(Circuit Court, N. D. Illinois. January 14, 1895.)

##### 1. EMINENT DOMAIN—EXTENT OF POWER.

Complainant owned land adjacent to the village of L. The village began a proceeding in the nature of eminent domain in a state court, to obtain an easement over plaintiff's land for the flow of its sewage, not seeking, in such proceeding, to obtain any particular portion of land for a culvert, drain, or cesspool, but simply proposing to throw its sewage upon complainant's land, leaving him to dispose of it as he could. The village had no power of eminent domain, except as accessory to its power to make public improvements, including the power to construct a system of sewage

disposal. *Held*, that neither the power to make public improvements nor the power of eminent domain extended to such an invasion of private property as was proposed by the village, and that the prosecution of the proceedings for that purpose would be enjoined.

2. EQUITY—HE WHO SEEKS EQUITY MUST DO EQUITY.

It seems that, if it should appear that the best method of sewage disposal for the village involved the use of complainant's land, and he refused to accede to a reasonable plan, equity would decline to interfere by injunction with the proceedings of the village.

This was a suit by Charles L. Colby against the village of La Grange to enjoin the prosecution of proceedings in a state court. Defendant demurs to the bill.

J. L. High and Page & Booth, for complainant.

Richard Prendergast and W. R. Burleigh, for defendant.

GROSSCUP, District Judge. The complainant is the owner of a tract of land lying within the village of Grossdale, and adjacent to the village of La Grange. The bill charges that the village of La Grange, in effectuation of its scheme of an outlet for its sewage into the Des Plaines river, proposes to bring the sewage by means of sewer drains to the land of the complainant, and there discharge the same, thereby creating a nuisance upon said land, and doing irreparable injury to the rights of the complainant. The supplemental bill shows that since the filing of the original bill the village has begun a proceeding in the nature of eminent domain in the courts of the state to obtain an easement over the complainant's land for the flow of its sewage after leaving the sewers of the defendant, and, in effect, asks for an injunction against the further prosecution of this eminent domain suit. To the supplemental bill the defendant now demurs, and likewise moves the court to postpone action upon either the original or supplemental bills until the eminent domain proceedings have been concluded. Both the demurrer and motion of defendant turn upon the question whether the village can lawfully, by proceedings of eminent domain, obtain an easement upon and over the lands of the complainant for the flow of its sewage. It is not proposed by this proceeding to take any particular strip of land, and pay the complainant its value and the incidental damages, according to the constitutional provisions, but simply to obtain the privilege or easement of discharging its sewage upon and across this tract of land.

My attention has been called to no case where such an exercise of the right of eminent domain has ever been considered, and counsel on the argument have stated that no such cases are in existence. The village has no right of eminent domain whatever, except such as is bestowed upon it by statute. The original power in bulk, whatever it may comprehend, lies in the state, and is only delegated to other bodies corporate by express legislation. Such legislation must necessarily be ineffectual to carry the power claimed, unless it clearly evinces a legislative intention to that end.

Now, the only power of eminent domain expressly conferred upon cities and villages is that accessory to their power to make public

improvements. In such respect as they have no right to make public improvements, there exists no power of eminent domain. The latter, therefore, is limited by the field of the former. Now, what power respecting the disposition of sewage is conferred upon villages? I know of none which permits them to empty their sewage upon a private owner's land. Unquestionably they can dispose of it by constructing culverts, drains, sewers, and cesspools, as expressly provided in the statute, and perhaps by conveying it to outlying fields owned by such municipality for destruction and treatment, or by conveying it through intermediate tracts to natural drains and water courses. But clearly there is no power to dump it untreated, and with its distasteful and unhealthful consequences, upon the property of a private owner, leaving it to him to take care of as best he can. The village does not seek in its proceeding to obtain land from the complainant for any culvert, sewer, drain, or cesspool, or for a locus for the treatment and disposal of the sewage. It proposes, simply, to throw upon the complainant's land its sewage, and thus compel him to provide the necessary drains, culverts, sewers, or other methods of disposing of it. Such an interpretation of its right would, in my judgment, go beyond the express authority conferred.

This conclusion, of course, does not affect whatever rights the defendant may have growing out of the existence of a natural drain or water course across defendant's lands. If such a drain or water course is naturally in existence, the defendant may be entitled to its use as an outlet for its sewage. And whatever right in this respect it has is not dependent upon, or enlarged or in any way affected by, the right of eminent domain. Indeed, the right to condemn for the purposes sought presupposes the nonexistence of a natural right of outlet to the village. Both the demurrer and the motion of the defendant will, therefore, be overruled.

I deem it proper to repeat what I stated on the oral argument. The complainant is in a court of equity, asking for an injunction against the defendant's proposed disposal of its sewage. The defendant is a growing village, and every consideration of public health and justice requires that it should have some outlet for its sewage, or some reasonable means of disposing of it. If the situation is such that the clearly better course, both by reason of topography and expense, is across the complainant's lands, and the complainant refuses to accede to a system that is reasonable and just, I am very much inclined to think a court of equity would not entertain his bill for relief. I therefore suggest that, instead of going into a long trial upon the parties' legal and technical rights in this controversy, the defendant village offer to the complainant a practical and reasonable scheme of sewage disposal.

**RALSTON v. WASHINGTON & C. R. RY. CO. (LADD et al., Interveners).**

(Circuit Court, D. Washington, S. D. January 14, 1895.)

**RECEIVERS—APPOINTMENT OF OFFICER OF INSOLVENT CORPORATION.**

Although, when a court assumes control of the affairs of an insolvent corporation, it is preferable to take it entirely out of the hands of its managing officers, yet there is no inflexible rule rendering such officers ineligible as receivers; and in a case where the trustee prosecuting the foreclosure under which the receiver is appointed is authorized by the mortgage to nominate a receiver, and nominates an officer of the corporation, who is known to the judge making the appointment to be a capable, honest, and fair-minded man, who has managed the property well, under adverse circumstances, it is proper to appoint such officer receiver.

This was a suit by Robert Ralston, as trustee, against the Washington & Columbia River Railway Company, for the foreclosure of a mortgage. W. D. Tyler, president of the corporation, was appointed receiver. W. M. Ladd and others, composing the firm of Ladd & Tilton, holders of bonds, intervened, and moved for the removal of the receiver.

L. L. McArthur, for complainant and C. B. Wright.

B. L. Sharpstein and John L. Sharpstein, for defendant.

Williams, Wood & Linthicum and J. C. Flanders, for interveners.

John B. Allen, for receiver.

HANFORD, District Judge. The complainant, as trustee for the holders of bonds of the Washington & Columbia River Railway Company, filed his bill of complaint, setting forth a mortgage upon all the property of said corporation, given to secure payment of the principal and interest of said bonds, and alleging, in substance, that installments of interest on said bonds had become due and were unpaid; that said corporation is insolvent; that the complainant had been duly selected and constituted as trustee in place of the trustee named in said mortgage, and had been requested by C. B. Wright, the holder of more than three-fourths of said bonds, to bring this suit to foreclose said mortgage,—and praying for a decree of foreclosure of the mortgage, and sale of the property, and for the appointment of W. D. Tyler, president of said corporation, as receiver, to take immediate charge of the railway, and manage the same during the pendency of this suit. The mortgage contains provisions authorizing the trustee, in case of default in the payment of any installment of interest, to declare the whole debt due, and proceed at once to foreclose and to have a receiver appointed, and to choose a receiver. Upon application of the complainant, after notice to the defendant corporation, one of the judges of this court, in chambers, appointed said Tyler receiver of said corporation, with power to manage the business and operate the railway; and he has accepted the appointment, and is now acting as such receiver. William M. Ladd and others, composing the firm of Ladd & Tilton, obtained leave to intervene in the suit, and thereupon filed a petition alleging that said firm holds certain bonds secured by said mortgage; that the selec-



tion of complainant as trustee was without their knowledge or consent; that this suit was commenced, and said appointment of a receiver was made, without previous notice to them, and without their knowledge or consent; that the foreclosure of said mortgage and sale of the railway at the present time will necessarily cause a sacrifice on their part, and by reason of facts alleged, as to the manner in which said C. B. Wright had induced them to exchange other securities for the bonds which they now hold, the suit is inequitable; that said Tyler is objectionable to them as receiver, on account of his position as president of the defendant corporation, and his past and present relations with Wright, and he is charged with having mismanaged the railway, and diverted its earnings for the benefit of Wright. Wherefore, the interveners ask to have the appointment of Tyler as receiver set aside, and a disinterested person substituted. Pursuant to an order of the court requiring them to answer said petition, all the parties to the suit and Wright and Tyler have filed answers, and to said answers the interveners have excepted for insufficiency. Upon the hearing of said exceptions, counsel for the interveners, in his argument, frankly abandoned all the charges against Mr. Tyler of collusion with Wright to fraudulently mismanage the railway, and has rested his case against the receiver on the ground that he is an unsuitable person to be receiver, because of his past connection with the railway as president and manager, and because he was nominated by the trustee in the interest of Mr. Wright, who owns the stock of the corporation, and, for himself and others, holds most of the bonds.

In appointing this receiver, I took into account the fact that the mortgage authorizes the trustee to choose a receiver; and I assumed that all the parties interested would be satisfied to have his nominee confirmed, but I was not controlled by these considerations. I have known Mr. Tyler personally for several years, and at the time of acting upon said application I had perfect confidence in his capacity, integrity, and fairness. I considered him a suitable person to administer the trust, and for that reason, mainly, gave him the appointment. And now, after having canvassed the situation in the light of the showing made by the parties, respectively, I still hold Mr. Tyler in the same high estimation, and consider that his appointment was in fact prudent. I concede that, when a court assumes control of the affairs of an insolvent corporation, it is preferable to take it entirely out of the hands of its managing officers. But there is no inflexible rule rendering such officers ineligible to appointment as receivers. I also assent to the proposition advanced by counsel for the interveners, that the rule of managing officers, whose mismanagement has resulted in bringing a corporation into a condition of insolvency, should not be perpetuated by continuing them or their subservient agents in charge as receivers. The Washington & Columbia River Railway Company was organized after a sale of the railway and its appurtenances under a decree of foreclosure against another corporation, which formerly owned it, and which had become insolvent. The property transferred by said sale

was deficient in rolling stock, stations, warehouses, and necessary equipments, and included no right to ground for terminals and stations at the most important towns on the line of the railway, other than options to purchase. During the time of Mr. Tyler's incumbency as president of the new company, its business has been seriously affected by the financial stringency which has prevailed throughout the whole country for the past three years; and yet, by his answer, it appears that he has so managed the property that he has, from its surplus earnings above operating expenses, acquired and paid for terminal and station ground, built station buildings and freight houses, and made betterments which were absolutely necessary. He has honestly applied the whole income of the company to the legitimate uses of the company. He has not conducted its business so as to bring on insolvency. On the contrary, he took charge of an incomplete and partially equipped railway, overburdened with an interest-bearing debt, and, in hard times, has made it serve the public well, paid operating expenses and taxes, and actually improved its condition. My conclusion is that Mr. Tyler's good management as president of the company; his knowledge of its requirements, gained by practical experience; his well-known character as a capable, honest, and fair-minded man; and the right of the trustee to choose a receiver, stipulated in the mortgage sued on,—outweigh all objections urged by the interveners. Their application is therefore denied.

---

MANHATTAN TRUST CO. v. SIOUX CITY & N. R. CO. (HUBBARD, Intervener).

(Circuit Court, N. D. Iowa, W. D. January 15, 1895.)

**1. PLEDGE—REHYPOTHECATION—REDEMPTION BY PLEDGEE.**

G. and four others formed a syndicate for the construction of a railroad. The necessary money was, in part, raised upon notes of the members of the syndicate, indorsed and negotiated by the U. Trust Co., upon an agreement that the stock and bonds of the road, when issued, should be deposited with that company to secure its indorsements. Subsequently the syndicate became interested in another railroad enterprise, and it was agreed that the securities acquired in connection therewith should be held as security for all debts of the syndicate. More money being needed, G., acting on behalf of the syndicate, secured a loan from T. & Co., pledging the syndicate securities therefor. The U. Trust Co. knew of this transaction, and its secretary and treasurer, who was practically the sole manager of its affairs, placed the securities in G.'s possession, whereby he was enabled to pledge them for the new loan. Subsequently a third loan was made, for the purpose of retiring the second, in which, by an arrangement to which T. & Co. and the members of the syndicate were parties, the syndicate securities were again pledged, as the property of a corporation controlled by the members of the syndicate, to a corporation organized by T. & Co. The interest on this loan not having been paid, the securities were sold, and bought in by T. & Co. Held, that the U. Trust Co. had consented to the rehypothecation of the securities, and could not insist upon having them applied to its security upon its indorsements, but was entitled to redeem them upon paying the amount due to T. & Co., and to hold them, as against the members of the syndicate, as security for its indorsements.

**2. BONA FIDE PURCHASER—SUBSTANCE OF TRANSACTION.**

*Held*, further, that T. & Co. acquired no rights in the securities, as purchasers in the ordinary course of business, but that the court would look through the form to the substance of the third loan, and would hold the securities subject to redemption in the hands of T. & Co.

This was a suit by the Manhattan Trust Company against the Sioux City & Northern Railroad Company for the foreclosure of a mortgage. E. H. Hubbard, assignee of the Union Loan & Trust Company, for the benefit of creditors, intervened for the purpose of asserting certain rights of his assignor in and to the stock of the defendant company. The cause was now heard upon the intervening petition, and proofs submitted.

John C. Coombs, Spalding, Taylor & Burgess, and Wm. Faxon, Jr. (Henry J. Taylor, of counsel), for intervener.

Strong & Cadwalader and Henderson, Hurd, Daniels & Kiesel, for defendant.

SHIRAS, District Judge. On the 5th day of October, 1893, the Manhattan Trust Company, a corporation created under the laws of the state of New York, filed a bill in equity in this court against the Sioux City & Northern Railroad Company, averring that it was the trustee in a mortgage executed by the railroad company, to secure an issue of bonds amounting to \$1,920,000; that the mortgagor was not fulfilling the provisions of the mortgage in several particulars, and was permitting the mortgaged property to be incumbered by liens for unpaid taxes, which might shortly ripen into tax titles under sales made for the delinquent taxes, and was otherwise permitting the mortgaged property to become incumbered and wasted; and therefore it was prayed that a receiver should be appointed by the court to take possession of the mortgaged property, and operate the same to the end that the income thereof should be properly used and applied, that the delinquent taxes should be paid, and that the property should be preserved for the benefit of all interested therein.

E. H. Hubbard, assignee for the benefit of creditors of the Union Loan & Trust Company, by leave of court, filed a petition in intervention, for the purpose of asserting the rights and equities of the Union Loan & Trust Company in and to the stock of the Sioux City & Northern Railroad Company, and, by consent of the complainant, the defendant, the Sioux City & Northern Railroad Company, and the intervener, receivers were appointed by the court, who have since had possession of the mortgaged property. The questions now submitted to the court arise upon the original and amended petition in intervention, filed by the assignee of the Union Loan & Trust Company, which are based upon the following facts: In July, 1889, D. T. Hedges, John Hornick, James E. Booge, Ed. Hakinson, and A. S. Garretson associated themselves into what is called in the evidence "a railroad syndicate," the primary purpose being to undertake the construction of the Sioux City & Northern Railroad. By a written contract dated July 3, 1889, signed by the parties above named, it was agreed that they should undertake the immediate construction of the named railroad from a point near Merrill Station, Iowa,

to a junction with the St. Paul, Minneapolis & Manitoba road, at or near Palisades, Dak.; it being further agreed that, for all money borrowed and contracts made for the building and equipment of the railway, the parties should be equally liable; that all losses and profits were to be equally divided; that, if it should be found best for one member of the syndicate to execute notes for borrowed money and contracts for materials in his own name, the same should, nevertheless, be deemed to be the obligation of all the parties to the contract; that all borrowed money was to be placed to the credit of John Hornick, trustee, with the Union Loan & Trust Company, and to be paid out on his order; that the contract thus made was to be deposited with the Union Loan & Trust Company, and was to hold good until the railroad was built and all debts connected therewith should be paid. The construction of the Sioux City & Northern Railroad being thus entered upon, the money therefor was raised by executing notes from time to time, which were indorsed by the Union Loan & Trust Company, and sold by it to various banks, the larger part of the notes being signed by John Hornick, and the remainder by the other members of the syndicate. The arrangement between the parties was that the stock and bonds of the road, as the same were issued and became the property of the syndicate, were to be deposited with the Union Loan & Trust Company, as security for the protection of the makers of the notes and of the Union Loan & Trust Company, as indorser of the paper negotiated by it; and, if sold, the proceeds were to be deposited in the Union Loan & Trust Company, to the credit of John Hornick, trustee, and to be used in the payment of the notes signed and negotiated as above stated.

Subsequently the named syndicate became interested in the enterprise carried on under the name of the Nebraska & Western Railway Company, and with the understanding that the securities and property acquired in connection therewith should be held as security for the payment of all debts created by the syndicate in the furtherance of the enterprise. Through a mortgage foreclosure, the property of the Nebraska & Western Railway Company was transferred to a new company, known as the Sioux City, O'Neill & Western. During the pendency of the foreclosure proceedings, an agreement, in writing, under date of October 1, 1891, was entered into between J. Kennedy Tod & Co. and A. S. Garretson, wherein it was recited that Garretson was the holder of \$2,500,000 of the mortgage bonds of the Nebraska & Western Railway Company, of 25,000 shares of the capital stock of said company, and 7,200 shares of the capital stock of the Sioux City & Northern Railroad Company; that Garretson, on his own behalf and that of his associates, proposed to purchase the Nebraska & Western Railway at the coming foreclosure sale, and form a new corporation for the completion of that enterprise, and, for that and other purposes, Garretson needed money; that, to obtain the same, Garretson was to execute and deliver to J. Kennedy Tod & Co. his promissory notes to the number of 200 for \$5,000 each, thus making an aggregate of \$1,000,000, and to deposit, as security therefor, the above-named bonds and stock of the Nebraska & Western Rail-

v.65f.no.6—36

way Company and the stock of the Sioux City & Northern Company. And the said Tod & Co. agreed that, within two months from the date of the agreement, they would sell the notes at par to others, or would themselves take them at par, and would at once advance to Garretson the sum of \$200,000, to be used in obtaining title to the Nebraska & Western Railway property; that, upon the purchase at the coming foreclosure sale, a new corporation should be organized, to take the property, and a new mortgage thereon should be executed to the Manhattan Trust Company, to secure an issue of bonds at the rate of \$18,000 per mile; and that the entire amount of bonds and one-half of the capital stock of the new company should be delivered to Tod & Co., as security in place of the bonds and stock of the Nebraska & Western Company; and that the stock of the Pacific Short-Line Bridge Company should be likewise pledged with Tod & Co., as security for the notes executed by Garretson. The foreclosure sale of the Nebraska & Western property was had at Omaha, Neb., on October 23, 1891, and was confirmed by the court, October 28, 1891; and in December, 1891, the new company, known as the Sioux City, O'Neill & Western Railway Company, was organized, and the property was conveyed to it, in consideration of the issue of \$2,340,000 of first mortgage bonds and \$36,000 of capital stock. A temporary printed bond for \$2,340,000 was first executed pending the preparation of engraved bonds, which were subsequently issued; and, when issued, the same were delivered to Tod & Co., as security for the 200 promissory notes executed by A. S. Garretson, and which were disposed of to various parties by Tod & Co., the proceeds thereof being accounted for to Garretson, under the written agreement of October 1, 1891. Thus, there came into the hands of J. Kennedy Tod & Co., as security for the \$1,000,000 of notes executed by Garretson, \$2,340,000 of the first mortgage bonds of the Sioux City, O'Neill & Western Railway Company, one-half of the capital stock of that company, 7,200 shares of the capital stock of the Sioux City & Northern Railroad Company, and the stock of the Pacific Short-Line Bridge Company.

In December, 1892, a further loan was made, known as the "\$1,500,000 loan," which seems to have had for its main purpose the retirement or payment of the 200 notes executed by A. S. Garretson. The form of this transaction was substantially as follows: The Union Debenture Company, a corporation organized by Tod & Co. and their associates, entered into a written contract, under date of December 30, 1892, with Garretson, wherein it was recited that Garretson was the owner of 300 of the promissory notes of the Pacific Short-Line Bridge Company, of \$5,000 each, or \$1,500,000 in the aggregate, and that, as security therefor, the bridge company had pledged to Garretson 2,340 of the first mortgage bonds of the Sioux City, O'Neill & Western Railway Company, and 10,200 shares of the capital stock of the Sioux City & Northern Railroad Company, and had authorized him to transfer and pledge said stock and bonds as security for the notes of the bridge company; and it was therefore agreed that an indenture of trust should be made to J. Kennedy Tod & Co., as trustees, transferring to them, in trust, the bonds of the Sioux City, O'Neill &

Western Railway Company and the stock of the Sioux City & Northern, as security for the payment of the 300 notes of the bridge company, and that the debenture company should undertake the sale of the notes, or should purchase the same at par and accrued interest. In pursuance of this agreement, Garretson, under date of December 31, 1892, executed an indenture of trust to J. Kennedy Tod & Co., assigning to them, in trust, 2,340 bonds of the Sioux City, O'Neill & Western Railway Company, and 14,200 shares of the capital stock of the Sioux City & Northern Railroad Company, as security for the benefit of the holders of the notes of the bridge company. The execution of the notes of the bridge company was brought about through an agreement entered into between Garretson, Hedges, Hornick, and Hakinson, on the one part, and the bridge company, on the other, under date of December 31, 1892. The plan of having the notes to be issued signed in the name of the bridge company was first suggested by J. Kennedy Tod. The notes were signed and delivered to the debenture company, and the stock and bonds were delivered to J. Kennedy Tod & Co., as trustees. In the trust indenture it was provided that, in case of default in payment of any principal or interest for a period of 30 days, the trustees might, and, upon demand of the owners of one-half in amount of the outstanding notes, must, declare the whole debt due; and provision was also made for a sale at public auction of the stock and bonds, upon the written request of the holders of a majority of the outstanding notes. The interest maturing July 1, 1893, on the notes in question, was not paid, and, a majority of the note holders so requesting, the whole sum was declared to be due, and an auction sale of the securities was had on September 26, 1893, at an auction room in the city of New York, and J. Kennedy Tod & Co., as purchasing trustees, bought in the 2,340 bonds of the Sioux City, O'Neill & Western Railway Company, and 10,600 shares of the capital stock of the Sioux City & Northern Railroad Company, bidding therefor the sum of \$1,000,000, which was accounted for by giving the auctioneer a receipt to the effect that payment would be made by crediting on the notes the sum bid, less expenses. These securities thus purchased are now in the possession of J. Kennedy Tod & Co.

As already stated, an intervening petition was filed in this case by the assignee of the Union Loan & Trust Company of Sioux City, Iowa, the primary purpose thereof being to settle the question of the ownership of the stock in the Sioux City & Northern Railroad Company,—a question material to the proper and final disposition of the original case, wherein a receiver had been appointed to take charge of the railway property, in order to stop waste thereof; one of the grounds for such action being that an election of directors by the stockholders could not be had, owing to the dispute over the ownership of a majority of the capital stock of the company. The ground taken in support of the claim on behalf of the Union Loan & Trust Company is that the agreement between the members of the syndicate rendered all the bonds and stock which were derived from the operations of the syndicate liable for the debts of the syndicate; and that the trust company indorsed the syndicate paper in reliance upon

this security; and that, being now liable on the syndicate paper by reason of its indorsement, it is entitled to demand the application of the securities, or the proceeds thereof, to the payment of the debts upon which it is liable.

Under the arrangement entered into between the members of the syndicate and between the syndicate and the trust company, it seems clear that the trust company, as against the members of the syndicate, is entitled to the benefit of the securities which were placed in its possession, and upon the faith of which, it may be assumed, it indorsed the syndicate paper. If these securities were now in the actual possession of the trust company, it would have the right to insist that the syndicate could not withdraw or dispose of the same, except for the purpose of paying the notes indorsed by the trust company, the proceeds of which were used in creating or procuring the securities in question. It is claimed on behalf of the trust company that it has been wrongfully deprived of the actual possession of these securities, and that it is not bound by the transaction whereby the possession thereof has been transferred to Tod & Co., as hereinbefore recited. While there is some force in this contention, still, taking the entire evidence into consideration, it is fairly deducible therefrom that the trust company parted with the possession of the securities, knowing that it was intended to rehypothecate them. It is entirely clear that E. R. Smith, the secretary and treasurer of the trust company, dealt with these securities as though he had full authority from the company so to do, and he obeyed Garretson's instructions in regard to the same without demur; and it does not appear that the trust company, or any officer thereof, ever objected to such disposition of the securities; and, furthermore, so far as the evidence in this case discloses, the general management of the business of the trust company was intrusted to Smith, with but little, if any, supervision on part of the directors or other officers of the corporation.

In the case of *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, the supreme court, in deciding the question of the authority of a bank cashier, held that:

"As the executive officer of the bank, he transacted its business under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier—at least, where its charter does not otherwise provide—in transactions outside of his ordinary duties, without his authority to do so being in writing, or appearing upon the record of the proceedings of the directors. His authority may be by parol, and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years, or in numerous business transactions, he has been permitted without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to

what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. \* \* \* That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

The facts in the case now before the court bring the same fairly within the rules thus enunciated by the supreme court, and justify the conclusion that it is not now open to the trust company to repudiate the acts of its secretary and treasurer in regard to these securities, by whose action, in placing the same in the possession and under the control of Garretson, the latter was enabled to repledge the same as security for further advances. On the other hand, it does not appear that the trust company intended to wholly abandon all claim to or interest in these securities. In order that the stock and bonds and the properties they represented should become valuable, it was necessary that the enterprises which they were based upon should be carried through, and this required the procurement of additional funds. To this end, Garretson undertook the negotiations with Tod & Co. and the Union Debenture Company already recited; and the fair inference from the entire evidence is that the trust company consented to the repledging of these securities, in order that further funds might be procured for carrying on the work in question; but, by so doing, it did not abandon its lien upon or equity in the securities, but only subordinated its rights to those created by the repledging of the securities. Thus, if it appeared that Garretson had repaid all the moneys borrowed on these securities, and the same had been returned to him, it would be open to the trust company to insist that the securities should be applied to the payment of the syndicate paper, indorsed by it in accordance with the original agreement of the parties.

There is nothing in the evidence which justifies the holding that the trust company has been deprived of its equitable right to these securities for the purpose indicated, unless such result has been brought about through the auction sale and purchase of the securities by Tod & Co., under the circumstances already detailed.

The determination of the rights and equities of the parties largely depends upon the transaction carried on in the name of the Pacific Short-Line Bridge Company. On behalf of the defendant, it is claimed that they and the holders of the bridge notes are entitled to protection against the equity of the trust company, on the ground that they are holders of these notes, negotiable in form, and purchased in the ordinary way of business, and, as owners of the notes, they hold the securities pledged to secure the same, free from all equities on behalf of the trust company. The evidence clearly shows that the notes in question were not purchased in the ordinary way of business, nor were they in fact issued by the bridge company in connection with the business of that company. It appears in the evidence that in December, 1892, negotiations were pending between Garretson and Tod & Co. in regard to procuring a loan of \$1,500,000, the intent being to use the proceeds thereof in extinguishing the



**\$1,000,000 loan** previously made, and evidenced by Garretson's personal notes, and the surplus was to be used by Garretson in furtherance of the Sioux City, O'Neill & Western enterprise. It seems that it was originally the purpose of Tod & Co. to base this proposed loan upon notes to be issued by the Sioux City, O'Neill & Western Railway Company; but it was found that, under the statutes of Nebraska, that company could not lawfully issue notes to the necessary amount; and on December 21, 1892, a telegram signed by Strong & Cadwalader, who were attorneys for Tod & Co., was sent to Garretson, saying:

"On examination, find railroad cannot lawfully make notes, present indebtedness being almost to limit. Tod suggests bridge company do it, and we can prepare papers on that theory. Who are officers of the bridge company? Please arrange have directors of that company meet to pass resolutions we will send, and you should have on Saturday."

Following the suggestion thus made, it was in form arranged that the bridge company, then absolutely insolvent, should ostensibly purchase from the syndicate \$2,340,000 of the first mortgage bonds of the Sioux City, O'Neill & Western Railway Company, and the entire capital stock of the Sioux City & Northern Railroad Company, less 4,200 shares, and should execute, in payment therefor, its promissory notes for \$1,500,000, payable to the order of A. S. Garretson; that the notes and stock and bonds should be pledged to the debenture company, which company was to advance or secure an advance of money thereon; and the stock and bonds were to be placed in the hands of J. Kennedy Tod & Co., as trustees, to be held as security for the payment of the notes issued in the name of the bridge company.

From the evidence in this case, it clearly appears that J. Kennedy Tod & Co. and the Union Debenture Company were not only fully acquainted with the circumstances surrounding the execution of the notes of the bridge company, but in fact they were active participants in the entire transaction. The evidence shows that these notes were not issued by the bridge company in furtherance of its business, or for a consideration moving to it; and it affirmatively appears that the persons occupying the position of directors of the bridge company, when ostensibly authorizing the purchase of the railroad stock and bonds, and the issuance of \$1,500,000 of promissory notes therefor, were not in fact acting on behalf of the bridge company, but were obeying the dictation of the syndicate and J. Kennedy Tod & Co., and were in truth acting in fraud of the rights of the bridge company and its stockholders. In fact, the use that was made of the bridge company's name, as the maker of the notes in question, was clearly unauthorized and fraudulent; and the formal execution of the notes in its name, and of the contract of December 31, 1892, with the syndicate, did not create any binding obligation on the company in favor of the other parties to the transaction, or those holding under them with knowledge of the facts. In the face of the facts developed in the evidence, it cannot be held that the Union Debenture Company, J. Kennedy Tod & Co., the railroad syndicate, or parties holding under them, have any enforceable rights against the bridge company,

growing out of the transactions in question, or based upon the notes or contract alleged to have been executed in the name of that company; nor can a good title to or interest in the railroad bonds and stocks in question be founded upon the title of the bridge company thereto. The use of its name in these transactions was in reality a matter of form, and was so understood by all the parties in interest; and a court of equity, in now dealing with the rights of the parties, is justified in disregarding the form given to the transaction, and should be governed by the real substance thereof, which appears to be as follows: A railroad syndicate was formed, primarily to insure the construction of the Sioux City & Northern Railroad, but subsequently it became interested in the Sioux City, O'Neill & Western Railway, the Pacific Short-Line Bridge, and perhaps other enterprises. The money needed in these operations was partly procured through the agency of the Union Loan & Trust Company, it being agreed that the securities acquired in the operations of the syndicate should be held for the common benefit and protection of the members thereof, and also for the protection of the Union Loan & Trust Company, as indorser of the syndicate paper. In the progress of time, Garretson, needing more money to meet the demands upon him, procured advances from J. Kennedy Tod & Co., and pledged the syndicate securities therefor. When the \$1,500,000 loan was arranged for, the other members of the syndicate knew of the use that had been made by Garretson of the syndicate securities, and acquiesced therein, and participated in the transactions resulting in the loan of \$1,500,000. The Union Loan & Trust Company consented to the pledge of the securities, and must be held to be bound thereby, in so far that it cannot assert its equities to the securities except in subordination to the equities growing out of the rehypothecation of the same. In short, the facts are that the railroad syndicate, in December, 1892, negotiated a loan through J. Kennedy Tod & Co., and, with the assent of the Union Loan & Trust Company, pledged as security therefor the stock and bonds in question. Under these circumstances, before the Union Loan & Trust Company can reclaim the securities for its protection as indorser of the syndicate paper, it must pay off the loan made on the faith of the pledge thereof. The fact that the use of the name of the bridge company may have been unauthorized does not defeat the equitable lien created by the actual pledge of the stock and bonds. Brushing aside all connection of the bridge company with the transaction, the fact remains that the syndicate procured the loan of the \$1,500,000 by pledging the stock and bonds as security therefor; and the equity in the securities thus created is superior to that existing in favor of the trust company, because it is accompanied with the possession of the bonds.

It is urged on behalf of the intervener that the loan of \$1,500,000 was rendered usurious by the payment of a commission of  $3\frac{1}{2}$  per cent. to the debenture company for floating this loan. It is not necessary to consider at length the legal questions discussed by counsel in connection with this matter of usury. Even if it were open to the intervener to plead usury in a contract for the loan of money, to

which contract the trust company was not a party in any form, nevertheless, when the aid of a court of equity is invoked, equity must be done, and that requires the payment of the sum advanced, with interest. *Tiffany v. Institution*, 18 Wall. 375; Pom. Eq. Jur. § 937.

Counsel for J. Kennedy Tod & Co., when the testimony was taken, interposed many objections to the competency of particular evidence offered, and also to the form of many of the questions put to the witnesses, and they have submitted a full brief in support of these objections. In the view taken of the case, it has not seemed necessary to consider these objections. The main facts of the transaction, and those upon which the conclusion of the court is based, are shown by competent evidence, not objected to, and this obviates the need of considering the exceptions at length.

The conclusion reached is that the Union Loan & Trust Company is in equity, as against the syndicate, entitled to enforce the agreement that the securities belonging to the syndicate should be applied to the payment of the syndicate notes indorsed by the trust company; that this right, however, is subordinate to the right and equity created by the pledge of these securities to J. Kennedy Tod & Co., as trustees, to secure the loan of \$1,500,000; that the right of the trust company in this respect is not other nor greater than that of the syndicate; that, in seeking redemption of these securities, neither the syndicate nor the trust company can be permitted to question the validity of the varied moneyed transactions preceding the loan of the \$1,500,000, and which led up thereto, as the parties in interest therein are not all parties to this suit, and cannot be made such; that to enable the syndicate, as matters now are, to reclaim these securities, it would be incumbent on them to repay the loan, principal and interest, which they obtained by pledging the securities, and the trust company is under like obligation. The decree will therefore be to the effect that the intervener, as assignee of the Union Loan & Trust Company, is entitled to redeem the securities in question upon payment to J. Kennedy Tod & Co., as trustees, within a reasonable time, to be named in the decree, of the sum of \$1,500,000, with interest at the rate of 6 per cent. per annum from December 30, 1892, payable semiannually, up to the date of payment by the intervener; that upon payment of the sum due or tender thereof by said intervener, to said Tod & Co., trustees, all claim, right, title, or equity in said securities on behalf of said J. Kennedy Tod & Co., as trustees or otherwise, shall terminate, and said securities shall be delivered to said intervener, all proper and necessary transfers being executed by said Tod & Co. to fully transfer said securities to said assignee; that, if said intervener shall fail or refuse to pay or tender the amount necessary to redeem the securities, then the intervening petition shall be dismissed; that the costs shall be equally divided; and that the court shall have and retain jurisdiction for the purpose of making all further orders and decrees necessary to enforce and protect the rights of the parties, as established by the present decree.

## EASTERN BUILDING &amp; LOAN ASS'N v. DENTON et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 225.

## FORECLOSURE OF MORTGAGES—MULTIFARIOUSNESS.

Where one gives to the same person two mortgages, each covering a separate lot, and securing a different loan, and the lots have since been conveyed to different persons, who are made defendants, a bill to foreclose both mortgages in one suit is multifarious.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Suit by the Eastern Building & Loan Association against John A. Denton and others to foreclose two mortgages. A demurrer to the bill was sustained, and complainant appeals.

In this case the complainant filed its bill in the court below for the purpose of foreclosing two several mortgages. The mortgages originated in the manner following: On the 1st day of July, 1891, the complainant made two separate loans of money to John S. Buchanan and A. A. Crabbs, each of which was for the sum of \$1,819.53. For each of these several loans the defendants Buchanan and Crabbs gave their joint promissory notes, and to secure the notes given for one of said loans executed to complainant a mortgage on lots 5 and 6, in block 28, in the town of Dayton, Tenn. To secure the notes given for the other loan, they gave another mortgage to complainant on lots 7 and 8 in the same block. Both of these mortgages were duly registered. The makers of the notes paid something over one-fourth of the amount due on each of the loans. Subsequent to the registration of the mortgages, the mortgagors, Buchanan and Crabbs, conveyed lots 5 and 6, being the lots covered by one of the mortgages, to the defendant Swabey, who went into possession thereof; and also conveyed to defendant Denton lots 7 and 8, being the lots covered by the other of said mortgages, and the grantee took possession of those lots. The makers of the notes being in default in respect to the remainder of the loans, the mortgagee filed this bill to foreclose them both in one suit. The amount due upon each of the mortgages, exclusive of interest, is less than the sum of \$2,000; but the amount due on both of them exceeds that sum. It is alleged in the bill that, prior to the conveyances to Swabey and Denton, the defendants entered into a fraudulent combination for the purpose of defrauding complainant, and hoped to deprive the jurisdiction of the United States court. The bill prayed for foreclosure, and for general relief. No defense was made by Buchanan and Crabbs, but the defendants Swabey and Denton appeared, and demurred to the bill on the ground that it is multifarious, in that it seeks the foreclosure of two separate and distinct mortgages in one suit; and because there is a misjoinder of parties defendant, in that each defendant has no interest in the two lots which were conveyed to the other; and because, also, the matter in dispute, in respect to each mortgage, does not exceed \$2,000. The complainant moved for the appointment of a receiver of the rents and profits of the mortgaged premises pendente lite, on the ground that the security was insufficient. The court below sustained the demurrer and dismissed the bill as to the defendants Swabey and Denton, and denied the motion for a receiver. The opinion of the court below shows that the ground on which the demurrer was sustained was that of multifariousness in the bill. The complainant appeals, and assigns as error the action of the court below in sustaining the demurrer, and in refusing to appoint a receiver.

T. M. Burkett, W. B. Miller, and F. L. Mansfield, for appellant.  
Pritchard & Sizer, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge, having stated the case as above, delivered the opinion of the court.

It has been frequently observed, in cases where the question of multifariousness has been involved, that it is difficult to state any clear and definite rule governing the subject, and that it is difficult, also, to reconcile the various cases in which the doctrine has been applied. Several different attempts have been made to state the general rule governing the subject, from which it would seem to result that a bill is to be regarded as multifarious when it embraces two or more distinct subjects of litigation. Daniell, Ch. Pl. & Prac. 334; 1 Beach, Mod. Eq. § 115. In such cases it is sometimes attempted to join separate and distinct claims against the same defendant; in others, separate and distinct claims are asserted against several defendants. With respect to the first class, the courts have been more disposed to treat the matter as one of convenience, and have been rather disinclined to entertain the objection where the rights of the parties could be fairly worked out, and justice fully administered. In respect to the last class, the objection has been quite uniformly sustained. *Emans v. Emans*, 13 N. J. Eq. 205; *Brewer v. Norcross*, 17 N. J. Eq. 219; *Sanborn v. Dwinell*, 135 Mass. 236; *Keith v. Keith*, 143 Mass. 262, 9 N. E. 560; *Boyd v. Hoyt*, 5 Paige, 65; *Swift v. Eckford*, 6 Paige, 22. A general test by which the propriety of joining several subjects of litigation in one bill would seem to be whether there is any element in the controversy which forms an intrinsic connection between the subjects, the determination of which, one way or the other, would affect the related matters in issue; or whether, on the other hand, the matters are so distinct and isolated from each other as that the determination of the one does not control or affect the other matter in controversy, or the other parties who represent the interests therein involved. The subject was fully considered in the case of *Gaines v. Chew*, 2 How. 642. In that case the legatee, claiming several estates under a will, filed a bill against the executors of a former will, which was alleged to be void, and the devisees therein, for an accounting of the dealings with the estate, and also various parties who held in severalty lands conveyed to them by the executors. The objection that the bill was multifarious was taken by the defendants in their defense, but the objection was overruled, and it was held by the supreme court that the question of the validity of the will was a vital one in the case, and that, as all the defendants were interested in that question, it furnished a common bond, which held all the issues together. The question was again considered in the case of *Brown v. Guarantee Trust Co.*, 128 U. S. 403, 9 Sup. Ct. 127, where the rules governing the subject were stated in considerable detail. In the course of the opinion delivered in that case by Mr. Justice Lamar, it is said at page 412, 128 U. S., and page 127, 9 Sup. Ct.:

"It is not indispensable that all the parties should have an interest in all the matters contained in the suit; it will be sufficient if each party has an interest in some material matters in the suit, *and they are connected with the others;*" citing *Addison v. Walker*, 4 Younge & C. 442; *Parr v. Attorney General*, 8 Clark & F. 409; *Worthy v. Johnson*, 8 Ga. 236.

The italics in this quotation are our own, but they indicate the limitation of the principle which renders it permissible to join different matters in the same suit. Illustrations of the rule are given in Story, Eq. Pl. § 272, as follows:

"Thus, if an estate should be sold in lots to different persons, the purchasers could not join in exhibiting one bill against the vendor for a specific performance, for each party's case would be distinct, and would depend upon its own peculiar circumstances; and therefore there should be a distinct bill upon each contract. On the other hand, the vendor, in the like case, would not be allowed to file one bill for a specific performance against all the purchasers of the estate for the same reason."

The facts in the present case furnish an equally pertinent illustration. The loans were separate and distinct, and the mortgages securing the respective debts were of separate parcels of land. The lands had passed into the hands of subsequent purchasers, neither of whom has any interest whatever in the land purchased by the other; and these purchasers are made defendants. It is clear that their demurrer for multifariousness is well founded.

No facts are stated in the bill in support of the allegation that the defendants combined to defraud complainant of its rights, and there is no allegation that the conveyances were made with an intent to defeat the jurisdiction of the United States court. The combination for such a purpose, and making the conveyances to accomplish it, are not well pleaded, and therefore not admitted by the demurrer. We do not mean to imply, however, that the suit would not have been multifarious if it had been brought before those conveyances against the mortgagors only. The motion for the appointment of a receiver was addressed to the discretion of the court, and its action in refusing it cannot be assigned as error. Besides, it is not such an order as constitutes the basis for an appeal, being merely interlocutory. The decree and order of the court below should be affirmed.

---

In re CHIN YUEN SING.

(Circuit Court, S. D. New York. November 5, 1894.)

1. IMMIGRATION—RIGHT OF ALIEN TO ADMISSION—POWER OF COURT ON HABEAS CORPUS.

Under the provision of the sundry civil appropriation act of August 18, 1894, making final the decision of the immigration or customs officials upon the right of an alien to admission to the United States, the only questions into which a court can inquire upon habeas corpus seeking the discharge of the relator from restraint by the collector of customs are whether the relator is an alien, and whether the collector has made a decision.

2. SAME—DECISION BY COLLECTOR.

The signing by the collector of a return to a writ of habeas corpus, stating that he has decided adversely to the relator's right to admission, is in itself a decision.

This was a petition for a writ of habeas corpus by Chin Yuen Sing, a Chinese person, alleging that he was illegally restrained of his liberty by the collector of the port of New York.

B. C. Chetwood, for the motion.

W. Macfarlane, U. S. Atty., opposed.

LACOMBE, Circuit Judge. The relator, a Chinese person, who was formerly a resident of this country, contends that upon facts which he offers to prove he is entitled to entry. This court cannot, however, go into that question. In the sundry civil appropriation act of August 18, 1894, there is found this paragraph:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury."

Under the decision of the supreme court in *Fong Yue Ting v. U. S.*, 149 U. S. 698, 13 Sup. Ct. 1016, the power of congress to confide such decision exclusively to executive officers must be accepted by this court. The act itself leaves nothing for this court to inquire into, save only whether relator is an "alien," which is not disputed, and whether the collector has "made a decision." On this latter point, the return, in which he states that he has decided adversely to admission, is conclusive. Even if he had not so decided when the writ was applied for, the signing of such a return is itself a decision. Relator remanded.

---

In re CHIN YUEN SING.

(Circuit Court, S. D. New York. December 3, 1894.)

IMMIGRATION—POWER OF COURT ON HABEAS CORPUS.

The provision in the sundry civil appropriation act of August 18, 1894, making final the decision of the immigration or customs officials upon the right of an alien to admission to the United States, is not inconsistent with the act of May 5, 1892, providing for a writ of habeas corpus, "which shall be heard and determined promptly," but upon the return to the writ the court can only inquire whether the relator is an alien, and whether the appropriate officer has made a decision.

This was an application for a rehearing of a petition for a writ of habeas corpus by Chin Yuen Sing, a Chinese person, alleging that he was illegally restrained of his liberty by the collector of the port of New York.

B. C. Chetwood, for the motion.

W. Macfarlane, U. S. Atty., opposed.

LACOMBE, Circuit Judge. There is nothing in the brief filed upon reargument which calls for a modification of the ruling heretofore made in this case. It is no doubt true that special laws will not be construed to be repealed by subsequent general laws, unless the intent so to do is expressed or plainly implied. But here there is no difficulty in construing both acts together. The earlier one (of May 5, 1892) providing for a writ of habeas corpus, "which shall be heard and determined promptly, without unnecessary delay," is not repealed; but when the return to the habeas is filed the court is con-

fin'd to an examination of the two questions whether relator is an alien and whether the appropriate immigration or customs officer has decided adversely to his admission. A precisely similar provision is found in the act of March 3, 1891 (chapter 551), concerning immigrants other than Chinese, and which was before the supreme court in Nishimura Ekin's Case, 142 U. S. 660, 12 Sup. Ct. 336. The provision now under discussion, which is found in the appropriation act of 1894 under the subhead "Enforcement of Chinese Exclusion Act," is manifestly intended to conform the practice in the case of Chinese persons to that already established for other aliens. The writ must stand dismissed.

# CHEMICAL NAT. BANK OF NEW YORK v. ARMSTRONG.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 56.

## 1. NATIONAL BANKS—BORROWING MONEY—POWER OF OFFICERS.

A national bank, whose vice president borrows money in its name of another bank, and appropriates it to his own use, is not liable therefor, unless he was specially authorized to borrow the money, or his act was ratified. 8 C. C. A. 155, 59 Fed. 372, modified to accord with Bank v. Armstrong, 14 Sup. Ct. 572, 152 U. S. 346.

## 2. SAME—INSOLVENCY—DIVIDENDS—INTEREST.

The receiver of an insolvent bank withdraws his offer to allow part of a claim by filing a pleading in the proceedings denying the liability of the bank on the claim, and the interest on dividends should be allowed the owner of claim as though no such offer had been made.

On rehearing. Modified. For former opinion, see 8 C. C. A. 155, 59 Fed. 372.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This case is before the court on two motions for a rehearing. The original opinion of the court filed at the last term is to be found in 16 U. S. App. 465, 8 C. C. A. 155, and 59 Fed. 372. The controversy related to the allowance of a claim for more than \$300,000 in favor of the Chemical National Bank of New York, against David Armstrong, the receiver appointed by the comptroller of the currency to take charge of the assets of the Fidelity National Bank of Cincinnati, and to distribute the same in accordance with law to the persons properly entitled. The claim of the Chemical Bank was based on a loan made by it, as it supposed, to the Fidelity Bank, at the instance of E. L. Harper, the vice president of the Fidelity Bank. The loan was evidenced by a certificate of deposit for the amount of the loan, signed by the cashier of the Fidelity Bank, payable to E. L. Harper, and indorsed by him in blank. It was secured by a large amount of collateral, in the form of commercial paper. The amended answer of Armstrong, in the court below, averred that the alleged loan was made by E. L. Harper without authority, and that the funds obtained were never used by the Fidelity Bank, but were taken by Harper to his own



use, and the liability of the Fidelity Bank for the loan, or any part of it, was therefore denied. The issue thus made was not pressed by counsel for the receiver, and was decided against him, both in the circuit court and in this court, in the original opinion filed in this case. The decision here was made practically without argument by counsel, and is disposed of in our former opinion in a sentence.

The main question discussed when the case was first heard in this court was whether a creditor of the Fidelity Bank, holding collateral at the time of the declared insolvency, was obliged, in proving his claim against the insolvent bank, to reduce it by the amount collected on the collateral after the declared insolvency, and before the allowance of the claim. This court held that the claim of the creditor against the fund in the hands of the receiver must be allowed for the full amount due, with interest down to the time of the declared insolvency of the bank, without respect to the collateral then held or to collections made on it thereafter. No motion for a rehearing was made or granted upon this point, and the ruling of this court thereon remains unchanged.

Another question considered in the former opinion was in respect to the right of the claimant bank to have interest paid to it on dividends, the payment of which had been long delayed after the time when similar dividends were paid to all the other creditors. Upon this question the appellant conceived that, by the former opinion of this court, injustice had been done to it by allowing too small an amount for interest, and a motion was therefore made on its behalf for a rehearing thereon. An examination of the record led us to grant the motion. Pending that motion, no mandate could, under the rules of this court, issue to the circuit court. While the case thus remained within the breast of this court, and completely subject to its control, the supreme court of the United States decided and announced its opinion in the case of *Bank v. Armstrong*, reported in 152 U. S. 346, 14 Sup. Ct. 572, in which it was held that the borrowing of money by a bank, though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money, and that where no such special authority appears, and no ratification of the unauthorized act is shown, the bank is not liable. Therefore the receiver made a motion for a rehearing on the question whether there was any liability at all of the Fidelity Bank to the Chemical Bank on the claim asserted and heretofore allowed by this court. The action of the circuit court in allowing the claim at all was assigned for error on the cross appeal by the receiver, and, as already stated, though not pressed, was nevertheless before this court for decision. Because the court still had the case under its control, and no mandate had gone down, and because the decision of the supreme court of the United States seemed to throw a new light on the question heretofore decided against the receiver, it was deemed proper to grant the motion to rehear the question. The fact that the point was not pressed by counsel for the receiver at

the original hearing doubtless vested a discretion in this court to refuse to rehear the issue now urged. We would not by our action in this case wish to establish a precedent that this court will rehear any case upon a question lurking in the record, and not pressed at the first hearing, because, in a subsequent decision of the supreme court, a principle is established by which such question must be decided in a different way, and a different conclusion in the case reached. In this case, however, the moving party is a trustee appointed, not by the beneficiaries, but by the comptroller of the currency, and we feel disposed to exercise the discretion which we have in favor of a trust fund thus administered, which we might not exercise in favor of parties representing their rights in person.

The supreme court, in its conclusion in *Bank v. Armstrong*, differs from the decisions of several state courts upon the same or kindred questions. In *Bank v. Sullivan*, 11 Wkly. Notes Cas. 362, the supreme court of Pennsylvania used this language:

"We have no doubt of the power of national banks to borrow money by means of negotiable paper, made or indorsed for their accommodation, and that they are bound by the contract of their presidents or cashiers to indemnify the person who may have accommodated them with his credit. It is a usual banking operation, and, unless expressly prohibited, would be necessarily implied in every bank charter."

In *Barnes v. Bank*, 19 N. Y. 152, a state bank of New York was held bound by a certificate of deposit issued by its cashier to evidence a loan made to the bank, although the cashier made the loan and used the proceeds for his individual purpose. The same principle was applied in the case of *Coates v. Donnell*, 94 N. Y. 168. *Barnes v. Bank* is cited with approval by the supreme court of the United States in the case of *Merchants' Bank v. State Bank*, 10 Wall. 604. The same principle is recognized and approved in *Donnell v. Bank*, 80 Mo. 165; *Sturges v. Bank*, 11 Ohio St. 153, 167; *Rockwell v. Bank*, 13 Wis. 653; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120, 134; *Morse, Banks*, § 160. The effect of the foregoing cases is that it is within the usual course of banking business for a bank to borrow money, and that the generally recognized authority of the cashier or of the managing officer of the bank extends to making such loans, and that, therefore, any one dealing with such officer has the right to rely on the existence of such authority unless the contrary appears. That the right to borrow money is incident to the banking business is decided by the judicial committee of the privy council in *Bank v. Breillat*, 6 Moore, P. C. 152, 193-195, and by the court of appeals of New York in *Curtis v. Leavitt*, 15 N. Y. 9. The effect of the decision in *Bank v. Armstrong* is to make the above rule as to the authority of a cashier to borrow money for the bank inapplicable to national banks; and the question to be decided in this case is whether there was any special authority vested in Harper, as the vice president of the Fidelity National Bank, to borrow money for the bank, or whether, in this particular case, his act in so doing was ratified by the bank. Counsel for the appellant states upon his brief that, had he anticipated any real controversy upon the question of the liability of the Fidelity Bank, there was

much evidence at hand to establish special authority of Harper and subsequent ratification by the bank. He therefore asks that, as the case must go back to the circuit court, in any event, the appellant be allowed to adduce additional evidence on these two points. In view of the fact that the decision of the Western National Bank against Armstrong gave an importance to these issues which they did not have under previous adjudications in the state courts, and in view of the discretion we have already exercised in favor of the receiver to allow a rehearing of the question, we think it only fair to the Chemical National Bank, the appellant herein, not to decide the question of special authority and of ratification on the record before us, but to reverse the decree for the reasons given in the former opinion, and to send the case back to the circuit court, with leave to the parties to introduce evidence on the issue whether the alleged loan created any liability against the Fidelity Bank at all. This court is very loth to open up a case for new evidence upon issues already decided, and has no intention of making a troublesome precedent by doing so in this case. The circumstances here are so peculiar as to prevent such a result.

And now as to the question of interest, which will become material only in case the liability of the Fidelity Bank is established. Dividends on claims against the Fidelity Bank, which had been duly allowed, were declared by the comptroller of the currency as follows: October 31, 1887, 25 per cent.; June 15, 1889, 10 per cent.; June 30, 1890, 10 per cent.; August 5, 1891, 5 per cent. The Chemical Bank did not present its claim for allowance until April 5, 1890. On April 25, 1890, the receiver offered to allow the claim of the Chemical Bank to the extent of \$200,000, without prejudice, on the one hand, to the right of the Chemical Bank to sue for the allowance of the remaining \$105,000, and without prejudice, on the other hand, to the right of the receiver to reduce the claim allowed below \$200,000 in case the court should hold such reduction proper. The language in which this offer was made is given in the former opinion. Its effect we found to be as above stated. This we considered to be an equitable offer by the receiver, and one which ought, in equity, as between creditors entitled to share the same fund, to prevent the payment of interest upon any dividends which would have been paid then or thereafter, had the Chemical Bank seen fit to accept the offer. In the argument upon the rehearing, counsel for the Chemical Bank questions the correctness of the construction which the court placed upon the language of the receiver's offer, as well as of the view which the court took of the proper effect to be given to the offer, thus construed, upon the payment of interest. After a re-examination of these two questions, we are still of the opinion that our construction of the language of the receiver's offer was correct; and that thus construed, if it had remained in force, it ought to prevent the payment of interest on the dividends paid or to be paid on the \$200,000. The argument of counsel proceeds on the theory that the question is to be settled on principles relating to the legal tender of money due at common law. We think, however, that those rules have little or no application in

a case like this, where the question is of equality of distribution of a trust fund between creditors. By the argument on the rehearing, however, our attention has been especially directed to the state of the pleadings below, as indicating a withdrawal by the receiver of this offer to allow the claim for \$200,000. In the court below, in his amended petition, the receiver denied the liability on the part of the Fidelity Bank to the Chemical Bank for this loan, and this position of the receiver is emphasized by his present motion for a rehearing upon the issue thus made. We quite agree with counsel for the appellant that the raising of such an issue must be considered to be a withdrawal of the previous offer by the receiver, and, therefore, that the offer cannot now be used as a ground for refusing the payment of interest upon dividends upon the whole claim for the period after April 25, 1890, when the claim was presented and rejected, down to the time when such dividends shall be paid. The court overlooked this consideration in its former opinion, and to this extent the previous decision of the court is modified. The previous order of the court is therefore changed so as to make the order as follows: That the decree of the circuit court is reversed, with leave to the parties to adduce further evidence upon the issue whether the Fidelity Bank owes anything to the Chemical Bank by virtue of the alleged loan; that, if this issue is decided in favor of the receiver, the bill shall be dismissed, and a decree entered in favor of the receiver for the restitution of the \$100,000 paid by the receiver July 25, 1892, to the Chemical Bank on the faith of the decree of the court below; that, if the liability of the Fidelity Bank for the loan is established, a decree shall be entered directing the receiver to allow the claim for \$305,450 (being the amount of the loan and interest until the date of the declared insolvency, June 21, 1887), and to pay the dividends accruing on such claim, with interest, on those declared before April 25, 1890, from that date, and on those thereafter declared, from the date of their declaration, until the dividends and interest are paid, and to take credit, on the payment of such dividends and interest, for the \$100,000 by him paid July 25, 1892, on the principle ordinarily applied in partial payments. The costs of this appeal will be equally divided. The costs in the circuit court will abide the event.

---

UNDERHILL v. HERNANDEZ.

(Circuit Court of Appeals, Second Circuit. January 23, 1895.)

No. 62.

**I. INTERNATIONAL LAW—IMMUNITY OF OFFICERS OF FOREIGN GOVERNMENTS.**

Public agents, military or civil, of foreign governments, whether such governments be *de jure* or *de facto*, cannot be held responsible, in any court within the United States, for acts done within their own states, in the exercise of the sovereignty thereof, or pursuant to the directions of their governments; and this immunity extends to the agents of a revolutionary government, set up by a part of the citizens of a foreign country, which is ultimately established and recognized by the government of the United States.

**2. SAME.**

A military commander acting under the authority of a revolutionary government in Venezuela, which was afterwards recognized by the United States as the legitimate government of that country, is not liable, in an action in a court of the United States, for imprisonment of, and assault and battery committed upon, a citizen of the United States.

In Error to the Circuit Court of the United States for the Eastern District of New York.

This was an action by George F. Underhill against Jose Manuel Hernandez for false imprisonment and assault and battery. The jury in the circuit court returned a verdict for the defendant, by direction of the court. Plaintiff brings error.

Logan, Clarke & Demond, for plaintiff in error.

F. R. Coudert and Joseph Kling, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant entered upon the verdict of a jury pursuant to the direction of the trial judge. The suit was for false imprisonment and assault and battery of the plaintiff, committed by the defendant at the city of Bolivar, Venezuela. The acts complained of consisted in the detention of the plaintiff at his own residence, in the city of Bolivar, under a guard of soldiers stationed near the house, from August 13 to October 18, 1892, by the authority of the defendant, during which time the plaintiff was not permitted to leave the house without an escort of soldiers, and was several times refused a passport to leave the city, for which he made application to the defendant. During this period the defendant was in command of the city, as a military officer. A revolution had been organized against the government of Venezuela, and an army had been mustered against the adherents of the recent president, whose term of office had expired, and who, it was claimed by the revolutionists, no longer represented the legitimate government. The principal parties to this conflict were those who recognized Palacio as their chief, and those who followed the leadership of Crespo. The defendant belonged to the revolutionary party, and commanded its forces in the vicinity of Bolivar. Early in August, an engagement took place between the forces of the two parties, near Bolivar. The revolutionists prevailed, and August 13th the defendant entered Bolivar, at the head of his forces, and assumed command of the city. From that time until the plaintiff was permitted to leave Bolivar, the defendant was the civil and military chief. Early in October, the revolutionary party prevailed generally, and took possession of the capital of Venezuela; and on the 26th day of October, 1892, the "Crespo Government," so called, was formally recognized as the legitimate government of Venezuela by the government of the United States, pursuant to instructions from the state department, to our minister, to recognize the new government, provided it was "accepted by the people, in the possession of the power of the nation, and fully established." The plaintiff was a citizen of the United States, who had constructed a water-works

system for the city of Bolivar under a contract with the government, and was engaged in supplying the place with water. He also carried on a machinery repair business. The evidence upon the trial indicated that the purpose of the defendant, in his treatment of the plaintiff, was to coerce the plaintiff to operate his water works and his repair works for the benefit of the community and the revolutionary forces. It was not sufficient to have warranted a finding by the jury that the defendant was actuated by malice, or any personal or private motive. The trial judge ruled, at the request of the defendant, that upon these facts the plaintiff was not entitled to recover, and directed a verdict for the defendant, against the exceptions of the plaintiff. The important question presented by the assignments of error arises upon the exception to the direction of a verdict for the defendant. This ruling proceeded upon the ground that because the acts of the defendant were those of a military commander, representing a de facto government in the prosecution of a war, he was not civilly responsible therefor.

Considerations of comity, and of the highest expediency, require that the conduct of states, whether in transactions with other states or with individuals, their own citizens or foreign citizens, should not be called in question by the legal tribunals of another jurisdiction. The citizens of a state have an adequate redress for any grievances at its hands by an appeal to the courts or the other departments of their own government. Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs, even by a resort, if necessary, to the arbitrament of war. It would be not only offensive and unnecessary, but it would imperil the amicable relations between governments, and vex the peace of nations, to permit the sovereign acts or political transactions of states to be subjected to the examination of the legal tribunals of other states. Influenced by these reasons, and because the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers, courts and publicists have recognized the immunity of public agents from suits brought in foreign tribunals for acts done within their own states in the exercise of the sovereignty thereof. In *Moodalay v. Morton*, 1 Brown, Ch. 469, the master of the rolls, while retaining jurisdiction of a suit which involved the private transactions of the East India Company, said:

"They have rights as a sovereign power. They have also duties as individuals. If they enter into bonds in India, the sums secured may be recovered here. I admit that no suit will lie in this court, against a sovereign power, for anything done in that capacity."

In *Nabob of Arcot v. East India Co.*, 4 Brown, Ch. 180, the answer to a bill in equity alleged that all the transactions mentioned in the bill were of a political nature, and matters of state, and the court dismissed the suit upon that ground. In *Duke of Brunswick v. King of Hanover*, 6 Beav. 1, the master of the rolls concluded an elaborate discussion of the liability of the defendant to a suit in chancery with the opinion that the king of Hanover, although a subject of Great Britain, was exempt from all liability to be sued in the courts of

that country for any acts done by him as king of Hanover. Upon an appeal from his judgment dismissing the cause, to the house of lords (2 H. L. Cas. 1), that tribunal decided that the defendant, notwithstanding he was a British subject, and was in England, exercising his rights as such, when sued, could not be made to account in the court of chancery for acts of state, whether right or wrong, done by him abroad, in virtue of his authority as sovereign. The decision was put, not upon the personal immunity of the sovereign from suit, but upon the principle that no court in England could sit in judgment upon the act of a sovereign, effected by virtue of his sovereign authority abroad. The lord chancellor said that "a foreign sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country"; that "the courts of this country cannot sit in judgment upon the act of a sovereign, effected by virtue of his sovereign authority abroad,—an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as sovereign. \* \* \*" In *Hatch v. Baez*, 7 Hun, 596, the New York supreme court decided that an action could not be maintained in the courts of the state against the former president of the Dominican republic, for acts done by him in his official capacity, although he had ceased to be president when the suit was brought. The court said:

"We think that by the universal comity of nations, and the established rules of international law, the courts of one country are bound to abstain from sitting in judgment on the acts of another government, done within its own territory. \* \* \* To make him amenable to a foreign jurisdiction for such acts would be a direct assault upon the sovereignty and independence of his country. \* \* \* The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity. That springs from the capacity in which the acts were done, and protects the individual who did them, because they emanated from a foreign and friendly government."

The law officers of the United States have uniformly advised the executive department that individuals are not answerable in foreign tribunals for acts done in their own country, in behalf of their government, by virtue of their official authority.

In 1794, one Collet, lately the French governor of Guadaloupe, was arrested in this country, in an action brought against him for the seizure and condemnation of a vessel. The matter having been brought to the attention of our government, it was referred to the attorney general; and he advised that, the defendant being subject to process, the government could not then intervene, but added his opinion that if the seizure of the vessel were admitted to have been an official act, done by the defendant by virtue or under color of the powers vested in him as governor, it would of itself be a sufficient answer to the plaintiff's action, and that the defendant ought not to answer in our courts for any mere irregularity in the exercise of his powers, and that the extent of his authority could, with propriety or convenience, be determined only by the constituted authorities of his own nation. 1 Op. Attys. Gen. 45, 46. In 1797, in the *Case of Sinclair*, the attorney general expressed the opinion "that a person acting under a commission from the sovereign of a foreign state is not amenable for what he does, in pursuance of his commission,

to any tribunal of the United States." Id. 81. In 1871, the attorney general advised the secretary of state as follows:

"It has often been laid down that, before a citizen of one country is entitled to the aid of his government in obtaining redress for wrongs done him by another government, he must have sought redress in vain from the tribunals of the offending power. The object of this rule, plainly, is to give the offending government an opportunity of doing justice to the injured party in its own regular way, and thus avoid all occasion for international discussion." 13 Op. Attys. Gen. 550.

In 1872, in the case of *The Tipitapa*, the attorney general advised the secretary of state, in a case where an officer, with a party of armed men, acting under an order of the judicial officer of the port of Granada, seized an American vessel at that port,—the seizure having been made for the purpose of enforcing a supposed legal right,—"that the government ought not to make reclamation in behalf of the owner, as it is presumable that if the proceedings were illegal the judicial tribunals of Nicaragua would afford redress." Id. 554.

Conspicuous among the acts which are sheltered by this principle of international law are those of military officers in command of the armed forces of the state. According to one of the most recent commentators upon international law (Hall, § 102), officers in command of armed forces of the state, and their subordinates and soldiers, are not in any case amenable to the civil or criminal laws of a foreign state, in respect to acts done in their capacity as agents, for which they would be punishable or civilly responsible if done in their private capacity. This doctrine was sanctioned by our own government, in 1841, in the *Case of McLeod*, who was under indictment for murder in a state court of New York. He had been engaged, as a member of the colonial forces, in repelling an attack made upon Canada by an armed force from the United States, and had assisted in the destruction of a vessel moored on the American shore of the Niagara river, during which an American citizen was killed. The British government, through its minister at Washington, demanded his release upon the ground that the destruction of the vessel was a public act of persons in her majesty's service, obeying orders of the superior authorities, and therefore, according to the usages of nations, could only be the subject of discussion between the two governments. Mr. Webster, then secretary of state, acceded to this view, stating that:

"The government of the United States entertains no doubt that, after the avowal of the transaction as a public transaction authorized by the British authorities, the individuals concerned in it ought not, by the principles of public law, and the general usage of civilized states, to be holden personally responsible, in the ordinary tribunals of law, for their participation in it."

The courts of New York refused to release McLeod, at the intervention of the general government, and he was tried, but acquitted on proof of an alibi. The episode led to the enactment by congress, in 1842, of the provision (now section 753, Rev. St.) by which the courts of the United States are authorized to issue a writ of habeas corpus "where a person, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under



any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations."

Upon principle, it cannot be important whether the acts of military authorities, when called in question, are done by the authority of a *de jure* or titular, or of a *de facto*, government. In either case, if they are done in the legitimate exercise of belligerent powers, they are not ordinarily attended with civil responsibility. This principle has been recognized by the supreme court of the United States in cases in which the civil liability of Confederate soldiers for acts done, as members of the insurgent forces, during the Rebellion, was under consideration. *Ford v. Surget*, 97 U. S. 594; *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763. As was decided in *Williams v. Bruffy*, 96 U. S. 176, the government of the Confederate States was a *de facto* government of an inferior class. "It never represented a nation. It never expelled the public authorities from the country. It never entered into any treaties, nor was it ever recognized as a government by an independent power." *Ford v. Surget* was an action brought by the plaintiff to recover the value of certain cotton destroyed during the war of the Rebellion in the state of Mississippi; and the court held that the defense that it was destroyed by the defendant, acting under the orders of the military authorities of the Confederate States, was a good justification. *Freeland v. Williams* was a bill in equity to invalidate a judgment of the court of the state of West Virginia, obtained against the defendant for a tort committed by him as a soldier of the Confederate army. One of the questions discussed was whether the judgment was void, inasmuch as it proceeded upon the ground that the defendant was civilly responsible, as a trespasser, for an act done by him, as a Confederate soldier, in accordance with the usages of civilized war. In the prevailing opinion, the court said:

"The case, as presented to us, shows that the trespass for which the original judgment was rendered was of that character; and it is argued with much force that the court which rendered that judgment had no jurisdiction in the case, or, at all events, had no jurisdiction to render such a judgment, and that it is therefore void. It follows from this view of the subject that the court in which it was originally rendered had jurisdiction to set aside or annul it, without the aid of the constitutional provision of the state of Virginia, and that on that ground alone the decree we are called upon to review must be affirmed. In this view of the subject, some of the judges of this court concur."

Again, the court say:

"If it be true that, when the original action was presented to the circuit court of Preston county, the thing complained of was found to be an act in accordance with the usages of civilized war, during the existence of a war flagrant in that part of the country, that court should have proceeded no further, and its subsequent proceedings may be held to have been without authority of law. While it is not necessary to hold that the judgment, as presented by the record, is absolutely void, it may be conceded that a court of equity, in a proper case, can prevent the enforcement of it."

In a dissenting opinion, Mr. Justice Harlan insisted that the judgment was not void, but conceded that the complainant was not

civilly responsible, if his act was one of legitimate warfare, as a soldier in the Confederate army.

The acts of the defendant, as a military commander of the revolutionary forces in the civil war in Venezuela, although performed before the revolution became successful, are sheltered by the same immunities that would surround them if they had been performed subsequently. The organization, of which he was a part, represented that kind of a *de facto* government which is described in *Williams v. Bruffy*:

"Such as exists where a portion of the inhabitants of a country have separated themselves from the parent state, and established an independent government. The validity of its acts, both against the parent state, and its citizens or subjects, depends entirely upon its ultimate success. If it fail to establish itself permanently, all such acts perish with it. If it succeed, and become recognized, its acts, from the commencement of its existence, are upheld, as those of an independent nation."

By its success, the revolutionary party vindicated its claim to recognition as the legitimate government of Venezuela, and achieved a justification, in the estimation of foreign governments and their legal tribunals, for the acts of its military forces, as complete and ample as though those forces had been employed by any sovereign power. After the recognition of the new government by the United States, the courts of this country must accord to those who, throughout the progress of the civil war, acted as the agents of the people of Venezuela, the position of official representatives of the state. The act of recognition by our government neither added to nor detracted from the responsibility of the people of Venezuela for any prior injuries which citizens of the United States may have suffered on her soil from the hands of her *de facto* authorities; but these responsibilities, in our judgment, are to be adjudicated by the two governments by international action, according to the principles of international law applicable to such cases.

For these reasons, we conclude that the acts of the defendant were the acts of the government of Venezuela, and, as such, are not properly the subject of adjudication in the courts of another government.

The various requests made to the court on behalf of the plaintiff for instructions to the jury either involve propositions of law which, according to the views we have expressed, were properly refused, or propositions for the submission of questions of fact, as to which there was no conflict of evidence, and which, therefore, the trial judge was not required to submit to the jury. If the trial judge, in directing a verdict for the defendant, enunciated a rule which, to its full extent, may not obtain, because it implies that the defendant would not be civilly responsible, even in a court of Venezuela, for any act done by him as a military commander, his disposition of the case was proper, and the result is not affected by his expression of an erroneous opinion. The judgment is affirmed.

## MORRIS v. RECEIVERS OF RICHMOND &amp; D. R. CO.

(Circuit Court, W. D. Virginia. November 24, 1894.)

## WATERS—LIABILITY FOR OBSTRUCTION OF STREAM.

Plaintiff owned a warehouse on the bank of a stream, several hundred yards above the point at which defendant's railroad crossed the stream on an embankment, under which were two culverts to allow passage to the water. In an extraordinarily severe freshet, plaintiff's warehouse was flooded, and his goods damaged. *Held*, that plaintiff could not hold defendant liable for such damage without showing, affirmatively, that the damage would not have occurred if there had been no embankment or no obstruction in the culverts.

This was an action of trespass on the case by E. L. Morris against the receivers of the Richmond & Danville Railroad Company to recover damages for injury to plaintiff's warehouse. At the close of the evidence on trial before a jury, defendants moved for the direction of a verdict in their favor.

P. W. McKinney and W. H. Mann, for plaintiff.

B. B. Munford and A. J. Montague, for defendants.

HUGHES, District Judge. The plaintiff here seeks to recover from the Richmond & Danville Railroad Company compensation for damages caused by the water of a very high freshet which occurred in Drake's Branch in Charlotte county, Va., in September, 1893. The damage was to hogsheds of tobacco belonging to the plaintiff, which were stored in a warehouse on the banks of the stream, into which the water of the freshet rose some two feet above the floor of the building. The amount of the damage claimed is \$6,000. Several hundred yards below the warehouse the railroad crosses Drake's Branch on an embankment, under which are two culverts constructed for the vent of the water of the stream. The complaint of the plaintiff, on which he founds his claim for damages, is that the passage of water through these culverts was obstructed by more or less rubbish and debris lodged in them at the time of the freshet. There is no proof that there had been any previous complaint of the insufficiency of these culverts at any time since they were constructed, 40 years ago. It is proved that the freshet which caused the damage to the plaintiff's tobacco was produced by a downpour of rain, unprecedented in volume within the memory of middle-aged witnesses who were examined on the subject. Some 30 or more witnesses have been examined on the naked question whether there were obstructions in the culverts.

The vis major in the case was the freshet; and, inasmuch as this was of extraordinary magnitude and volume, it is to be regarded as one of those dispensations of Providence which are called "acts of God," such as cannot be provided against by the ordinary care and foresight of man. Our law holds that damages cannot be recovered against man when it is caused by the act of God. The law also holds that, where damages occur from an act of God and from the negligence of man occurring coincidentally, there can be no recovery, unless it be affirmatively proved that, if there had been no act of God,

the damage would still have occurred. In the case at bar it is a non sequitur to assume that, because there was a railroad embankment below the place of damage by which the flow of the water of the freshet was obstructed, therefore the damage to plaintiff's tobacco was caused by the obstruction. It is not enough to prove the obstruction and stop there. Something more must be proved. Damages from freshets so frequently occur on streams in which there are no dams below the places of damage that the courts are bound to take judicial notice of the fact. Where damage occurs during the coincident existence of a freshet and an obstruction, it must be affirmatively proved that, if there had been no obstruction, there would have been no damage. It is of common knowledge that damage is produced by freshets where there are no dams or other obstructions to the waters of streams below the places of the damage. We have very notable historical instances of this fact. The Johnstown flood in Pennsylvania, where a dam several miles above the town burst in a freshet, and suddenly let loose a great volume of water, which inundated all the region of country below, overwhelming the town of Johnstown in its flood, washing away buildings in the town, and devastating the country for many miles along the course of the stream, was a notable instance of the fact that freshets may do damage where there is no dam below. Many other such instances might be given from history. Freshets in streams high enough to overflow lands, carry away wooden structures, and, by inundating dwellings, warehouses, and other buildings, damage property contained in them, are of continual occurrence; far more often, indeed, in streams where there are no dams below than where there are such dams. The courts take judicial cognizance of facts of common knowledge like this; and therefore it becomes necessary in every case where dams do exist for the plaintiff to show affirmatively that the particular damage for which he sues would not have occurred from the freshet if the dam had not been there. This requirement of law has not been supplied in the case at bar. If the damage for which the plaintiff sues would have occurred had there been no railroad embankment below the warehouse, then the plaintiff has no case. It was vital to his suit that he should prove that he would not have been damaged if there had been no embankment, or obstructed culverts.

Plaintiff's counsel, in opening the case to the jury, did not announce an intention to make this vital matter clear to them. No witness was examined in the whole course of the plaintiff's evidence to prove that, if there had been no obstruction in the culverts, there would have been no damage to the tobacco in the warehouse. I felt interested to know how this was, and listened attentively for information on the subject, but in vain. There was no affirmative testimony whatever to this fact, and the inferences were strongly the other way. In the Jackson lot, which was probably half a mile above the culverts, the water was five feet above the ordinary level; so that, if there had been a warehouse on that lot, the water would have been as much as two feet above the floor. The water there was entirely beyond any possible influence from the culverts. The plaintiff

himself proved that the flotsam and jetsam of the high water was all borne to the railroad embankment, and left in a great pile there after the subsidence of the flood, drawn by the suck of the culverts; and not a single witness testified that any of the flotsam and jetsam drifted back towards the warehouse. It was vital to the plaintiff's case that he should have proved that, if there had been no obstruction in the culvert, there would have been no water above the floor of the warehouse. It was a non sequitur to assume that, because there was obstruction in the culverts, therefore there was high water in the warehouse; and he failed to produce any affirmative evidence to show that there would have been no high water in the warehouse if there had been no obstruction in the culverts. I must therefore instruct the jury to find a verdict for the defendants.

---

FERGUS FALLS WATER CO. v. CITY OF FERGUS FALLS.

(Circuit Court, D. Minnesota, Sixth Division. February 4, 1895.)

1. CITIES—CONTRACTS FOR WATER.

Where a city with a population of 5,000 and an assessed valuation of property of two and a quarter millions of dollars contracts with a person giving him the exclusive privilege of laying water mains in the city for 30 years, and providing that he shall furnish the city with 50 fire hydrants, for each of which it shall pay him a rent of \$80 per year for the 30 years, with a stipulation that, at the end of 10 years, it may, at its option, buy the waterworks, at a price commensurate with the productive value thereof, the contract will not, after the city has enjoyed the benefit of it for over 10 years, be held so unreasonably oppressive or contrary to public policy as to be void.

2. SAME.

Under the power given a city by its charter to contract for waterworks, it has power to make necessary and proper arrangements to provide for payment of the same.

Action by the Fergus Falls Water Company against the city of Fergus Falls.

Frank W. Booth, for plaintiff.

Mason & Hilton, for defendant.

NELSON, District Judge. This is an action brought by plaintiff against the city of Fergus Falls to recover the sum of about \$5,600, with interest, on account of rent for water supplied to defendant under a certain contract embodied in one of the city ordinances. There is no contention whatever as to the facts, and a stipulation in writing was filed that the case should be heard and decided by the court, without a jury.

The agreed facts are as follows:

March 3, 1881, the legislature of the state of Minnesota granted to defendant a charter, the provisions of which, material to this case, are as follows (Sp. Laws 1883, p. 1):

Chapter 4, § 5: "The city council shall have power and authority to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the

government and good order of the city, \* \* \* and for these purposes the said city council shall have authority by such ordinances."

Subsection 45: "To contract with any person, persons or corporations for the lighting of such streets or parts of streets and public places as the city shall deem proper, for the convenience and safety of the inhabitants, and also for supplying the city with water."

Subsection 47: "The city council may permit any parties or corporation to lay water mains and pipes in any and all streets and alleys, highways and public grounds of the city, and shall regulate the position of the same, so that they shall not obstruct or interfere with the common sewers or with the proper drainage of the city."

Chapter 7, § 3: "The city council shall have power to purchase, keep and maintain fire engines and other fire apparatus, and to build and maintain engine houses, hose houses and such other buildings as may be necessary or convenient. \* \* \*

Section 4: "The city may maintain the present volunteer fire companies and authorize the organization of such other volunteer companies as in its discretion may be necessary or expedient."

Section 7: "The city council shall have power and authority to make by ordinance all needful rules for the government of the fire department, and for the protection and use of all engine houses, telegraph lines, and other property and apparatus pertaining thereto, and of the water works, mains, pipes, cisterns, and hydrants in said city as used in connection with said department.  
\* \* \*

Chapter 8, § 1: "The city council shall have the care, supervision and control of all highways, streets, alleys, public squares and grounds within the limits of the city, and may lay out and open new streets and alleys, and extend, widen, straighten and may build, maintain, repair bridges across streams and railway tracks, may provide for the pavement of gutters or the roadbeds of any streets or alley."

On April 19, 1883, Ordinance No. 18, relative to gas and water works, was passed by the common council of defendant, certain portions of which, material to this case, are set out as follows:

"Ordinance XVIII.

"Gas Works and Water Works.

"(Passed April 19, 1883.)

"Section 1. In consideration of the benefits that will result to the city of Fergus Falls and its inhabitants from the erection and operation of gas and water works, there is hereby granted unto Carroll E. Gray, his associates or assigns, the privilege of establishing, maintaining and operating gas and water works, and the construction of pipe lines, open or closed stand pipes, reservoirs, conduits, gas holders, necessary and sufficient in size; also the laying of mains, pipes, and the placing of fire hydrants and lamp posts in and along the streets, avenues, alleys and public grounds of the city of Fergus Falls, county of Otter Tail, state of Minnesota, as the same now exist or may hereafter be extended, for the supply of gas or water suitable for domestic and other purposes, for and during the term of thirty (30) years from and after the passage of this ordinance. The said city of Fergus Falls shall and will abstain, for the period of said thirty (30) years, from and after the passage of this ordinance, from granting to any party or parties other than the said Carroll E. Gray, his associates or assigns, the right or privilege to lay water pipes in any of the streets, avenues, alleys, public grounds or sidewalks or furnish water to said city or its inhabitants or any portion thereof, and to abstain from so doing for and on its own behalf; and said city will also abstain for a period of ten (10) years, from and after the passage of this ordinance, from granting to any party or parties, other than the said Carroll E. Gray, his associates or assigns, the right or privilege to lay gas pipes in any of the streets, avenues, alleys and public grounds or sidewalks, or furnish gas to said city or its inhabitants or any portion thereof, and the said city will likewise abstain from so doing for and on its own behalf: provided, however, that

at the expiration of said thirty (30) years, should the city refuse to grant to the said Carroll E. Gray, his associates or assigns, the right to continue and maintain said works for another term of twenty (20) years in and upon the public ground and streets of the said city, and to supply the said city and the inhabitants thereof with gas or water on reasonable terms, then and in such case the city shall purchase from said Carroll E. Gray, his associates or assigns, said gas works or water works, or either of them, and the property connected therewith, at a fair valuation, as provided for in section ten (10)."

"Sec. 4. \* \* \* The public fire hydrants rented by said city are not for the private use of its citizens or for street sprinkling purposes, but shall be used only for fire protection purposes, fire company practice, and for flushing gutters through hose. \* \* \*

"Sec. 5. In further consideration of the benefits that will accrue to the city of Fergus Falls and its inhabitants from the erection and operation of water works, and for the better protection of the city against fire, the city of Fergus Falls hereby agrees and binds itself to rent, and does hereby rent, from said Carroll E. Gray, his associates or assigns, fifty (50) public fire hydrants of the class and character hereinbefore described, to be located on the aforesaid six (6) miles of pipes, for and during the term of thirty (30) years from and after the completion of the works, and agrees to locate the same promptly along the lines of the street mains, on written demand of the said Carroll E. Gray, his associates or assigns, and upon submission by the said grantees to said city of a plan of the location of the said street mains. The said city agrees to use said hydrants carefully, protecting them from molestation or damage by the employees or officers of said city, and pay said Carroll E. Gray, his associates or assigns, for any injury which may result from misuse or abuse by the servants or employees of the city. The rental to be paid for the use of said hydrants shall be eighty (\$80) dollars each per annum, payable to the said Carroll E. Gray, his associates or assigns, or to his or their order, and the payment shall be made quarter yearly therefor, pro rata, viz.: On January first, April first, July first and October first of each and every year during the term of this contract, or until said works are purchased by said city as hereinafter provided for. The said hydrant rental to begin from the dates when each of such hydrants shall be put in successful operation. For any additional fire hydrants, the city may thereafter require and locate the annual rental to be paid by the city shall be seventy (\$70) dollars per hydrant for the next fifty (50) hydrants, and all after that number fifty (\$50) dollars per hydrant.

"Sec. 6. In the event that said Carroll E. Gray, his associates or assigns, after said works shall have been in successful operation, suffer a suspension of a supply of good and wholesome water, thereby causing an insufficiency for domestic and other purposes and for a period exceeding sixty (60) days, then in that event said Carroll E. Gray, his associates or assigns, shall forfeit all exclusive franchises herein granted, unless such suspension shall have been caused by the act of God, by public enemies or unavoidable accident, and during any such failure of supply, all hydrant rental shall be suspended."

"Sec. 10. The city of Fergus Falls shall have the option and privilege at any time after the expiration of ten (10) years from the passage of this ordinance, or at the expiration of five or ten years thereafter, on giving six (6) months prior notice in writing to the said Carroll E. Gray, his associates or assigns, to purchase said gas or water works or either of them, and all property connected therewith, and necessary for the effective operation of the same at a fair valuation to be ascertained as follows, to wit: In the event said city and Carroll E. Gray, his associates or assigns, fail to agree upon the price, three (3) disinterested persons of good intelligence not residents of the county of Otter Tail shall be chosen and sworn to determine the value, one to be appointed by said city, one by said grantees, and the third by the two so appointed. When said three persons shall have been so chosen, and before they determine said value, the said city and the said grantees shall each at their option have the right to call nonresident experts not exceeding three (3) in behalf of each party, to give testimony under oath before said three appraisers as to such value. The said three appraisers shall then proceed to determine such value, and in so doing they shall take into consideration the

productive value of said gas or water works, rights, privileges and property. When the three or their majority shall have made an award in writing, ten per centum shall be added to the amount thereof, and the said city shall then have the option of refusing to purchase, or of paying to the said Carroll E. Gray, his associates or assigns, within six (6) months of the date of said award the amount thereof in cash and the said ten per centum additional thereon. If the said city shall refuse to purchase as aforesaid, it shall pay the necessary expense incurred, in making said award; in case the city buys, the expense of said award to be equally borne.

"Sec. 11. \* \* \* The said Carroll E. Gray, his associates or assigns, shall also furnish, free of rent to the city, water for the use of the city hall and city offices, calaboose or jail, and to the city engine houses and fire department offices, also to the central high school."

"Sec. 13. Said Carroll E. Gray, his associates or assigns, shall within thirty (30) days from the passage and publication of this ordinance, file with the city clerk a written acceptance of the terms, obligations and conditions herein set forth, and after the date of the filing of said acceptance this ordinance shall be the measure of the rights and liabilities of said city and of said Carroll E. Gray, his associates or assigns, and shall constitute a contract. Said Carroll E. Gray, his associates or assigns, shall within thirty (30) days from such acceptance commence said gas or water works, and have said water works in operation and substantially completed as herein contemplated by the first day of December, 1883. In the event that said Carroll E. Gray, his associates or assigns, shall fail to have said gas works in operation the first day of December, 1883, then they shall forfeit all exclusive rights and franchises pertaining to the erection and operation of gas works herein conferred, unless longer time for such completion be granted by said city. In the event that said Carroll E. Gray, his associates or assigns, shall fail to have said water works in operation to supply water by the first day of December, 1883, then they shall forfeit all exclusive rights and franchises pertaining to the erection and operation of water works herein conferred, unless longer time for such completion be granted by said city.

"Sec. 14. All ordinances and parts of ordinances inconsistent with and repugnant to the provisions of this ordinance are hereby repealed, and this ordinance shall take effect and be in force from and after its passage and publication."

The water works were completed by the 1st of December, 1883, and have been in constant use ever since. On the 30th day of August, 1893, the city council duly passed, and the mayor approved, the following resolution:

"It is hereby resolved and determined that the contract for water supply through fire hydrants for fire protection, heretofore recognized as existing between the city of Fergus Falls and the Fergus Falls Water Company, under the provisions of Ordinance No. 18 of said city, be, and the same is hereby, declared to be null and void, and is hereby canceled. And it is hereby determined that the city will no longer take water from the said water company under the provisions of said Ordinance No. 18."

On the same day the city council passed, and the mayor approved, the following resolution:

"Resolved, that the city will take from the Fergus Falls Water Company for fire protection purposes from twenty-five hydrants, said hydrants to be situated as the council may hereafter designate. And it is hereby further determined that the city will pay the said water company, at such hydrants and such other hydrants as the city may from time to time engage to use, the sum of sixty dollars per hydrant per year; the said hydrant rents to be paid quarterly, at the end of each quarter of the year from the commencement of the contract. And the committee on water works are hereby instructed to so contract with the said water company for a water supply from the hydrants as hereafter designated by the city council."



Plaintiff refused, and still refuses, to accept the last-named proposition. A demurrer was interposed to the complaint, claiming that this court had no jurisdiction, because no federal question was involved in the case. The demurrer was overruled by Judge Thomas, and will not be considered by me.

It is admitted that all rents have been paid under the provisions of the ordinance up to September 1, 1893, and no later; and this suit is brought to enforce the payment of rent which has accrued since that date. Defendant resists payment of rent on the ground that the contract embodied in the ordinance is illegal, unreasonable, oppressive, contrary to public policy, and that the common council had no authority to enact the ordinance in question; and, further, that, at the time of the passage of the ordinance, there was no revenue assessed, or funds of the city available, wherewith to pay the rent in question.

It is true that the charter merely gives defendant authority to contract with any person, persons, or corporation for supplying the city with water; but, in order to properly construe that section, we must read it in connection with other portions of the charter which may be applicable thereto. We find that power and authority are given the council to permit any parties or corporation to lay water mains and pipes in any and all streets and alleys, highways, and public grounds of the city, and the council is given the care, supervision, and control of all the highways, streets, alleys, public squares, and grounds within the limits of the city. The council also has power and authority to make all needful rules for the government of the fire department, and "may continue the present volunteer fire companies, and authorize the organization of such other volunteer companies as in its discretion may be necessary or expedient." Under the authority thus conferred upon it by the charter, express and implied, the city council, on the 19th day of April, 1883, enacted and passed the ordinance in question, which on the 30th day of August, 1893, it declared null and void, and refuses to pay rent thereunder. In enacting this ordinance the council did nothing prohibited by the charter, and the question is: Did it exceed its power in such a manner that, under all circumstances of the case, this court must say, as a matter of law, that the ordinance is void, and cannot be enforced? What are these circumstances? It appears that in April, 1883, the defendant, with a population of about 5,000, and an assessed valuation of property of \$2,231,201, being desirous to be provided with water works, contracted for the same under this ordinance, and thereby induced the expenditure of a large amount of money on the part of plaintiff's assignors. The works were completed in accordance with the contract, and for nearly 10 years thereafter defendant has used and had the benefit of said water works for fire and other purposes, and has, during all that time, paid for the same, without objection, according to the terms of the contract. On August 30, 1893 (the population at this time not exceeding 4,000, and the assessed valuation having shrunk to \$821,773), the common council declared this ordinance void, and refused to be bound any longer by its terms. On the same day, however, they passed another

ordinance, whereby they offered to take from the plaintiff, for fire protection purposes, 25 hydrants, at the rate of \$60 each, and pay for the same quarterly.

It is stipulated that when fires have occurred in the city since August 30, 1883, some of the hydrants have been used by the volunteer fire companies of the city of Fergus Falls, but that such action on part of these companies was without any action or consent of defendant. It appears that these fire companies are under the control of the defendant; that no action was taken by the council forbidding the use of the hydrants for such purpose, and the city certainly had the benefit of them. Defendant claims that the ordinance granting this franchise to Gray and his assigns for 30 years, whereby defendant was bound to pay for 50 hydrants, at \$80 each, during all that time, is void, for the reason that the city council had no authority to bind the defendant for such a period in advance. It must not be forgotten that 10 years of that time have elapsed; that the contract has but 20 years to run, and is now considerably modified. It is no longer an exclusive one, for the time has been reached when the defendant can purchase the works, not at the cost price or any arbitrary figure, but at a price to be agreed upon by three impartial persons, taking "into consideration the productive value of said water works, rights, privileges, and property." There is no claim of fraud, nor that the water works are useless or unnecessary. On the contrary, defendant by its second ordinance, of August 30, 1893, admits their usefulness and necessity. It is evident that the passage of the first ordinance, of August 30, 1893, was brought about by the fact that instead of growing, as was expected, the city had decreased in population and assessable valuation. The law does not favor the idea that a man shall abide by a contract when it is advantageous to him, and repudiate it when it becomes irksome. It is well settled that time and even exclusive contracts may be made by city authorities for the purpose of inducing persons to embark capital in such enterprises as water or gas works, and common sense and experience teach us that without such provisions capital would not be invested. The only question is, is this ordinance so unreasonable, so oppressive, so contrary to public policy that the law will interfere and declare it void? I am of opinion that, if this question had been raised at the outset, it is doubtful whether the city council had authority to give an exclusive contract of this character to any person for the purpose stated; but as plaintiff's assignor, relying upon the ordinance, in good faith invested a large sum of money in these works, and the city has for 10 years enjoyed the benefits thereof without objection or complaint, and has now the opportunity of purchasing the works at a reasonable valuation, commensurate with the productive value thereof, I do not consider that the ordinance is so unreasonable, oppressive, or contrary to public policy as to be void. Where a contract is sought to be avoided on the grounds above stated, it must be treated as a nullity by the party seeking to avoid it, and must be repudiated in toto. He cannot repudiate it, and at the same time reap any of the benefits derived from it, as the defendant has attempted to do.

As to the other defense, I do not think it can prevail. When the city received power from the legislature to contract for water works, the power to make necessary and proper arrangements to provide for the payment for the same was also granted. I think the plaintiff is entitled to recover the full amount claimed for rent, and judgment will be entered accordingly.

---

ROZA v. SMITH.

(District Court, N. D. California. January 28, 1895.)

No. 11,112.

FALSE IMPRISONMENT—DAMAGES.

S., the master of a vessel lying at a remote point on the coast of Alaska, suspecting that one R. had instigated a seaman to desert, seized R., put him in irons, and confined him in the "run," on board the vessel, for about 9 hours, keeping him in custody altogether about 18 hours. S. justified this act as a necessity, in order to compel the return of the deserting seaman. *Held*, that punitive damages should be allowed to R. for this indignity and invasion of his liberty, and that \$500 was a proper allowance.

Libel in personam to recover \$10,000 damages for unlawful detention and imprisonment on board the American steam whaler Narwhal, of which H. P. Smith was master. Five hundred dollars awarded.

Walter G. Holmes, for libelant.

Page, Eells & Wheeler, for respondent.

MORROW, District Judge. The libel in personam was instituted to recover damages in the sum of \$10,000 for the unlawful detention and imprisonment of libelant on board the American steam whaler Narwhal by H. P. Smith, the respondent, he being at that time master. There is no substantial controversy as to the material facts of the case. The libelant is a whaler, and resided in 1892 at a whaling station known as "Shooting Station," situated at Point Barrow, on the northern coast of Alaska. About July 20th of that year, the Narwhal was lying at anchor off Point Barrow, waiting for the ice to break up, so that she might proceed eastward to her destined whaling grounds. Among her crew was one Joe Peters, who was boat steerer and hunter. The libelant and Peters had, it seems, been previously acquainted. On the 20th of July, Peters, who had been watching for an opportunity to leave the vessel for some time before, obtained the captain's permission to absent himself from the vessel to visit the steam whaler Balaena, which was lying near by. This was, however, a mere pretense to get away from the vessel, and he proceeded to the shore with the intention of going to Cape Smythe, the headquarters of the Pacific Whaling Station, some 15 or 16 miles distant. The station or house occupied by the libelant is in the direction of Cape Smythe, and is some five or six miles from where the Narwhal was lying. Peters had, previous to his leaving that vessel, sent his clothes on shore by a native, and had directed

that they be left at Roza's house. He reached the latter's place about 7 or 8 o'clock in the morning, remained there a few minutes, and then proceeded on to Cape Smythe. It appears from the testimony that the captain was informed of his desertion about 10 o'clock in the evening. Whether this is 10 o'clock of the same day that Peters reached Roza's house, or of the day preceding, is uncertain. The fact that daylight prevails at this season of the year at Point Barrow during the whole 24 hours renders the question of time somewhat dubious. Some natives came on board the vessel, and reported that Peters had been seen on his way towards Roza's house. The captain ordered a search to be made, to ascertain whether Peters' clothing was still on board, and found that all his things had been taken from the vessel. He testifies that he then went on shore, accompanied by the second mate and another officer of the vessel, and, visiting Roza's house, had an interview with him. He states that Roza told him that Peters was not there, and further told him that "he [Peters] had deserted the ship; but, if he [Roza] knew where he was, he would not tell me, or give me any assistance in finding the man." But Roza swears that when he was asked about Peters he told them that he had seen him at his house about two hours before. The first mate, in his deposition, could not recall the conversation that passed between the captain and Roza, although as to other matters his memory was apparently good. After this first interview, the captain returned to the vessel, leaving the two officers on shore to make further search. The latter subsequently returned on board, bringing with them Peters' clothes, and reported that they had found them at Roza's house. In regard to this the first officer states in his deposition that he was authorized by the captain to search Roza's house; that the latter was not there when he made the search; that the only person present was a native woman, with whom, it appears, Roza was living; that he obtained her permission to search the premises, and found the clothes in the loft, concealed from view. The captain, on learning this, again repaired to Roza's house. The latter was then there. Capt. Smith accused him of having instigated Peters to desert. This Roza denied. The captain told him he should take him on board the vessel, and keep him there until Peters' return. Roza refused to go, and the captain, with the assistance of the two officers, put him in irons. It is denied by the captain that he resorted to this measure. He, however, admits that he took the irons with him, and went prepared to use them in case Roza should offer any resistance. The first officer, who was called as a witness for the respondent, corroborates the testimony of Roza that the irons were placed on him. Roza told the captain to take the irons off, and he would go with them on board the vessel. The irons were thereupon removed, and he went peaceably on board with the captain, arriving there about 1 o'clock in the afternoon. The two officers remained on shore to make further search. Meanwhile Roza was kept under close watch, so that he might not escape. When the two officers subsequently returned on board without having found Peters, he was again put in irons, and placed in the hold of the vessel.

The place where he was confined is described by him as being a small and dark compartment, which was used as a storeroom, and was called the "run," entrance to it being gained by a small hatch right in the middle of the cabin floor. The captain states that it was about 20 feet in length, and perhaps 26 feet in width, and 7 feet high; that it was used for keeping light stores which were being used constantly; that it was not very full at the time, and that there was a space of 6 feet in which one could move about. Roza swears that the place was dark, ill-ventilated, and so uncomfortable that he could not rest or sleep. He was given nothing to eat during the entire time of his incarceration. This, however, is disputed by the captain. He was placed in the "run," according to the captain's testimony, between 10 and 11 o'clock at night, and kept confined there in irons until between 7 and 8 o'clock on the following morning, when the captain received word that Peters had been found, and Roza was thereupon released. He had, therefore, been in close confinement in irons for about 9 hours, and in the custody of the respondent on board the vessel for about 18 hours altogether. The libellant suffered no physical damage, so far as the proof shows, and his recovery must be upon the basis of exemplary or punitive damages for the oppression, humiliation, and indignity he suffered by reason of the wrongful act of the captain. The latter justifies his course on the ground of the necessity incident to the situation in which he was then placed. He testifies that he considered that Roza had instigated Peters to desert, and that he deemed himself justified, under the circumstances, in holding him as a hostage until Peters' return or capture, for the reason that there was no court or official to whom he could appeal or apply for redress; that the ice was breaking up at that time, thus affording him an opportunity of proceeding on his whaling voyage; that, unless he availed himself of this chance, another might not have occurred again that season; that Peters was a skillful hunter, whom he could ill afford to lose. The captain lays great stress upon the fact that his delay in getting Peters back greatly hazarded his chance of getting out into the whaling ground, and imperiled the successful outcome of the whole enterprise. But how this situation could, under any circumstances, justify the captain in his treatment of Roza, who was not concerned in the voyage, it is difficult to understand. Even conceding, for the sake of argument, that Roza had been guilty of instigating or conniving at Peters' desertion, the captain had no right to punish him for that offense. Had there been a court of competent jurisdiction accessible to which the captain could apply for redress, the only remedy he could have had against the offender, aside from his civil action for damages, would have been a penalty under section 4601 of the Revised Statutes, which provides that "whenever any person harbors or secretes any seaman belonging to any vessel, knowing him to belong thereto, he shall be liable to pay ten dollars for every day during which he continues so to harbor or secrete such seaman, recoverable one-half to the use of the person prosecuting for the same, the other half to the use of the United States." No criminal liability is attached, so far as merchant vessels are concerned, to the

act of enticing or assisting or conniving at a seaman's desertion. But the preponderance of the evidence establishes affirmatively that Capt. Smith was mistaken in believing that Roza had anything to do with Peters' desertion. Peters testified that he did not consult Roza, or disclose to him his intention of leaving the vessel, and that Roza never suggested the subject to him, or knew of his intention. He further states that he sent his clothes to Roza's house by a native, without having told Roza that he was going to do so, or obtaining the latter's permission. Roza, on his part, denies emphatically that he did or said anything to induce Peters to desert, or assisted him in doing so, or that he knew of his intention to desert. The circumstances of finding Peters' clothes in Roza's house, and that Peters had stopped there on his way to Cape Smythe, added to the further fact that Peters and Roza had been previously acquainted, did not furnish the captain with a reasonable excuse for his conduct in arresting and detaining Roza in irons as a hostage for the return of Peters. The captain disclaims having been actuated by malice. But to support an action of this character, and to recover exemplary or punitive damages, it is not necessary that express malice should be proved. A wanton disregard of the rights of others, such as was displayed in this case, will suffice. In *Johnson v. Ebberts*, 11 Fed. 129, Judge Deady said:

"The plaintiff testified that the reason he had the defendant arrested was, 'He had my note, and I wanted to know how he got it.' But no one has a right to cause the arrest of another as an experiment, for the purpose of finding out who committed a particular crime. This is trifling with the liberty and good name of another, which the law does not justify or excuse. But it must appear that the arrest was malicious, as well as without probable cause, before the defendant can be held responsible in damages. It is not claimed that there is any direct evidence of malice, but only that it is sufficiently shown by the circumstances of the case. The malice necessary to sustain this action is not express malice, a specific desire to vex or injure another from malevolence or motives of ill will, but the willful doing of an unlawful act to the prejudice or injury of another. *Frowman v. Smith*, 12 Am. Dec. 268."

The libelant was kept in irons in the "run" for about 9 hours, and was restrained of his liberty, in the custody of the captain, for about 18 hours altogether, on board the vessel. The captain justifies putting the libelant in irons while in the "run" because he was afraid the latter might set fire to the vessel, or do some other mischief. But this does not appeal very strongly to the court in view of the unlawful character of the whole proceedings. If there was danger that the libelant would set the vessel on fire, or commit any other mischief, the danger arose primarily out of the misconduct of the captain in detaining him on board without authority of law, and it therefore affords no justification for the imprisonment. No case analogous in its features to the case at bar has been cited, nor have I been able to find any. In *Boyle v. Case*, 18 Fed. 880, the plaintiff was unlawfully arrested by a vigilance committee, and confined in jail. They pretended to try him, and sentenced him to receive 25 lashes on his bare back, and, in pursuance of said sentence, caused him to be blindfolded, gagged, and taken from the jail during the following night,

onto the hill back of the town, where he was first tantalized or tortured by the information that he was to be hung, and then to receive 200 lashes, and finally was whipped on the bare back with a cat o' nine tails,—five men giving him five lashes each,—when he was sworn upon his knees never to reveal what took place on that occasion, nor to harm any one engaged in the transaction; that he was taken in irons to the Portland steamboat, and sent away on her. It was shown that he was a gambler and bartender, and that the committee considered him an obnoxious and undesirable character, and took these measures to rid the town of him. He was awarded the sum of \$1,000. In the case of *Harris v. Railroad Co.*, 35 Fed. 118, the facts of that case are much stronger than in the case at bar, and \$5,000 were there awarded. As before stated, the libelant in this case suffered no actual physical damage, and the test of any recovery by him must be based upon the oppression, humiliation, and indignity heaped upon him, the wanton and unjustifiable disregard of his rights, and the harshness of his treatment. "Punitive damages may be awarded when a wrongful act is done willfully, in a wanton or oppressive manner, or even when it is done recklessly,—that is to say, in open disregard of one's civil obligations and of the rights of others. "The cases on the subject show that in the matter of assessing damages for false imprisonment, or for an assault or trespass, it is the duty of the jury to consider not only all the circumstances of aggravation attending the wrongful act, but, in some measure, at least, the nature of the right that has been invaded, and the effect upon social order of permitting a wrongdoer to escape without substantial punishment in case of a flagrant violation of the law and the rights of others." *Fotheringham v. Express Co.*, 36 Fed. 252. Exemplary or punitive damages have a double object,—one to reward the person wronged, the other to punish the offender; the punishment partaking of the character of a fine or penalty as an example to deter others. *Field, Dam.* § 615; *Boyle v. Case*, supra; *Fotheringham v. Express Co.*, supra; *Railroad Co. v. Prentice*, 147 U. S. 103, 107, 13 Sup. Ct. 261. In my judgment, the action of the respondent deserves punishment. It would, indeed, be establishing a most dangerous precedent if his conduct in this case should be recognized as lawful, or justified as a measure of necessity. The law of necessity, whatever may be its extreme limit in authorizing the use of violence as a means of self-defense or for self-preservation, does not justify the infliction of an injury upon a third party who is a stranger to the situation. This was the position of the libelant in this case. He had no interest in the controversy between the captain and the deserting seaman, and was under no obligation to assist in the capture and return of the latter. The most that can be said is that he was not greatly damaged. The humiliation of being confined on board of a vessel in the uninhabited and inhospitable Arctic regions cannot be said to be a very serious matter. The law, however, extends to every foot of American territory, and to the deck of every American vessel, and must be enforced as well in the Arctic Sea as in the port of San Francisco. No claim is made for damages on account of the act of the master in arresting the libelant on land.

The libel is confined to the marine tort arising out of the imprisonment on board the vessel, that being the only part of the transaction within the jurisdiction of this court. For this injury I will allow, as full compensation, the sum of \$500.

---

## P. LORILLARD CO. v. PEPER.

(Circuit Court, E. D. Missouri, E. D. February 5, 1895.)

No. 3,672.

**ASSIGNMENT—SUFFICIENCY OF EVIDENCE.**

In a suit by P. Lorillard Co., incorporated in 1891, for an infringement commencing in 1886, of a trade-mark of P. Lorillard & Co., the allegation in the bill of the sale and transfer to complainant by P. Lorillard & Co. of its business, including right to sue for past infringements of trade-marks, being traversed by the answer, is not established by testimony of a witness that he had been connected with the business of complainant and its "predecessor" for over 20 years.

Suit by P. Lorillard Co. against Christian Peper for infringement of trade-mark.

Phillipp, Munson & Phelps, for complainant.  
Smith P. Galt, for defendant.

PRIEST, District Judge. Since 1886 the defendant has used, among a multitude of other designs for the product of his tobacco factory, one called "Peper's True Smoke." It is contended by the complainant that the style of lettering and dress of this package constitutes an infringement upon a similar package of smoking tobacco put up by it and its predecessor since 1871, called "P. Lorillard & Company's Tuberoze." The evidence shows the tuberoze package was devised and adopted as early as 1871 by P. Lorillard & Co., and by that firm was continuously used down to July, 1891. Who constituted the firm of P. Lorillard & Co. is not disclosed by the evidence. The complainant was organized as a corporation under the laws of New Jersey in 1891, and began business in July of that year. The record shows that its capital stock is \$5,000,000, divided into 50,000 shares, of which Pierre Lorillard, Jr., subscribed 49,997, and George D. Finley, Ethan Allen, and William Brankerhoff, one each; and that the objects for which the corporation was formed were "to manufacture, buy, sell, and deal in tobacco, cigarettes, cigars, and snuff, and all materials, rights, privileges, patents, trade-marks, and other property of every description, commonly or conveniently used, manufactured of, or sold in connection therewith, or necessary or convenient in and about the transaction of the said business of said company." There is no intimation in the articles of incorporation that this company was to succeed to any business already established, but, on the contrary, so far as appears from the record, it was to engage in an original business undertaking. The bill, however, avers:



"That on or about the 1st day of July, 1891, the said business [that is, the business of P. Lorillard & Co.], the manufacturing plant and good will thereof, and all the trade-marks pertaining to said business, and each and every detail and part thereof, were sold and transferred to your orator, together with the full right, title, and interest in and to any and all damages and profits which your orator's predecessor in business was, or might be, or has been, entitled to sue for and recover by reason of any and all violations or infringements of said trade-marks or any of them. Thereupon your orator succeeded to the said business, good will, and trade-marks, and became, and has since continued to be, and now is, the sole owner thereof, and solely entitled to have, hold, use, enjoy, and apply the same."

This averment of the bill is traversed by the answer. There is no direct proof of this averment of the bill, but complainant insists that there is proof inferential and indirect sufficient to sustain this averment. For instance, the witness Allen was asked (C. R. p. 24):

"How long have you been connected with the business conducted by said complainant corporation and their predecessors, and in what capacity? A. Since 1867. Q. To what degree have you had the responsibility of the selling department of this business from 1867 to the present time? A. Well, from the time of my entering the employ of the concern, in 1867, to the fall of 1868, I was employed as an assistant in the salesroom; from the fall of 1868, as manager of the New York salesroom, and of the goods sold by the house to the New York City trade and customers visiting the salesroom; since 1885, as manager in chief of the selling department. Q. To what extent have your duties in these capacities caused you to become familiar with the general state of the tobacco trade in the United States? A. It brought me to a large extent in connection with the tobacco trade of the United States."

We do not think this testimony establishes the controverted fact of the succession of the complainant to the business of the firm of P. Lorillard & Co. Taking the context, these inquiries do not appear to have been directed to any such purpose. If the evidence had been so intended, it certainly would have been objectionable.

As to who is a "predecessor," within a legal signification of that word, is a question of law and fact, which no witness is competent to determine. One may be a predecessor of another without the relation of contractual succession. For instance, P. Lorillard & Co. might have occupied a building for the purpose of manufacturing tobacco, and have gone out of the business entirely, and the complainant may have established a new business in the same building, and the former partnership be denominated, and be, in the opinion of the witness, a "predecessor." "Predecessor," in the common acceptance, means "one who goes before or precedes another in a given state, position, or office," and does not necessarily express any relation of legal privity. There is no evidence in the record that P. Lorillard & Co. sold, assigned, or transferred their business of manufacturing tobacco or trade-marks to the complainant in this case. If they did, the fact is susceptible of direct and unequivocal proof; and the complainant having failed to furnish it, and relying merely upon incidental and accidental expressions of witnesses, it will be presumed that the fact averred in the bill is not true; and for this reason the bill will be dismissed, at complainant's cost.

## OFFICE SPECIALTY MANUF'G CO. v. GLOBE CO.

(Circuit Court, S. D. Ohio, W. D. January 21, 1895.)

No. 4,607.

## 1. PATENTS—WHAT CONSTITUTES INVENTION.

There is no invention in connecting two old devices to operate simultaneously, when the operation and function of each in their connected relation is the same as that performed by each when used singly.

## 2. SAME—COMBINATION CLAIMS—LIMITATION AND INFRINGEMENT.

A combination claim containing separate elements must be limited to those precise elements or their mechanical equivalents, each for each; and it is not infringed by a different combination, of different elements, or a combination consisting of a less number of elements.

## 3. SAME—DISCLAIMER—UNREASONABLE DELAY.

A delay of over four years in filing a disclaimer of a claim which has been adjudged invalid by a judgment from which no appeal is taken is an "unreasonable delay," within the meaning of Rev. St. § 4922, and operates to invalidate the whole patent.

## 4. SAME—FILE BINDERS.

The Shannon patent, No. 217,907, for an improvement in temporary file binders, is invalid, for want of invention, as to all the claims, and also because of unreasonable delay in filing a disclaimer after one claim of the claims had been adjudged invalid.

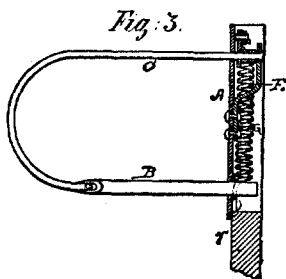
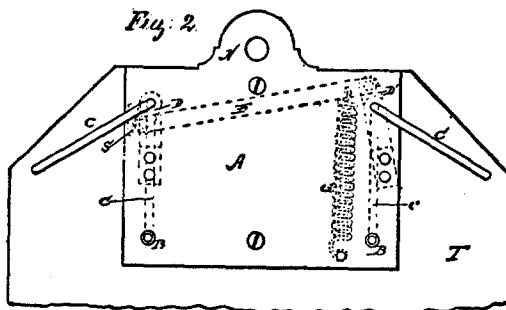
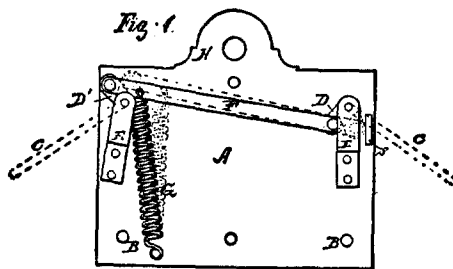
This was a bill by the Office Specialty Manufacturing Company against the Globe Company for infringement of a patent.

Church & Church, for complainant.

O. W. Hill and Parkinson & Parkinson, contra.

SAGE, District Judge. The patent for the infringement of which this suit is brought was issued to James S. Shannon on the 29th of July, 1879 (No. 217,907), for an improvement in that class of temporary binders which have fixed receiving wires and transfer or vibrating wires. The improvement consists—First, in giving movement to the transfer wires on a vertical axis, for the purpose of swinging their free ends towards or from the free ends of the fixed wires; secondly, in means provided and arranged whereby the transfer wires are held stationary, either in contact with or removed from the fixed wires; and, thirdly, in connecting the two swinging wires of a double file, so that in rotating one the other is also rotated. The vertical wires are secured preferably to a metal plate or base, which is intended also as a connection for the several working parts of the device with a board or tablet. Each transfer wire has a vertical and a curved or arched portion, arranged in the plate at the same distance apart as the fixed wires, and also so as to engage with the fixed wires when closed. These wires pass through the plate, and are supported at the foot by brackets, in which, and in the plate, they freely, but closely, turn. The free ends of the vertical fixed wires are beveled on one side, as shown in the specification, to give puncturing points. Preferably the fixed wires are beveled from the outside upwardly and inwardly, and the ends of the transfer wires are beveled or sharpened so as to meet the beveled faces of the fixed

wires, and form a directly continuous ring. They are both vibrated or rotated outwardly. A crank arm is fixed to the lower end of each vibrating wire between the plate and the brackets. A connecting arm joins the extremities of the crank arms for the purpose of giving to the vibrating wires simultaneous movement when either of them is rotated. A spiral spring is fixed at one end of the plate, and attached at the other end to the connecting bar, for the purpose



of holding the vibrating wires either in contact with the fixed wires or away from them, as may be required to have the rings closed or open. To this end one of the arms and the spring are so relatively arranged in connection with the arch of the vibrating wires as to be held by the spring at each extremity of its throw. A slot limits the throw of the crank arm and of the vibrating wires, so that the latter may not bear forcibly at their points against the fixed wires.

Their throw in the opposite direction is arrested by the connecting bar, which strikes one of the fixed wires. It is suggested in the specification that other means may be provided for this purpose. By varying the relative arrangement of the crank arms, the arched portions of the vibrating or transfer wires may be made to rotate in opposite directions or in the same direction; that is, either both inwardly, both outwardly, or both to either side. The preferable movement is both outwardly, in which case the crank arms are arranged on opposite sides of the vibrating or transfer wire, and the spring is connected as near as may be to one of the crank arms. If the vibrating arms be bent to form a crank, as is shown in one of the figures, the spring may directly connect thereto, or other forms of spring may obviously, it is stated in the specification, be otherwise employed. The mode of forming the crank arm, as shown in Fig. 5 of the drawings of the letters patent, is especially adapted to single files; that is, to files having only one fixed and one transfer wire. That figure also shows the plate or base bent over at its margin to form the bracket to support the foot of the vibrating wire. The inventor states in the specification that, when the plate is cut from sheet metal, projections for this purpose may be formed at the corners of the plate no longer than is required to form the central hanging loop and eye, which is designated in the drawings by the letter H.

It is further stated in the specification that it is not material to the invention claimed whether the fixed wire is solid or tubular. If solid, it may be perforated near its point, as shown in Fig. 4, for the purpose of stringing the contents of the file. It is not material that the fixed wires be attached to the metal plate, instead of to the tablet at the rear of the plate; but the inventor says it is obviously better to secure them to the plate, in order to permit separate packing of the tablets and working parts for shipment, and to facilitate putting the parts together in proper relation. The beveled faces of the fixed wires should be arranged to meet the transfer or vibrating wires, whichever way the latter may swing, so as to make as smooth and perfect a joint as possible, in order that papers may be transferred from one wire to the other without injury.

There are four claims. The first is for the combination with the fixed wire and the base of the arched vibrating wire having a positive rotary movement in the axis of its vertical portion, whereby its free end may be swung into contact with or away from the free end of the fixed wire, substantially as described. This claim was held invalid by Judge Blodgett in a decision rendered November 5, 1887, in *Schlicht v. Letter File Co.*, 36 Fed. 590. The owners of the patent acquiesced in this decision, but did not file a disclaimer until February, 1893.

The claims of the patent in issue are as follows:

(2) "In combination with the vibrating wire, C, and the fixed wire, B, the spring, G, and the crank, D, or D', formed or fixed in the vibrating wire, C, whereby the ring composed of the latter and the fixed wire, B, may be held either open or closed, substantially as described."

(3) "The combination in a double file or binder of the fixed wires, B, B, the vibrating wires C, C, crank arms, D and D', connecting bar, F, and

spring, G, whereby the free ends of the wires, C, C, may be simultaneously swung horizontally to open and close the rings, substantially as described."

(4) "The fixed wires, B, B, and vibrating wires, C, C, combined with operative spring, G, connecting bar, F, and cranks, D, D', set in opposite directions, so that the said vibrating wires move in opposite directions as they open or close."

Letters patent No. 198,968, issued to William C. Bussey, January 8, 1878, show a single bill file, consisting of a fixed vertical wire secured in a base, and a second vertical wire mounted in the same base, having its upper end bent to form an arch which registers with the upper end of the fixed wire, the bent wire being so mounted that it may be turned upon its own axis so as to swing its bent end laterally into or out of engagement with the fixed wire.

Patent No. 165,614, to Charles E. Ramus (July 13, 1875), for improvement in paper clips, shows a fixed wire, a bent wire mounted on the same base, and arranged to register with the fixed wire, also arranged to turn on its own axis laterally into and out of engagement with the fixed wire. This device shows, in addition to the elements found in the Bussey patent, a spring consisting of the bent end or portion of the transfer wire, so formed and arranged that in its normal condition that wire is out of engagement with the fixed wire, and is twisted in its vertical portion when its bent end is made to register with the fixed wire, and is also bent in its vertical portion or sprung out of line, so as to hold the bent end forcibly downward in engagement with the fixed wire. These devices contain all the elements found in either of the pair of file wires in the complainant's device, excepting the arm or crank attached to the lower end of the vibratory bent wire, and the spring arranged to engage with said arm so as to hold the bent wire into or out of position with the fixed wire. But in Ashley's patent, No. 69,385 (October 1, 1867), for improvement of letter files, there is shown the base, a fixed filing wire secured therein, a bent wire having a foot piece forming cranks projecting in opposite directions, one of the cranks so pivoted to the base that the bent wire might be swung laterally, being turned substantially on its own axis, and thereby brought into or out of engagement with the fixed wire, and the other arm or crank controlled by a spring so arranged as to hold the bent wire in engagement with the filing wire.

In Foster's patent, No. 202,013 (April 2, 1878), for an improvement in temporary binders, there are two fixed vertical filing wires, the two arms so arranged as to engage the upper ends of the fixed wires and hold the papers thereon, the arms being pivoted to a standard secured to the base, and being arranged to swing in a vertical plane into or out of engagement with the fixed wires, and controlled by a reacting spiral spring, which holds them in their position.

Patent No. 202,755 (April 23, 1878), to Louis Prahar, for improvement in clasps for pocketbooks, shows a fixed post secured to the base, and an arm pivotally connected to the base, provided with a crank, and arranged to swing in a vertical plane into or out of engagement with the upper end of the fixed post, and controlled by a spring which engaged its crank so as to hold the arm open or closed.

In patent No. 134,724 (January 14, 1873), to George W. Billow, for improvement in paper files, there is shown a pair of filing arms, each provided with a crank, and so pivoted as to swing in a vertical plane on the base, and a spring which so engages the crank arm as to hold the filing wires open or closed when swung upon their axis.

In *Schlicht v. Letter File Co.*, cited above, Judge Blodgett found that the disclaimer then filed by the complainant, limiting the first claim of the patent, admitted that the Bussey patent, cited above, anticipated the combination of a single vibrating wire with a fixed vertical wire, and added that the attempt of the complainant by his disclaimer to obviate the effect of that patent, by limiting his claim to a tablet or letter file containing at least a pair of wires, was ineffectual, because that was nothing more than a mere duplication of parts, which did not call for the exercise of inventive talent. He said: "There is no more invention in fastening papers to a letter file by two points of attachment instead of one than there would be in fastening a board to a piece of studding or beam by two nails instead of one." In that opinion this court entirely concurs. Is there, then, invention in the device exhibited, connecting the wires for simultaneous operation? The complainant's expert testified upon cross-examination that the principal difference between the operation of the single file and that of the double file consisted in operating the vibrating wires of the latter simultaneously by means of connecting mechanism, and that, considered as an abstract principle, he did not regard the connecting of two old devices to operate simultaneously as invention, when the operation and function of each in their connected relation was the same as that performed by each when used single. The expert was right in the view thus expressed.

The only remaining feature is the use of the spring to hold the wires in open and closed position. The use of a spring to hold any device in an open or closed position was common and well known long prior to complainant's patent. Equivalents for like use were shown in the patent to Boeklen, No. 187,494 (February 20, 1877), for improvement in temporary binders. It is true that the precise construction or device shown in complainant's device does not appear in any of the prior devices in evidence, but it required no invention to apply to duplicate wires the spring which had been applied to single wires. Moreover, the application to duplicate wires is shown in the Underwood patent. But it is contended that there is both novelty and invention in the specific combination of the old devices recited in the claims. This brings us to the lowest plane of the patent law, where, if the distinction between mechanical skill and invention is not altogether ignored, and novelty and utility made the only test, the line between skill and invention is so shadowy and uncertain, and so little regarded, that in very many cases, if not a majority of them, the patent is wholly invalid. I do not see how the specific combination in this case can be recognized as patentable. But if the patent, restricted to the precise arrangement described and shown, could be sustained, the defendant would not be within the restriction, and therefore does not infringe. Its files are manu-

factured under letters patent No. 438,574, issued October 14, 1890. In external appearance they do not differ in any material respect from the files manufactured by complainant. The general construction is similar. The files are double, with fixed and vibrating wires, the latter arched, pivoted, and rotated into or out of engagement with the fixed wires, which have their ends beveled in the same manner as in the complainant's device. On the lower ends of the transfer or rotating wires are cranks projecting in opposite directions, having intermeshing gear teeth for causing the simultaneous movement of the rotating wires inwardly towards the fixed wires, and outwardly away from them. A spring is connected to the crank beneath the base plate, and pressing towards its center of rotation; so that, when the crank is moving across the center of motion, the spring is under the greatest tension, but, when on either side, it serves to hold the crank and wires in proper position, whether open or closed. It is claimed that this spring is the equivalent of the complainant's spring, as a leaf spring is the equivalent of a coil spring if it performs the same function in the same way.

Attention is called to the statement in the specification of the Dom patent that, instead of the S-shaped spring (which is the shape employed by the defendant), any suitable form of spring or springs may be employed for accomplishing the desired result; and it is altogether true that the meshing gear teeth take the place of the connecting bar in the complainant's device. The patentee of that device might have drawn his claim to cover "connecting mechanism," or "means for connecting," or "a connection between" the filing wires, whereby they might be operated simultaneously; but, as pointed out by counsel for the defendant, had he done this the state of the art and the authorities would have limited his claim to the precise construction shown and described. He elected to draw his claim for combinations calling for certain specified elements, and, independently of the state of the art, he must be held limited to combinations containing those precise elements or mechanical equivalents, each for each, which would relieve defendant from the charge of infringement. The connecting bar is entirely absent from defendant's device. Defendant employs a different spring, applied in a different way, attains his result by a different combination of different elements, and employs one less element than the combinations called for by the claims. The defendant, therefore, does not infringe.

Lastly, it appears from the record that the first claim was held invalid in the case of *Schlicht v. Letter File Co.*, already referred to, on the 5th of November, 1887. Complainant's title is derived through *Schlicht & Field*. This decision was acquiesced in. It has not been appealed from. No disclaimer under and in accordance with it was filed until February, 1893,—four years and three months later,—and no reason is shown for the delay.

Now, under section 4922, Rev. St. U. S., the right of a patentee, who has inadvertently claimed more than he is entitled to, to maintain suit for any distinguishable part of the patented invention, which was bona fide his own, is preserved, provided that "no paten-

tee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer." Counsel for the complainant cite *Sessions v. Romadka*, 145 U. S. 29, 41, 12 Sup. Ct. 799. In that case, upon the hearing in the court below, it was claimed that the patent was invalid by reason of the joinder in it of distinct inventions. The court below, says Justice Brown, in announcing the opinion of the supreme court, was evidently inclined to that opinion, but permitted the plaintiff to enter a disclaimer of all claims but the one in suit; and that disclaimer was, so far as appears from the report of the case, thereupon promptly made.

In *O'Reilly v. Morse*, 15 How. 62, 121, it was held that the delay in entering a disclaimer was not unreasonable, for, said Chief Justice Taney, speaking for the court, "the objectionable claim was sanctioned by the head of the office. It has been held to be valid by a circuit court, and differences of opinion in relation to it are found to exist among the justices of this court. Under such circumstances, the patentee had a right to insist upon it, and not disclaim it until the highest court to which it could be carried had pronounced its judgment." This case was followed in *Seymour v. McCormick*, 19 How. 105, 106.

In *Singer v. Walmsley*, 1 Fish. Pat. Cas. 558, Fed. Cas. No. 12,900, the court, remarking that what is unreasonable delay is a question to be settled by the court, added that unless the party knew that the claim was false, if he believed that he was the sole inventor of what he claimed, the court would find that the time, in reference to the question of delay, commenced when the knowledge was brought home to him that he was not the first inventor, or when it was declared by a court of competent jurisdiction that he was not the first inventor; that then the time would begin to run, and not until then. In the case at bar the decision that the first claim was invalid was made in November, 1887. That decision has all the force and effect, so far as the question under consideration is involved, of a decision by the highest court of the land, because it was accepted and became final by the fact that no appeal was taken from it. But until February, 1893, three months before this suit was commenced, the complainant continued, by its failure to disclaim, to hold out to the public the claim which had been adjudged invalid, as a valid claim. Knowingly to persevere in an invalid claim after the discovery that it is invalid is a fraud, which forfeits all right to the protection of any part of the invention covered by the patent. Rob. Pat. § 642. If, as held in *Miller v. Brass Co.*, 104 U. S. 350, an unexplained delay of two years before making application for a re-issue under a statute which makes no provision with regard to delay was unreasonable, it would seem that a delay of more than four years before entering a disclaimer, after the patentee became aware that he had claimed more than he had invented or described, there being an express statutory provision against unreasonable delay, is clearly unreasonable; and this court therefore holds that the complainant's patent is void, because of unreasonable delay in entering his disclaimer. The bill will be dismissed, at the costs of the complainant.



## HOE et al. v. SCOTT.

(Circuit Court, D. New Jersey. January 24, 1895.)

## 1. PATENTS—FOLDING MACHINE—ANTICIPATION.

Patent No. 331,280, issued to R. Hoe & Co., for improvements in machines for folding paper and other materials, consisting in mechanism to produce a two-part folding operation in contradistinction to the one-part folding operation, is not anticipated by any prior invention.

## 2. SAME—INFRINGEMENT.

Claims 1, 2, 3, 8, 9, 17, and 29 of said patent are infringed by the folder of defendant, Scott, which in form is substantially like the folder of the patent, while in mode of operation and result the two machines are identical.

Suit by Robert Hoe and others against Walter Scott for infringement of patent.

M. B. Philipp and H. T. Munson, for complainants.

B. F. Lee, for defendant.

ACHESON, Circuit Judge. This suit is founded upon letters patent No. 331,280, granted on December 1, 1885, to R. Hoe & Co., assignees of Luther C. Crowell, the inventor, for improvements in machines for folding paper and other materials. The declared object of the invention "is to accomplish the longitudinal folding of fabrics on the run by means of internal guides and co-operating external turners, which may be rapidly made and quickly adjusted in working order without necessitating great accuracy of construction, nicety of adjustment, or any considerable expense." The invention consists in mechanism to produce "a two-part folding operation," in contradistinction to "the one-part folding operation" of prior devices, which were provided with an internal guide so founded as to afford turning edges converging to a point, which point determined the line of the longitudinal fold. These devices, the specification states, "may therefore be said to operate to change the direction of the travel of the sides of the moving material, crease or lay the line of its fold, lap the sides together, and cause the lapped sides to take the same direction of travel, all simultaneously." In order thus to accomplish the longitudinal folding at a high rate of speed, without breaking or wrinkling the material at or near the fold-forming point, especially when such material was of two or three plies, it was found necessary to construct the members of the folder with great nicety, and to adjust them in relation to each other with great accuracy, thus incurring expense and a loss of time. The specification says:

"Stated broadly, the invention may be said to consist in a longitudinal folder composed of an internal guide, external turners set a distance apart, and a fold-laying device, these parts being so arranged as to divide the folding operation into two parts. The first part consists in conforming the material by guiding or bending the sides of the web towards each other until the major part or portion of the sides (considered on a transverse line or width-wise) are parallel or substantially parallel, without being brought into contact. This causes the central part of the material (or that portion connecting

said sides at right angles to the line of their parallelism) to lie or be bent substantially at right angles to said sides, and it is the distending or bringing of this central portion into alignment with the said side portions, and at the same time bringing the side portions together, whereby the folding is completed, that constitutes the second part of the operation. In this second part of the operation the leading edge of the material is directed onward from the devices which perform the first part to the fold-laying device at the proper angles to ultimately lay the sides of the material together or bring them into folded contact."

The specification and illustrative drawings show an internal guide formed of two angular converging guiding surfaces or edges which do not meet, but terminate in proximity to external turners which are set a distance apart, and co-operate with the internal guide, whereby the major portions of the sides of the material are strained over the internal guide, and brought into parallel positions, but not in contact, and a fold-laying device to bring together the sides of the material and the central connecting portion into alignment with the side portions, and thus complete the folding. The specification also describes a supplementary invention, a fold-creasing edge, which, while not an essential part of the folding devices, may, it is said, aid the forming of the line of longitudinal folding. This creasing edge, it is stated, "will simply act to guide or bend outward the slack portion of the material wherever such slack is produced by the sides being brought into contact in passing from the external turners to the said fold-laying or secondary device."

The defendant is charged with the infringement of the following seven claims of the patent:

"(1) A longitudinal folder consisting of an internal guide, two external turners set a distance apart, and a fold-laying device, substantially as described.

"(2) In a longitudinal folder, the combination, with an internal guide, of two external turners set a distance apart, whereby the major portions of the sides of the material, considered widthwise, are brought into parallel positions but not into contact, substantially as described.

"(3) A longitudinal folder consisting of an internal guide having converging guiding edges or surfaces which do not meet, external turners set a distance apart, and a fold-laying device, substantially as described."

"(8) The combination, with external turners set a distance apart, of a fold-laying device and a fold-creasing device, substantially as described.

"(9) The combination, with an internal guide and external turners operating to support the major portions of the sides of the material, considered widthwise, in parallel positions, but not in contact, of a fold-laying device operating to bring said sides together, and a fold-creasing device for distending the central portion of the material and aiding the formation of the fold line, substantially as described."

"(17) A longitudinal folder consisting of the combination, with an internal guide composed of a sheet or plate that provides the converging guiding edges or surfaces, 21, 41, and a supporting body, 20, of external turners, 22, 44, set a distance apart, and a fold-laying device, substantially as described."

"(29) A longitudinal folder consisting of the combination, with an internal guide composed of a sheet or plate that provides the converging edges or surfaces, 21, 41, and a supporting body, 20, of external turners, 22, 44, and a fold-laying device and a fold creaser, substantially as described."

Two defenses are mainly relied on, namely, want of patentable novelty and noninfringement. The voluminous proofs bearing on these points have been attentively considered. A particular dis-

cussion of them all, however, will not be attempted, for to do this would expand this opinion unreasonably and without profit. I cannot do much more than state conclusions.

After a patient study of the earlier patents and prior devices, I am not able to discover that any of them embodies the two-part folding operation which is the distinguishing feature of the patent in suit. Take, for instance, the Thompson 1856 patent, upon which the defendant so much insists. The mode of operation there contemplated, it seems to me, is essentially different from that of the plaintiffs' patent. According to the plain description of Thompson's patent, the paper or other fabric is doubled and folded as it passes down over the forming block, E, and by means of that block. Thus it is said that the material to be folded passes from the roller upon which it is wound to the "forming block, E, over which it is doubled and folded so as to pass between the rollers, K and K', by which it is drawn down over the forming block, E, and delivered to the rollers, L and L', after which it may be wound, cut, or folded, as may be preferred." Without reading into the patent what it does not contain, it is impossible to attribute to the lower edges of the doors the function of external turners or guides. The specification of the patent ascribes no such office to the doors, and there is no warrant whatever for the assumption of the defendant's expert that they act as do the external turners of the plaintiffs' patent.

Nor am I able to adopt the views of the defendant's expert with respect to the Sandeman English patent of 1870. It is a circumstance of no moment that in Fig. 10 of that patent the rollers, D, D, do not appear to be set close together, when the text describes them to be "a pair of vertical nipping or pressing rollers, acting also as guys or guides." Neither is there any justification in this language for the opinion that these rollers merely act as guides, and do not press the fabric together forcibly or into actual forcible contact. To the contrary, the specification, after describing the movement of the cloth upward over the triangular inclined plane from its base to and over its apex at a, which, it is said, "forms the line of fold," states that "the two halves or folds meet together at the rollers, D, D, and the cloth passes between them in its doubled state." The folding operation here described and illustrated is not the two-part folding operation of the patent in suit. Neither does the mechanism shown by Figs. 11, 12, and 13 of Sandeman perform Crowell's two-part folding operation.

The defendant lays much stress upon the Scholfield patent of 1880, and certain machines made in substantial conformity therewith. Turning to that patent, however, we find that it shows an internal guide,—a "plicater," as it is styled,—having a sharp point or apex, at which point the material is brought into a folded condition. Immediately under the plicater is a pair of guides, D, D, described as forming a "narrow slot" just wide enough to receive the two plies of the material, and below the slot are traction rolls for drawing the folded web through the slot and downward. From the description of this mechanism and its mode of action contained in the specification, and also from the illustrative drawings, it is evident

that the sharp apex of the plicater is the fold-forming point of the material passing through the machine.

I do not deem it necessary to particularize further. If the instances referred to do not show anticipation, certainly the other patents and mechanisms here set up fail to do so. My judgment is that the prior patents and devices, whether considered singly or together, do not disclose or suggest the invention of the patent in suit. That the patent covers improvements patentably novel and useful is not only to be presumed from the grant, but is, I think, affirmatively established by clear proofs.

Is infringement shown? Beyond any controversy, in the defendant's machine we find in combination an internal guide having converging guiding edges, external turners set a distance apart, and a fold-laying device, these parts coacting to accomplish the longitudinal folding of paper and other fabrics on the run. Furthermore, the proofs establish that these coacting devices are so arranged as to divide the folding operation into two parts. It is true, indeed, that the defendant's machine shows some formal departures from the description and illustrations of the patent in suit. The most noticeable variation is in the shape of the internal guide or former. In the defendant's folder the superior face of the internal guide conforms more nearly to a plane triangle than does that of the illustrations of the patent. This face, however, when carefully examined, is found not to be a single triangle in one plane. The evidence is quite convincing that the plane of the face of the defendant's internal guide changes downwardly as the apex is approached, and the point or apex is rounded. It is satisfactorily shown that the fold line is not made at the point of the defendant's internal guide, but that the rounded point simply performs the function of the fold creaser of the patent in distending the central portion of the material, and thus aiding the fold-laying device. The change which the defendant has made in the shape of the internal guide is unsubstantial. Nor is it material that the defendant's external turners are slightly reduced in diameter near the lower end of the internal guide, and that they are set nearer to each other than the external turners shown by the Crowell drawings. The patent merely describes the external turner as "set a distance apart," without defining the distance. The defendant's external turners are an essential part of his machine, and they perform the same function as those of the plaintiffs', and in the same way. Under the proofs, it is clear that the defendant's folder in form is substantially like the folder of the patent in suit, while in mode of operation and in result the two machines are identical. The claims in question in their terms are broad enough to cover the defendant's apparatus, and nothing in the prior art requires such a narrowing of them by construction as would relieve the defendant. The charge of infringement of the several claims quoted above is, I think, fully sustained. *Winans v. Denmead*, 15 How. 330, 342; *Machine Co. v. Murphy*, 97 U. S. 120; *Hoyt v. Horne*, 145 U. S. 302, 308, 12 Sup. Ct. 922. Let a decree be drawn in favor of the plaintiffs.

## WICKES et al. v. LOCKWOOD et al.

(Circuit Court, D. Minnesota, Fourth Division. February 4, 1895.)

## 1. PATENTS—GANG-SAW MILLS—INFRINGEMENT.

The Wickes patent, No. 215,526, for an improvement in gang-saw mills, consisting in a peculiar construction of a frame in combination with other parts, *held* to be infringed by the device of defendant Lockwood.

## 2. TESTIMONY—PRESUMPTION.

The recollection of witnesses as to the details of a machine built 20 years before, unaccompanied by contemporaneous drawings or exhibits, *held* insufficient to overcome the presumption arising from the issuance of a patent.

Suit by Henry D. Wickes and others against J. E. Lockwood and others.

Offield, Towle & Linthicum, for complainants.

P. H. Gunckel (Robert H. Parkinson, of counsel), for defendants.

NELSON, District Judge. This suit is brought by complainants, manufacturers of sawmill machinery at East Saginaw, Mich., against defendants, carrying on the same business at Minneapolis, Minn., for an infringement of letters patent No. 215,526, issued to complainants February 18, 1879. The patent in question is for an improvement in gang-saw mills, and is as follows:

Henry D. Wickes and Edward N. Wickes, of East Saginaw, Mich.  
Improvement in Gang-Saw Mills.

Specification forming part of letters patent No. 215,526, dated February 18, 1879. Application filed December 4, 1878.

To All Whom it may Concern: Be it known that we, H. D. Wickes and E. N. Wickes, of East Saginaw, in the county of Saginaw, and state of Michigan, have invented an improvement in gang-saw mills, of which the following is a specification:

The nature of our invention relates to new and useful improvements in that class of sawmills known as gang mills"; and the invention consists in the peculiar construction of the frame, by means of which greater stability to the general structure is obtained, and which admits of securing the base of the frame upon timbers independent from those ordinarily employed for supporting the main pillow blocks and crank shaft, thereby destroying the connecting vibrations produced from the heavy labor upon the main shaft which is sure to follow where the gang frame, pillow block, and main shaft rest upon the same base. The invention also consists in the new construction and combination of parts necessary to these beneficial results, and as more fully hereinafter described.

In the drawings, Fig. 1 is a perspective view of our improved gang-saw mill. Fig. 2 is a front elevation of the same. In the accompanying drawings, which form a part of this specification, A, A represent the vertical cheeks between which the gang saws have their reciprocating movement in guides of the usual construction. These cheeks are provided with shoulders, a, which rest upon shoulders, b, b, of the base, and to which they are rigidly secured. The vertical sections, c, of the cheeks, to which the lower guides are attached, project downward below the point of intersection between the upper and lower parts of the frame. B, B form the lower part of the frame, their upper ends being rigidly secured to, and coincident with the shoulders upon the upper part of the frame; but these parts, B, B, are spread apart at their feet to give greater stability to the structure, and to avoid the necessity, as occurs in gang mills of ordinary construction, of being supported upon the same timbers which carry the pillow block, d, and main driving shaft, h. C, C, are the timbers upon which rests the improved gang-saw mill frame. D is the timber which

supports the pillow block and main shaft, which is subject to great vibrations, produced by the heavy labor required of the main shaft. In practice it is found that when the whole of the gang-saw mill frame is in vertical lines, one of the legs of said frame must rest upon the timbers, D. When so resting, the vibratory strain caused by the severe labor of the main shaft is communicated to the gang frame, to the serious detriment of its perfect and successful operation. By the construction herein described we are enabled to provide separate and independent foundations for the gang-saw frame and for the pillow block and shaft, so that the vibrations of the one will not affect the successful and perfect operations of the other. What we claim as our invention, and desire to secure by letters patent, is: The frame for gang-saw mills, described, consisting of the spreading base frames, B, B, having forked upper ends, terminating in bearing faces, b, b, and the parallel cheeks, A, A, provided with sections, C, carrying the lower guides, and projecting down between the forked ends of the base frames, said cheeks having shoulders, a, which rest upon and are secured to the bearing faces, b, b, constructed and arranged substantially as and for the purposes set forth.

Henry D. Wickes.  
Edward N. Wickes.

Defendants' machine, as appears by their model, is almost identical with that of complainants. In the Wickes mill the upper cheek pieces in which the sash runs are parallel, and the spreading of the legs commences at the union of the upper and lower parts, while in the Lockwood machine the spread of the legs is uniform from top to bottom, and the guides for the sash, instead of being of uniform thickness, as in the Wickes machine, are made slightly beveling, in order to correspond with the spread of the legs, and present a vertical face in which the sash may run. These changes, it is clear, are merely in form, the results produced being precisely the same in both cases.

To my mind, the sole question for determination is as to the validity of complainants' patent, and, if it can be sustained, then the defendants are infringers. To sustain their claim, complainants introduced the patent, and supplement it with evidence showing that from 1870 to 1877 they built the old-style gang-saw mills, and since that time they have built exclusively, and without change of form, the machines described in their patent, and have nearly 300 of them in use at this time. They also show that after the issuance of the patent, when other manufacturers commenced to make gang-saw mills embodying complainants' devices, on being notified of the claims of the patent, they, with the exception of these defendants, desisted from such manufacture.

Defendants attack the validity of the patent, and seek to show prior use or anticipation, but they place their main reliance on the use in April, 1876, of what is called the "Torrent-Farr Mill." If the building and use of this mill, and its form as shown in the sketches, had been clearly and satisfactorily proved, and if the evidence had been of a more convincing and reliable character, I am inclined to think that the claim of complainants would have been defeated thereby. But the testimony is not of that clear and positive nature which is necessary to overcome the issuance of the patent, with the presumptions attaching thereto. It is based largely on the remembrance of witnesses as to the form and construction of a machine built nearly 20 years ago, subject to the infirmities of recollection,

and to the liability of mistake. Testimony of this character, without the production of contemporaneous drawings or exhibits, is, from its very nature, unreliable, and open to grave doubt. For these reasons I do not think it can be permitted to outweigh the evidence of the patent itself. Again, the patents cited as anticipations, in my opinion, do not come within the rule. The patent in question, if it is not merely an aggregation of parts,—as to which there may well be some doubt,—is for a combination of old devices to secure a better result than heretofore obtained; and, in order to prove prior use or anticipation, there must be shown a device using all these co-operative parts, or their mechanical equivalents, in one machine. I nowhere find an anticipation of the combination described in complainants' patent. It is a significant fact that the defendant firm or its predecessors built the old-style machines from 1870 to 1885, making none with iron frames until 1888 or 1889, and these latter machines did not infringe complainants' patent; subsequently, that pattern was discarded, and the one which is the subject-matter of this suit adopted. I hold, therefore, that complainants' patent is valid, and that defendants have infringed the same. A decree will be granted in accordance with the prayer in the bill of complaint, and the case will be referred to a master for an accounting.

---

EDISON ELECTRIC LIGHT CO. et al. v. GOELET et al.

(Circuit Court, S. D. New York. February 10, 1894.)

**INJUNCTION—TRIVIAL VIOLATION—GOOD FAITH.**

A defendant will not be punished for violation of an injunction restraining the use of articles which infringe plaintiff's patent when he has made an honest effort to remove the offending articles from the premises where they were used, though, by an oversight, a few remain.

This was a suit by the Edison Electric Light Company and the General Electric Company against Robert Goelet, Robert Stafford, and others to restrain the infringement of a patent. An injunction having been granted, plaintiffs move to punish defendants for contempt in violating the same.

Eugene Lewis and Richard N. Dyer, for complainants.

James M. Gifford, for defendants.

LACOMBE, Circuit Judge. As to the lamps of the Sawyer-Man pattern, I do not think disobedience of the order is sufficiently made out. Defendants seem to have made an honest effort to remove the offending lamps, and if, through the oversight of their employes, a few were still left, that fact, though technically a disobedience, is so unsubstantial in extent that attachment ought not to issue.

As to the other lamps: The injunction forbade the use by defendants of "any incandescent lamps made in accordance with or embodying or containing the invention described and claimed in said letters patent, and particularly pointed out in claim 2 thereof; the combination of carbon filaments, with a receiver made entirely

of glass, and conductors passing through the glass, and from which receiver the air is exhausted." It also enjoined the use of "any incandescent electric lamps like those [theretofore] used \* \* \* in infringement of claim 2 of said letters patent." It is not disputed that the lamps complained of fall within the first of these two classes; and the use of the lamps since injunction was served is admitted. That being so, the complainants have sufficiently proved a violation of the injunction, unless defendants are able to show that, nevertheless, they have the right to use these lamps. They seek to justify under the principles of law laid down in *Adams v. Burke*, 17 Wall. 453, and *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879, contending that "the sale by a person who has the full right to make, sell, and use a patented [article] carries with it the right to the use of that [article] to the full extent to which it can be used in point of time." The difficulty with such defense in this case, however, is that it is not proved. There is no evidence that these particular lamps ever passed out from under the monopoly by reason of a sale of them by a person who has the right to sell and use anywhere. On the contrary, the defendants most carefully, and evidently of intention, refrain from telling even of whom they bought, and make no effort to show that their vendor had any right to sell.

As indicated upon the oral argument, defendants may have 10 days' further time in which to file additional affidavits tending to show a sale such as would take these lamps out of the monopoly. Failing that, complainants may take an order.

---

EDISON ELECTRIC LIGHT CO. et al. v. GOELET et al.

(Circuit Court, S. D. New York. March 5, 1894.)

PATENTS FOR INVENTIONS — RIGHT TO USE PATENTED ARTICLES BOUGHT FROM LICENSEES.

The E. Co. sold its patented electric lamps to three several companies, upon agreements by them to sell only to users of the lamps within certain limited territory. Each of such three companies sold lamps, without restriction, to defendants, who were outside the territory of all the companies. *Held*, following *Adams v. Burke*, 17 Wall. 453, and *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879, that defendants had the right to use the lamps, so sold to them, anywhere in the United States.

This was a suit by the Edison Electric Light Company and the General Electric Company against Robert Goelet, Robert Stafford, and others to restrain the infringement of a patent. An injunction having been granted, plaintiffs moved to punish defendants for contempt. Upon the first hearing, defendants were given leave, within 10 days, to submit affidavits showing from whom they purchased the devices complained of. 65 Fed. 612. Such affidavits having been filed, the motion is now renewed.

Dyer & Seely and Eugene H. Lewis, for complainants.  
Hobbs & Gifford, for defendants.

LACOMBE, Circuit Judge. The additional affidavits show that the lamps of the Edison pattern used by defendants have been



obtained by them by purchase from three sources: (1) McLeod, Ward & Co., dealers in electrical supplies in this city; (2) the Jaynes Electric Company, a copartnership in Buffalo, dealing in such supplies; (3) the F. P. Little Electric Construction & Supply Company, also in Buffalo.

1. The first-named firm bought the lamps from the Edison General Electric Company, and its successor, the General Electric Company, exclusive licensees to manufacture under the patent. McLeod, prior to such purchase, had signed an agreement binding his firm not to sell any of the lamps so bought in violation of the various obligations which existed between the company and its licensees, and further agreed to keep himself informed of such obligations. The lamps in question were bought from the Edison Company upon an order of the firm, stating that they were "for use above 70th street." They were sold to defendants by McLeod without restriction.

2. The Jaynes Electric Company bought the lamps it sold to defendants from the Buffalo General Electric Company. This corporation obtained them from the General Electric Company, under a contract which authorized it to sell such lamps only to users of lamps within the county of Erie, except Tonawanda. The Jaynes Company bought the lamps from the Buffalo Company without restrictions, and sold them to defendants in like manner.

3. The F. P. Little Company bought the lamps it sold to defendants from the General Electric Company through its Syracuse agent. It had previously signed an agreement similar to that executed by McLeod, but, in making the sale to the defendants, imposed no restrictions.

No doubt, the defendants were advised in a general way that the complainant the illuminating company claimed that it had the sole right to use, and sell for use, lamps of the patent within the city of New York; but there is no reason for discrediting their statements that, as to these particular lamps, they had no notice or knowledge of any restrictions placed upon those who sold them. Under these circumstances, I am of the opinion that under the principles laid down in *Adams v. Burke*, 17 Wall. 453, and *Hobbie v. Jennison*, 149 U. S. 355, 13 Sup. Ct. 879, the defendants have the right to use the lamps they bought anywhere in the United States. Concededly, they were made by the General Electric Company, the exclusive licensee under the patent, and were sold by it to persons to whom it had the right to sell. The last-cited case reiterates the proposition that the "sale of a patented article by an assignee within his territory carried the right to use it everywhere. \* \* \* Once lawfully made and sold, there was no restriction on the use to be implied, for the benefit of the patentee or his assignees or licensees." The dissentients in *Adams v. Burke*, and many circuit judges in subsequent decisions, clearly and forcibly pointed out the result of such a construction of the patent laws as would leave a patentee, who wishes to divide his rights territorially, dependent upon the good faith of those to whom he sells. But the supreme court has so held, and there is nothing for this court to do but to conform to

such decision. The patentee's remedy is against those who, after binding themselves to conform to his restrictions, have violated their agreements. He may protect himself either by selling his lamps only to persons on whose honesty and responsibility he can rely, or by requiring from them sufficient security that they will respond for any damages he may sustain by their failure to keep faith with him. The purchaser of lamps once sold by the patentee, or by the person whom he authorizes to make and sell them, cannot, under the decisions *supra*, be charged with knowledge of the restrictions upon resale, which are matter of agreement between the patentee or the licensed manufacturer and the first purchaser. Motion to punish for contempt is denied.

---

EDISON ELECTRIC LIGHT CO. et al. v. BLOOMINGDALE et al.

(Circuit Court, S. D. New York. December 27, 1894.)

Eaton & Lewis, for complainants.  
Cravath & Houston, for defendants.

LACOMBE, Circuit Judge. I am still of the opinion expressed on the original argument (65 Fed. 212), viz. that, by the stipulation in the Southern district suit, complainants have practically assented, for the time being, to the sale of Buckeye lamps there. When they shall have changed the situation there by getting rid of their stipulation, or by obtaining an injunction against the defendants in that suit, the situation here will be different. But, while it is as it is, defendants' use of lamps, which apparently they may buy in the Northern district, will not be enjoined. As the conclusion now arrived at is adverse to complainants, it is unnecessary to await the decision in the Bate Case. Ordered accordingly.

---

THOMSON-HOUSTON ELECTRIC CO. v. WESTERN ELECTRIC CO.

(Circuit Court, N. D. Illinois. January 14, 1895.)

PATENTS—REGULATOR FOR DYNAMO—ANTICIPATION.

Letters patent No. 238,315, issued March 1, 1881, to Elihu Thomson and Edwin J. Houston, for a current regulator for dynamo-electrical machines, consisting of a device whereby the brushes on the commutator are automatically shifted so as to change the output of the machine to meet the change of conditions presented by variations in the number of burning lamps dependent thereon, are void for want of invention, being anticipated by letters patent No. 223,659, issued January 20, 1880, to the same parties, for a device whereby the same result in a less degree was obtained by a similar device for the purpose of preventing the production of sparks, which injured the machine.

Suit by the Thomson-Houston Electric Company against the Western Electric Company for injunction and accounting.

Offield, Towle & Linthicum, for complainant.  
Barton & Brown, for defendant.

GROSSCUP, District Judge. This is a suit for infringement of patent No. 238,315, granted to Elihu Thomson and Edwin J. Houston March 1, 1881, for "current regulator for dynamo-electric machines." The object of the invention is to control the operation of a dynamo-electric machine in such manner that the constant and unvarying

strength of current shall be maintained in its circuit, notwithstanding changes of load occurring from variations in the number of lamps or other devices actuated by it. A dynamo machine is a device for converting mechanical energy into electricity. It has a revolving part, called the "armature," usually driven from a steam engine. At one end of the armature there is a projecting part, called the "commutator," standing out something like the hub of a wagon wheel. Upon two opposite sides of this commutator are placed two copper strips, bars, or bundles of thin copper leaves, called "commutator brushes," which press upon the surface of the commutator during its revolution. A wire joined to one of these brushes leads away from the machine through the lamps or motors in which the current is used, and back to and through the other brushes. Thus the electric current which is generated in the armature by its revolutions passes out through one brush and back through the other. Prior to the time of the taking out of complainant's patent, the development of electrical lighting made it desirable to so construct a device that one, two, or more lamps might be dropped out or added to the circuit at will. In the operation of a dynamo it is necessary that the volume of current generated should be closely adapted to the work done. The problem was to change the output of the machine to meet the change of conditions presented by variations in the number of lamps burning. This could be done either by varying the speed of the machine or interposing for each lamp extinguished a resistance which would consume the same amount of energy, or by any device that, notwithstanding the variations of load, would keep the volume of the current sustained. The device described in the patent accomplishes this by means of the mechanical elements described therein. It was known by the patentees that by shifting the position of the brushes on the commutator, the volume of the current would be increased or diminished, and that this law of electrical mechanism was constant. For instance, if, after shifting the brushes to the position of least spark for eight lamps, a lamp should be cut off, the moving of the brushes forward a certain distance would so change the output of the machine that it would be adapted to the running of seven lamps; and a still further movement forward would adapt it to six, five, and so on; and that by a like shifting of the brushes backward a new load could be imposed without changing the apparent energy or varying the speed of the machine. The object of the complainant's patent was to obtain the advantage of this effect in electrical mechanism through some device that would move the brushes automatically, and upon the impulse of the condition that made the movement necessary. This was accomplished by means of a yoke, on which the brushes were rocked backward and forward, and which obtained its motion through the interposition in the main circuit of an electro-magnet, consisting of a core of soft iron, wound with insulated wire, which, becoming magnetic, more or less, according to the strength of the current, attracted an armature, supported upon a lever, at the other end of which was a spring antagonizing the attraction of the magnet. Thus the increase or diminution of

the current decided whether the attraction of the electro-magnet or the resistance of the spring was the stronger force, and in accordance therewith rocked the movable armature upwards and downwards, and by means of connecting devices likewise rocked the yoke to which the brushes were attached backward and forward. The intermediate motor device is not a part of the invention claimed, and therefore may be dropped from view.

The claims of the patentees are for a combination, and are expressed in the following terms:

"(1) In a current regulator for a dynamo-electric machine, the combination of a device responding to changes in the main or generated current, a shifting commutator for said machine, and mechanism controlled by said responsive device to shift the commutator to those positions where the current taken up by said commutator shall be constant. (2) In a current regulator for a dynamo-electric machine, an electro-magnetic device, acted upon by variations in the main or generated current, an adjustable or shifting commutator for the machine, and mechanism controlled by said electro-magnetic device to adjust the commutator to those positions where the main or generated current taken up by said commutator shall be constant."

Through an inadvertence of the drawings, at variance in that respect with the written description in the patent, the complainant's device, as drawn, is inoperative. But, this corrected, and the device in some other respects slightly modified, the so-called invention is both practical and highly valuable.

The principal defense is that, in view of the prior state of the art, and especially of the invention patented by Thomson & Houston, January 20, 1880, No. 223,659, this so-called invention has been anticipated, and the patent, therefore, is invalid. Much learning on this question by counsel for both sides, and by the experts called, has been put at the disposal of the court, and many questions relating to the laws of electricity, which are in their very nature, in the present state of the art, insolvable by one not an expert, are raised. I have availed myself, as closely as I could, of the excursions of counsel into these abstruse fields, but have come back from them, I confess, more bewildered than enlightened. So far as I have been able to ascertain, all knowledge of electricity is, so far, purely empirical, and mere speculations, therefore, however acute and plausible, as to the ways and methods of this force, are likely to be erroneous, and therefore valueless. In the view of the case to which my judgment has come, it is unnecessary to enter these regions of speculation, or to attempt to decide between the respective contentions so earnestly put forth and learnedly maintained.

Patent 223,659 discloses a device almost identical with that of the patent in dispute. As stated already, the commutator is made up of a number of subdivisions called "segments," which are electrically insulated from each other. In the revolutions of the commutator each of these segments comes into contact first with one brush, then with the other; and, as the contact is broken by the passing of the segment away from the brush, there is a tendency to form a spark between the tips of the brush and the edge of the leaving segment. When such sparking is violent, or repeated, it eats away the metal surfaces between which it occurs, and is, in every respect, disadvantageous. Whatever may be the cause of the sparking, it

was then discovered or known by the patentees that a proper shifting of the brushes upon the commutator would bring about a condition of minimum sparking. But the position of the brushes upon the commutator to prevent sparking was not necessarily uniform. It depended upon the speed of the revolutions, which, in turn, was dependent upon the uniformity of power, not so easily obtainable then as now. It depended also upon the accidental or purposed introduction or withdrawal of resistance from the circuit. It is apparent that a shifting by hand to meet these varying conditions would be both cumbersome and unsatisfactory, and the invention subsequently patented as 223,659 was to meet these electrical difficulties. The object here, as in the subsequent patent in suit, was to obtain a device that would move the brushes backward and forward responsively to the electrical condition that such movements were intended to meet. For this purpose the patentees employed a mechanical device in every substantial respect like that described in the patent in suit, except that the electromagnet was put in the short circuit beginning with the forward member of one of the brushes, and ending in the main circuit at the rear of the other member of the brush, instead of having been put in the main circuit, as in the patent in suit. It may be admitted that the anti-sparking device is, in some respects, different from the one in suit. The question is whether the difference is one of principle and conception, or only such a difference in use as leaves the uses nevertheless analogous. The complainant's anti-sparking patent revealed to the public a device by which the brush on the commutator could be automatically changed forward and backward responsively to a change in the current of electricity. The device, it may be admitted, was only used to prevent sparking, and was only acted upon by a small portion of the current; but it disclosed clearly and for all purposes a mechanism that would rock the brushes responsively to changes in the current, irrespective of whether such current were the main or only accessory ones. The problem sought to be solved by the patent in suit was a somewhat different one in its ultimate ends, but the object of both patents was reached by the application of any principle and the use of any device that would automatically maintain constancy of current, notwithstanding changes of motive power or of resistance. The fact that one may be intended to prevent destructive effects upon the machine itself, and the other to adapt the machine to the circumstances of changing resistance, will not make both devices patentable, if they employ substantially the same principles and the same mechanism. It seems clear to me that the real immediate use intended by both of these patents was to automatically equalize the volume of the current; the one in the less, and the other, it is true, in a much greater, degree. The immediate objects in view were thus analogous, and the ultimate uses into which they diverged do not make them less so.

Now, if the uses were analogous, and the principles and devices employed were somewhat different, the sole question remains whether an electrical mechanic, having the knowledge of the art that the public possessed when the so-called invention in suit was conceived,

could, without invention, have adapted the anti-sparking mechanism to the analogous uses of the patent in suit. It must be remembered that it was then well known to electricians that the shifting of the brushes forward and backward upon the commutator increased and diminished the volume of the current, and thus equalized it against the tendencies of a changed resistance. This is what the anti-sparking invention accomplished automatically within narrow limits. It is what the so-called invention in suit accomplished automatically through a wider scope. To an electrical mechanic, bent upon devising a remedy for the inconstancy of the current caused by the putting in and taking out of the lamps, and possessed of the knowledge that a shifting of the brushes on the commutator would accomplish this, and that such shifting, within very narrow limits at least, could be accomplished automatically by the anti-sparking invention, the sole problem was presented whether, by a like device, an automatic shifting of the brushes through a wider scope, and adapted to the whole current, could be effectuated. The mechanical idea and conception, and the principle on which it was based, were all before him. There was required simply experimentation to determine its adaptability to the new purpose. Doubtless such experimentation was difficult and delicate, and called into exercise a multitude of different adjustments of the brushes. But it was all done in the light and along the lines of the earlier device and of electrical principles well known to the public. It was, in my mind, adjustment purely, and not a new conception of either a principle of electricity or a mechanism to carry it out. If there is any mistake in this judgment, it is, I think, in putting a higher estimate upon mechanical skill in electrical fields than is applied to other fields. But I do not see how this can or ought to be avoided. It necessarily requires high skill to be an electrical mechanic at all. Adjustments and adaptations are there every day made use of. To give to each of these the dignity and consequence of inventions would tie up permanently this whole useful field to monopoly. No new distinct conception or discovery ought practically to go unrewarded. But it certainly would, if its readaptations, by experiment or adjustment, to the thousand uses the field of electricity discloses, were to be regarded as patentable improvements.

I differ from Judge COLT in this case with reluctance, for I defer to his superior experience and wisdom in the patent field; but I cannot follow him in this case without violating my own sense of judicial responsibility. The bill will be dismissed.

---

HEATON-PENINSULAR BUTTON-FASTENER CO. v. EUREKA  
SPECIALTY CO. et al.

(Circuit Court, W. D. Michigan, S. D. January 22, 1895.)

PATENTED MACHINES—SALE—RESTRICTION IN USE — PUBLIC POLICY — INJUNCTION.

Though a patentee sells button fastening machines made in accordance with his patent, with a stipulation that in them shall be used, for the purpose of fastenings, only the staples manufactured by patentee, but not in

themselves patented, one who manufactures and sells staples to the purchasers of the machines to be used therein will not be enjoined as a contributory infringer, the restriction on the use of the machines being against public policy.

Suit by the Heaton-Peninsular Button-Fastener Company against the Eureka Specialty Company and others.

Sweet & Perkins (Lange & Roberts, of counsel), for complainant.  
Taggart, Knappen & Denison, for defendants.

SEVERENS, District Judge. The bill is filed to restrain the alleged infringement of rights claimed to be possessed by the complainant under certain patents issued for inventions in button-fastening machines. The pith of the allegations is that the complainants, being the owners of said patents, do not sell the machines manufactured under them, outright, but with a condition, and that they attach to each machine, when they sell it, a conspicuous plate or tag, on which there is expressed a restriction to the effect that the machine was sold and purchased to use only the staples employed for fastening made by the owner of the patent, and that every user of the machine has full notice of this restriction; that the defendants, notwithstanding this, and with knowledge of these facts, manufacture staples adapted only for use in the machines so sold by the complainants, and persuade the users of the machines to buy and use them in violation of the above-mentioned restriction. To this bill the defendants have demurred. The two principal objections to the bill which have been argued, and to which this opinion will be limited, are (1) that as the defendants are not engaged in the business in which the machines are employed, and are only concerned therewith in selling to those who are so employed a nonpatented article,—an article which constitutes no part of the patented thing,—they are not accountable to the complainant; (2) that the restriction which the complainant puts upon the uses of these machines, whereby a monopoly in an unpatented article is secured to the complainant, is contrary to public policy, and that a court of equity will not enforce it.

In support of the first objection, it is urged that the cases cited by the complainant to show that parties held guilty of contributory infringement should be restrained were cases in which some part of a patented article was sold to another, with intent that it should be combined with other elements to make up the infringing article. I am not clear, however, that this distinction can be maintained upon the allegations of this bill, which are very broad and emphatic in asserting, not merely that the defendants make and sell the staples, but that they actively persuade the users of the machines to violate the supposed rights secured to the complainant by the patent, and the restriction in the sale of its machines. It would rather seem that, if the complainant has such rights as it asserts, the defendants would, upon such facts, be tortfeasors, and that equity would restrain them, in the circumstances alleged.

But, upon the second ground, I think the demurrer should be sus-

tained. The question involved is a novel one, and depends upon considerations of a fundamental nature. A very able and ingenious argument has been submitted to the court to vindicate the general proposition that a patentee may deal with his patent as he likes, and that the right is absolute. These three steps are taken by counsel in their argument: (1) A patentee has an exclusive right in his patented invention, and may arbitrarily control its manufacture, sale, and use in any conceivable manner. (2) In the case at bar, the users of Peninsular machines infringe complainant's patent rights when they use the patented property outside of the bounds of the authorized use. (3) The defendants, by furnishing to those users the means whereby their infringement is committed, with intent that it shall be committed, are liable as contributory infringers. But I am persuaded that the patentee's privilege has its limitations, in the rights and interests of the public, and that it is an abuse of his privilege to so shape his dealings with his patent as to secure a monopoly upon an unpatented article. It is hard to foresee to what extent such schemes might be carried, if patents can practically be broadened so as to gather in a multitude of subjects now and always hitherto free from monopoly. The perversion is complete in the instance of the present case. The complainant claims in its bill that it makes nothing in the sale of its machines, and that the entire profits of its business are made in the sale of staples. Manifestly, such a result is wholly inconsistent with the spirit and object of the patent laws, and would constitute an excrescence thereon. It is doubtful, also, whether the restriction which the complainant puts upon its customers is enforceable upon general principles. No price is fixed at which it will supply the staples. That may be arbitrarily determined afterwards by the seller, or he may choose not to sell at all. The validity of such collateral stipulations introduced into a contract of sale of rights secured by patents is discussed, both upon the grounds of public policy, and of the uncertainty of the elements of the stipulation, in the case of *Manufacturing Co. v. Gormully*, 144 U. S. 224, 12 Sup. Ct. 632; and, although the particulars of that case are not precisely analogous to the facts here, the principles there adverted to have application here, and seem to support the views I have expressed. If the staples were themselves the subject of a valid patent owned by the complainant, the case might be different, as was pointed out in the case of *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627. But they are not. They are no part of the machine, and, like the paper in the case last cited, are used up by their first employment. But it is argued that the complainant, having an absolute property right under its patent, might altogether refrain from putting its machines upon the market, and in that case neither the defendants nor the general public would have any interest in the making of such staples, for they would be of no use; and judicial utterances are cited to show that the patentee may, if he pleases, withhold his patent from public use during the whole period for which his monopoly is granted. I greatly doubt the correctness of that proposition, as thus broadly stated. It seems to me that such a course



would defeat the just expectation of the public, and would not be consistent with the implications of his grant. The expectation is that he will promptly disclose the nature of his invention, and accord to the public, on reasonable terms, the use of it, and not that others should be shut out of that field for the period of 17 years, and the public be debarred from the benefits of like inventions during that whole period. Nor did congress intend any such result, depending probably upon the supposed interest of the patentee in putting his invention to profitable uses. It may be that the technical right claimed exists, in the absence of any specific provision for compelling the patentee to do what is expected from him, or forfeit the grant, and that Judge Blodgett was wrong when he said in *Hoe v. Knap*, 27 Fed. 204, 212, that, "under a patent which gives a patentee a monopoly, he is bound either to use the patent himself, or allow others to use it on reasonable or equitable terms," if by that he meant to state it as an absolutely binding obligation, which I doubt; but I think a court of equity would be slow in lending its aid to such a course, and would only do so in a clear case, and where the right asserted is not clouded with other objections, and perhaps that is all Judge Blodgett really intended to say. In order to justify the refusal of a court of equity to award an injunction, it is not necessary to deny that a strictly legal right exists. Said Mr. Justice Brown, in delivering the opinion of the court in *Manufacturing Co. v. Gormully*, above cited:

"From time immemorial, it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive, or iniquitous contracts; and to turn the party claiming the benefit over to a court of law. This distinction was recognized by this court in *Cathcart v. Robinson*, 5 Pet. 264, 276, wherein Chief Justice Marshall says: "The difference between that degree of unfairness which will induce a court of equity to interfere actively, by setting aside a contract, and that which will induce a court to withhold its aid, is well settled. 10 Ves. 292; 2 Cox, Ch. 77. It is said that the plaintiff must come into court with clean hands, and that a defendant may resist a bill for specific performance by showing that under the circumstances the plaintiff is not entitled to the relief he asks. Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid."

A bill for an injunction, since it invokes the discretion of the court, is subject to the same objections. 2 Story, Eq. Jur. § 959a. The demurrer will be sustained, and the bill dismissed.

---

#### THE ADELINA v. THE GULF OF TARANTO.

(District Court, E. D. Pennsylvania. January 18, 1895.)

1. COLLISION—IN DOCK—NEGLIGENCE.

A steamer is at fault in entering a dock already occupied by a vessel, the dock being so small that at low water the steamer, being on the ground, careens against and crushes the vessel.

2. SAME.

The fact that the vessel already in the dock changed her position, moving back instead of forward, did not make her liable for the injury, it

being a matter of conjecture whether her change of position placed her in greater peril, or whether she would have improved her situation by moving forward.

3. SAME—ADVICE OF HARBOR MASTER.

The fact that the harbor master advised the steamer to enter the dock will not excuse it.

Libel by the Adelina against the Gulf of Taranto.

Henry R. Edmunds, for the Adelina.

N. Dubois Miller and J. Rodman Paul, for the Gulf of Taranto.

BUTLER, District Judge. The libel charges that on the 2d day of August, 1893, the bark Adelina arrived at the port of Philadelphia from the port of Rio Janeiro, Brazil, in ballast, and proceeded to pier 40 South Wharves, Delaware river. That the vessel commenced to discharge her ballast on August 3, 1893, and while engaged in so discharging the British steamship Gulf of Taranto arrived from Hamburg and docked on the south side of pier 39, alongside libelant. That before the steamship was docked those in charge of her were notified that there was not room enough in the dock for both vessels to lie together in safety; that at low water the steamship would damage the bark. That notwithstanding this warning those in charge of the steamship persisted in forcing her into the dock, where she subsequently, at low water, took the ground and careened over, striking the bark Adelina and forcing her against the side of the pier where she was lying; that by reason thereof the bark was forced over and crushed against the pier, where she was held between the steamship and pier, and hung out of the water until the tide rose, when the bark was taken to a place of safety, and it was found that both sides of the bark were crushed in, her planking and timbers split, broken and started, and that she suffered damages in the sum of \$5,000 as near as this libelant can estimate.

The answer denies the fault thus imputed, says the respondent was safely and properly docked; that although the bark declined to move forward as she was requested to do, near the head of the dock, there was still ample space as the vessels lay, but that later in the evening the bark moved back 20 or 30 feet where there was less room; that subsequently, at the bark's request the steamer put out a fender, but that owing to the change made in the bark's position, the vessels pressed together as the tide fell, and that both were consequently injured—the steamer to the extent of \$2,500, for the recovery of which she has libeled the bark.

The testimony presents the following questions: (1) Was the steamer at fault in entering the dock? (2) Was the bark at fault in moving back? (3) Was the steamer at fault in failing to change her position after the bark moved back?

On the first hearing I was inclined to believe that the second and third questions should be answered affirmatively, and both vessels consequently be condemned. The first I was inclined to think should receive a negative answer. It was deemed wise, however, to consult assessors, and Messrs. Barrett & Call were selected and interrogated on the subject. Their answers, as well as the interrogatories pro-

pounded, are on file. After reading the answers it was deemed proper to submit the assessors to examination by counsel. They were so examined, and the case again heard.

Their answers and testimony shed new light on the case; and have modified my original impressions. They are intelligent and experienced masters of vessels, and of course entirely impartial. They inspected the dock, and on measuring the bark found it to be wider than was before supposed.

I am now convinced that the first question should be answered affirmatively, and that the second and third should not. I believe the steamer was wrong in entering the dock; that the room was insufficient to allow the two vessels to lie there with safety at low tide. Of course it is possible the bark might have improved her situation after the steamer entered by crowding forward; but this is mere conjecture. The witnesses disagree about it, and the truth cannot be ascertained. In my judgment no prudent and intelligent master familiar with the dock, knowing the depth of water at low tide, would have taken the steamer in. When in she was entirely unmanageable; aground in front, her stern far out in the stream and swept by the tide, she was helpless. Resting substantially against the bark, when entered, as the water fell she would necessarily press over and injure her.

It is not necessary to consider the powers of the harbor master, or his assistant who is said to have advised the entry. He certainly could not authorize the steamer to crowd in where the room was insufficient, and relieve her from the consequences of injuring the bark.

The latter did not improve her chances of escape, apparently, by moving back; indeed she seems to have diminished them. But this too is conjecture: The truth cannot be known. An intelligent master present at the time, could form a more reliable judgment than can be formed from the conflicting testimony taken. The officers of the bark were seeking safety; and looking at the situation as presented to their view they believed that prudence required the movement they made. The fact that the bark was soon after jammed and immovable, seems to indicate that their judgment was at fault, but, as before suggested, this indication may be misleading; the tide was falling and other circumstances may have intervened to contribute to the disappointment they encountered. If imperiled by the steamer's improper entry no more was required of the bark than the exercise of such skill and judgment as should be exercised under the circumstances, to avoid the danger threatened. It certainly would not be safe to hold that she did not exercise such care and skill.

The libel is sustained; and the cross libel filed by the steamer is dismissed.

## UNION SWITCH &amp; SIGNAL CO. et al. v. HALL SIGNAL CO. et al.

(Circuit Court, S. D. New York. January 23, 1895.)

**CIRCUIT COURTS—JURISDICTION—PATENT CASES—NONRESIDENT DEFENDANTS.**

The provision of the acts of March 3, 1887, and August 13, 1888, that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, applies to suits to restrain the infringement of patents brought against parties who are not allens or corporations organized outside the United States. In *re Hohorst*, 14 Sup. Ct. 221, 150 U. S. 653, distinguished.

This was a suit to restrain the infringement of a patent. Defendants, by demurrer and plea, raised the objection that the court had no jurisdiction.

Cravath & Houston, for complainants.

Witter & Kenyon, for defendants.

TOWNSEND, District Judge. Counsel agree that the decision of the single question presented by demurrer and plea to this bill depends upon whether certain statements in the opinion of the supreme court of the United States in *Re Hohorst*, 150 U. S. 653, 14 Sup. Ct. 221, are controlling upon this court in this case. The suit is for infringement of a patent. The defendants claim that the circuit court for the Southern district of New York has no jurisdiction, because they are inhabitants of another state, and are not inhabitants of the state or district within which the suit is brought. The act of March 3, 1887 (chapter 373), as amended by that of August 13, 1888 (chapter 866), vests in the circuit and district courts of the United States jurisdiction over certain classes of controversies, and further provides that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." By a decided preponderance of authority in the circuit courts, this act and the preceding ones of a like character have been applied to suits for infringement of patents against nonresident individuals and corporations. *St. Louis, V. & T. R. Co. v. Terre Haute & I. R. Co.*, 33 Fed. 385; *Fales v. Railway Co.*, 32 Fed. 673; *Miller-Magee Co. v. Carpenter*, 34 Fed. 433; *Gormully & Jeffrey Manuf'g Co. v. Pope Manuf'g Co.*, Id. 818; *Preston v. Manufacturing Co.*, 36 Fed. 721; *Denton v. International Co.*, Id. 1; *Connor v. Railroad Co.*, Id. 273; *Jessup v. Railroad Co.*, Id. 735; *McBride v. Plow Co.*, 40 Fed. 162; *Henning v. Telegraph Co.*, 43 Fed. 131; *Reinstadler v. Reeves*, 33 Fed. 308; *Illingworth v. Atha*, 42 Fed. 141.

The precise question involved herein was presented by demurrer in this circuit in *Halstead v. Manning, Bowman & Co.*, 34 Fed. 565, and the bill was dismissed by Judge Wallace, on the ground that this court had no jurisdiction over the defendant nonresident corporation. In *Filli v. Railroad Co.*, 37 Fed. 65, Judge Lacombe set aside a service of summons on a nonresident defendant, on the same ground.

It was further shown by counsel for defendants that the construction of said provision adopted in this circuit, and generally in other

v.65F.no.7—40

circuits, had been repeatedly assumed by the supreme court, and directly applied to suits for infringement of patents, in the following cases: *Chaffee v. Hayward*, 20 How. 208; *Butterworth v. Hill*, 114 U. S. 128, 5 Sup. Ct. 796.

In *Re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587, the supreme court recognizes the substantial identity of the earlier and the existing statutes, so far as this forum clause is concerned.

In *Re Hohorst*, *supra*, suit was brought against a foreign corporation for infringement of a patent. The subpoena was served upon the general agent of the company at its principal place of business at the city of New York. The motion of the defendant to dismiss the bill, because of lack of jurisdiction, was granted, and the case came before the supreme court on an application for a writ of mandamus to the judge of the circuit court to take jurisdiction of the suit, as against the corporation. The supreme court granted the writ. Mr. Justice Gray, delivering the opinion of the court, said:

"Moreover, the present suit is for an infringement of a patent for an invention, the jurisdiction of the national courts over which depends upon the subject-matter, and not upon the parties; and, by statutes in force at the time of the passage of the acts of 1887 and 1888, the courts of the nation had original jurisdiction, 'exclusive of the courts of the several states,' of all cases arising under the patent right or copyright laws of the United States, without regard to the amount or value in dispute. Rev. St. § 629, cl. 9; Id. § 711, cl. 5. The section now in question, at the outset, speaks only of so much of the civil jurisdiction of the circuit courts of the United States as is 'concurrent with the courts of the several states,' and as concerns cases in which the matter in dispute exceeds \$2,000 in amount or value. The grant to the circuit courts of the United States, in this section, of jurisdiction over a class of cases described generally as 'arising under the constitution and laws of the United States,' does not affect the jurisdiction granted by earlier statutes to any court of the United States over specified cases of that class. If the clause of this section defining the district in which suit shall be brought is applicable to patent cases, the clause limiting the jurisdiction to matters of a certain amount or value must be held to be equally applicable, with the result that no court of the country, national or state, would have jurisdiction of patent suits involving a less amount or value. It is impossible to adopt a construction which necessarily leads to such a result. *U. S. v. Mooney*, 116 U. S. 104, 107, 6 Sup. Ct. 304; *Miller-Magee Co. v. Carpenter*, 34 Fed. 433. \* \* \* Upon deliberate advisement, and for the reasons above stated, we are of opinion that the provisions of the existing statute which prohibit suit to be brought against any person 'in any other district than that whereof he is an inhabitant' is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and that, consequently, such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant. In *re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587."

In the able and exhaustive briefs and arguments of counsel for defendants, it was strenuously contended that the decision of the court in *Re Hohorst* proceeded upon the ground that as the defendant therein was an alien, not an inhabitant of any district within the United States, it was necessary to so construe the above provision as not to embrace aliens. Upon this point the supreme court says:

"The intention of congress is manifest, at least as to cases of which the courts of the several states have concurrent jurisdiction, and which involve a certain amount or value, to vest in the circuit courts of the United States full and effectual jurisdiction, as contemplated by the constitution, over each

of the classes of controversies above mentioned; and (what particularly concerns the case at bar) congress, following the very words of the constitution, has here vested in those courts jurisdiction of controversies 'between citizens of a state and foreign states, citizens, or subjects.' The question then arises how far the jurisdiction thus conferred over this last class of controversies, and especially over a suit by a citizen of a state against a foreign citizen or subject, is affected by the subsequent provisions of the same section, by which, after other regulations of the jurisdiction of the circuit courts and district courts of the United States, it is enacted that 'no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' Of these two provisions the latter relates only to suits between citizens of different states of the Union, and is therefore manifestly inapplicable to a suit brought by a citizen of one of these states against an alien. And the former of the two provisions cannot reasonably be construed to apply to such a suit. The words of that provision, as it now stands upon the statute book, are that 'no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant.' These words evidently look to those persons, and those persons only, who are inhabitants of some district within the United States. Their object is to distribute among the particular districts the general jurisdiction fully and clearly granted in the earlier part of the same section; and not to wholly annul or defeat that jurisdiction over any case comprehended in the grant. To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole."

A careful consideration of these questions has led me to alter the view originally taken as to the effect of the Hohorst decision, and to conclude that the supreme court of the United States must have intended that what is therein said as to suits for infringement of patents should be limited to aliens or foreign corporations. The reasons for this conclusion are the following: The defendant in the Hohorst Case was an alien corporation. The only question presented in the briefs and arguments of counsel was as to the application of the acts of 1887 and 1888 to suits against aliens. The reasoning of the opinion is limited to a consideration of the effect of said laws upon such suits. In *Railway Co. v. Gonzales*, 151 U. S. 503, 14 Sup. Ct. 401, the court says:

"Both the decision and reasoning in the Hohorst Case were carefully limited to a suit brought by a citizen against an alien."

Furthermore, in the exhaustive opinion of Mr. Justice Gray in *Shaw v. Mining Co.*, 145 U. S. 444, 453, 12 Sup. Ct. 935, he says:

"This case does not present the question what may be the rule in suits against an alien or a foreign corporation, which may be governed by different considerations. Nor does it affect cases in admiralty, for those have been adjudged not to be within the scope of the statute. In *re Louisville Underwriters*, 134 U. S. 488, 10 Sup. Ct. 587. All that is now decided is that, under the existing act of congress, a corporation, incorporated in one state only, cannot be compelled to answer, in a circuit court of the United States held in another state in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different state."

It would seem that in this opinion the court had in mind the distinction which might be drawn between the application of the rule

in suits against a foreign corporation, and a corporation incorporated in one state only.

See, also, *Machine Co. v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44; *Railway Co. v. Gonzales*, supra.

In these circumstances, I shall follow the rule adopted in this and other circuits, and by the supreme court, in suits against nonresidents not aliens. This conclusion renders it unnecessary to consider the further arguments, which were forcibly suggested, that a construction of said law which would exclude patent causes would be an unnatural one, in view of the general scope and phraseology of the act; that it would impose hardship and promote injustice by permitting nonresident parties to be sued wherever they happened to be found; and that it would lead to an unequal distribution of the business of the courts in the various circuits. The demurrer and plea are sustained.

---

#### PHENIX INS. CO. v. CHARLESTON BRIDGE CO.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 97.

##### 1. REMOVAL OF CAUSES—TIME TO ANSWER.

An action was commenced in a state court, and the defendant's time to answer was extended, by order of that court, to a day certain. Before such day, the defendant removed the cause to the federal court, the condition of the removal bond requiring the transcript of the record to be filed on the first day of the next session of that court, which was after the date fixed for answering. On the opening of such session, the federal court ordered the defendant to answer forthwith, and set the case down for trial during that term. *Held*, that such procedure was proper, since the defendant's time to answer had not been extended for a certain number of days, part of which had not expired at the time of removal, but it had been required to answer before a fixed day, which had passed; it appearing also that defendant had suffered no hardship.

##### 2. INSURANCE—AGAINST DAMAGE BY WIND—PROXIMATE CAUSE OF LOSS.

The C. Bridge Co. held a policy of insurance on its bridge, insuring it against loss or damage by windstorms, cyclones, or tornadoes, but expressly excluding loss or damage by high water, floods, or freshets. In an action on the policy, it was shown that the bridge was broken down by vessels which were blown against it by a violent wind, which also caused a backing up of the water and an unusually high tide, but no evidence was offered showing any damage by water which could be discriminated from the damage by wind. The court instructed the jury that if the dominating, originating cause of the injury, but for which it would not have happened, was high water, flood, or freshet, the policy did not cover the loss, but, if such cause was a cyclone, tornado, or windstorm, the policy did cover the loss. *Held*, that such instruction was correct, and the court was not bound to qualify it by any instructions relative to damage by water, in the absence of evidence as to water damage which could be distinguished from wind damage.

In Error to the Circuit Court of the United States for the District of South Carolina.

This was an action by the Charleston Bridge Company against the Phenix Insurance Company upon a policy of insurance. The action was brought in a court of the state of South Carolina, and

was removed by the defendant to the federal court. A motion by plaintiff to remand was denied (60 Fed. 929), and, upon the trial, judgment was given for the plaintiff. Defendant brings error.

This action at law was commenced in the court of common pleas for Charleston county, S. C., on January 27, 1894, by service of summons and complaint upon the defendant's agents. By the state law (Code S. C. p. 51, § 164) the defendant was required to answer within 20 days; that is to say, before the 16th of February. The defendant applied to have the time enlarged, and, as authorized by the Code (section 193), the judge of the court, on the 5th of February, extended the time within which the defendant was required to answer until the 10th day of March, 1894. On the 26th of February the defendant filed its petition for removal to the circuit court of the United States for the district of South Carolina, with the bond required by law. On the 17th of March the petition and bond were approved by the judge of the state court, and an order removing the case was entered. The condition of the bond required the defendant to file a copy of the record in the circuit court on the 1st day of its next session, which was the 2d day of April. The plaintiff, in order to enable itself to move to remand the case, filed a transcript of the record in the circuit court on the 23d of March. Its motion to remand was denied, and thereupon, on the 2d of April, the defendant filed a copy of the record. The circuit judge thereupon required the defendant to plead forthwith, and ordered that the case be put upon the trial calendar to be called for trial at the then pending term. On the 7th of April the defendant filed its answer, and the case was placed on the trial calendar. The defendant excepted to the order compelling it to plead forthwith, claiming that it was entitled to as many days in which to plead as were unexpired of the time allowed it by the judge of the state court at the date of filing its petition for removal. It also excepted to the order placing the case upon the trial calendar for that term, for the reason that, by section 276 of the Code of South Carolina, in all issues to be tried by the court or jury the plaintiff is required to file his complaint and summons in the clerk's office at least 14 days before the term. The circuit judge (Simonton), in refusing a motion to modify the order requiring the defendant to plead forthwith, and placing the case on the trial calendar, stated his reasons as follows: "This is a motion to modify the order of 5th inst., requiring the defendants to file their answers forthwith, and directing the case to be called for trial at this term. The defendants rely on the case of *Pelzer Manuf'g Co. v. St. Paul Fire & Marine Ins. Co.* (decided in this court) 40 Fed. 186. The rule is this: When, under the Code of Civil Procedure, a defendant is served with a summons requiring him to answer or demur within twenty days from the service thereof, and pending the twenty days a petition and bond in a removal case are filed in the state court, when the record comes here it is examined, and in computing the twenty days none of the days are counted during the suspension of the jurisdiction of the state court and the resumption of procedure in this court. From the entry of the record here, it comes within our rules of procedure. And so, also, if, within the twenty days, a state judge enlarges the time by giving so many days more within which to file the answer, the same rule applies; only those days are counted in which the defendant could file his answer with the record. But in the case at bar the defendants did not have so many days within which to put in their answers. They were required by the order of the state court to put in their answers on or before a day fixed and certain,—10th March. When the records come here, they come with that order in full force. No days can be omitted from the computation, because the day is fixed,—10th March. No allowance is made for suspension. We examine the record, and see that the 10th of March had elapsed, and that no answer had been put in. It is said that defendants can construe the order as if it allowed so many days counting the days between the date of the order and the 10th March. But, for reasons of his own, the state judge did not say so. He fixed a day, allowing no chance of intermission or suspension, and required the answer on that day. Under the rule stated above, we come within the exigency of the order enlarging the time, for only certain days are counted. It is not within our power now, the day having elapsed, to



change his language or make a different order. If we fix a different day than the 10th March, we change the order of the state judge in a material point. If inevitable circumstances had arisen preventing the fulfillment of this order, we could consider them. But defendants had it within their power at any time between the filing of the petition, and the 10th of March, to enter a transcript of the record here, and get the active interference of this court. The whole scheme and purpose of the removal acts are to prevent the use of them for delay. Scarcely a case, if any, can be found in which the filing of the record in the circuit court and the filing of the defense were not contemporaneous. The record must be filed on or before the first term of the circuit court of the United States next succeeding the filing of the petition and bond. The construction contended for could be used to work delay, and forbids the court to be liberal in its judgment."

On the 7th of May a jury was sworn, and the trial began. The case was an action on a \$15,000 five-year policy of insurance against loss or damage by windstorms, cyclones, or tornadoes, issued by the plaintiff in error to the Charleston Bridge Company, the defendant in error, "on their frame and iron bridge, including wooden approaches, iron spans, and draw over the Ashley river, at the foot of Spring street, Charleston, S. C." The policy contained the following written clause: "This company is not liable for any loss or damage that may occur by reason of high water, floods, or freshets, said insurance being only against cyclones, windstorms, and tornadoes." The bridge insured was a structure built in 1886, extending across the Ashley river, near its mouth, from Charleston to the opposite shore, a distance of 2,376 feet. The testimony for the plaintiff below proved that, commencing at 3 o'clock p. m., on Sunday, August 27, 1893, and continuing until Monday morning, there prevailed at Charleston a cyclonic storm of unprecedented violence, the wind attaining about midnight of Sunday a velocity of 120 miles an hour. By the violence of the wind buildings were blown down, roofs carried away, telegraph poles snapped off, hundreds of trees uprooted, and vessels blown from their moorings. The wind also caused a banking up of the water on the shore, so that the tide rose  $4\frac{1}{2}$  feet above its normal height. During Sunday night, while the wind was at its greatest velocity, two schooners, each about 500 tons, one of them loaded with phosphate rock, and having a loaded barge and elevator made fast to it, were broken from their moorings by the wind, and driven up the river against the bridge, and passed through it by an opening which the loaded schooner and barge had made by knocking down a span of it. Several heavy lighters also went adrift, and were driven by the wind against the bridge. One was found among the wreckage of it, and one had gone through. The bridge was damaged to an extent which expert bridge builders testified would require over \$35,000 to restore it.

The court, in its charge, instructed the jury as follows: "The question is one of fact for the jury. Was the injury to the bridge caused by freshet, flood, or high water, or was it caused by cyclone, windstorm, or tornado? That is to say, what was the real cause of the injury, the dominant, originating cause of the injury, that cause but for which the injury would not have happened? If this cause, the operating, originating, efficient cause, was high water, flood, or freshet, the policy does not cover the loss, and the plaintiff cannot recover; but if this operating, originating, dominant, and efficient cause was a cyclone, tornado, or windstorm, then the policy does cover this loss, and you must find for the plaintiff." To this instruction the defendant excepted, assigning as error that the jury should not be limited to a consideration of what was the originating and efficient cause of the injury, because, as it contended, even if the originating and efficient cause of the loss was a cyclone, tornado, or windstorm, yet if the loss was occasioned through the agency of high water or flood, in the grasp or under the influence of the tornado, cyclone, or windstorm, the defendant was exempted under the policy from such loss. The defendant, on its own behalf, requested the court to instruct the jury as follows, which the court refused to do: "That if the jury believed that a tornado, windstorm, or cyclone was prevailing in and about the property specified in the policy at the time stated in the complaint, but the loss or damage, as may be shown to have been sustained, was caused by the force of high water or a flood in the grasp or under the influence of

the wind, then the plaintiff cannot recover, for such loss is expressly excepted under the terms of the policy." And the defendant also prayed the court to instruct the jury as follows: "If the jury believe that a tornado, wind-storm, or cyclone was prevailing in and about the property specified in the policy at the time stated in the complaint, but the loss, as may be shown to have been sustained, was caused partly by the force of the wind itself and partly by the force of high water or a flood in the grasp or under the influence of the wind, then the plaintiff can only recover for such immediate wind damage, and the jury must exclude all water damage in determining upon the amount of their verdict." And also requested the following instruction: "That if the jury believe that, at the time stated in the complaint, a wind-storm, cyclone, or tornado was prevailing in the vicinity and about the property specified in the policy, and that such loss or damage as may be shown to have been sustained was caused by the effect of a flood or high water, and such flood or high water was directly and immediately caused and rendered destructive by said cyclone, tornado, or windstorm, then and in such case plaintiffs cannot recover, because, under the express conditions of the contract, such loss or damage was excluded in the provision: 'This company is not liable for any loss or damage that may occur by reason of high water, floods, or freshets.'" The court refused to give any one of the three instructions asked by the defendant, upon the ground that no evidence had been offered to sustain the theory that any of the damage to the bridge had been caused by high water or flood. The case being submitted to the jury, they found for the plaintiff for the full amount of the policy.

George M. Trenholm, for plaintiff in error.

Julian Mitchell, for defendant in error.

Before GOFF, Circuit Judge, and HUGHES and MORRIS, District Judges.

MORRIS, District Judge (after stating the facts as above). The reasons stated by the circuit judge for requiring the defendant to plead forthwith, and for directing the case to be placed on the trial calendar of the then pending term of the court, appear to us satisfactory. The time allowed the defendant in the state court to plead was not the 20 days after service, as prescribed by the state statute, but the enlarged time fixed by the judge of that court, viz. the 10th of March,—a day certain. That day had passed when the defendant filed the transcript of record in the circuit court on the 2d of April, and the defendant was in default. There was no rule of practice either in the circuit court, or prescribed by statute for the state practice, applicable to such a case, regulating the time for pleading where default had occurred between the time when the petition for removal was filed in the state court and the record was actually filed in the circuit court. It was a case not provided for by rules, and of necessity a discretion remained in the judge to decide what reasonable terms should be imposed on the defendant. The defendant had had from the 27th of January to the 2d of April to prepare its answer. It alleged no facts, so far as the record discloses, to show why it could not answer forthwith, and, as the record shows, it filed an answer which an officer of the company had sworn to on the 1st of March. The case was not actually called for trial until a month after the answer was filed. It is manifest that there was nothing unreasonable or oppressive in requiring the defendant to plead without longer delay, and in requiring the case to be tried at that term.

The state practice invoked was not applicable to a case in which there had been a default in answering, or in which there had been a removal from one jurisdiction to another, and in which the regular conduct of the case had been by removal taken out of the control of the plaintiff. Under the special circumstances of this removal, the default was an excusable one, but the judge, in prescribing the terms upon which the defendant might plead, was called upon to see to it that, while the defendant was not deprived of its defense, the plaintiff should not have to submit to a continuance which in all probability would have postponed the trial for a year. The circuit courts are required by section 914 of the Revised Statutes to conform as near as may be to the practice of the state courts, but obviously conditions may arise from the peculiar situation of removed cases which may prevent the state practice from being strictly applied. The words "as near as may be," in the act of congress, impose a discretion (*Railroad Co. v. Horst*, 93 U. S. 301), and devolve a duty upon the judge not to allow justice to be delayed by the application of state court rules to cases for which they were not intended and to which they ought not to be applied. We find nothing in these rulings of which the defendant can justly complain.

Coming now to the merits of the case, the question is whether the court rightly instructed the jury that they were to seek for the operating, originating, dominant, and efficient cause of the damage to the bridge, and, if they found it was the cyclone, then the policy covered the loss, but, if they found it to be the high water, flood, or freshet, then it did not; and whether the court was right in refusing the three prayers submitted by the defendant. The rule of law is well settled that, where a particular peril is insured against, in order to be entitled to indemnity the assured must show that the particular peril caused the loss. It is held that the peril which causes the loss is the one which is the predominating and efficient cause, the cause which produces the disaster without any new intervening cause, which of itself would have been sufficient to produce the result. This rule has been carefully stated and elucidated in *Insurance Co. v. Tweed*, 7 Wall. 44; *Insurance Co. v. Boon*, 95 U. S. 131; *Railway Co. v. Kellogg*, 94 U. S. 469-473. In these and other cases in the supreme court, it has been so fully explained that the rule needs no further discussion. In the instruction given to the jury they were told that from the testimony they must ascertain what was the real cause of the injury,—the cause but for which the injury would not have happened; that, if the operating, originating, efficient cause was high water, flood, or freshet, the policy did not cover the loss, and the plaintiff could not recover; but, if the operating, originating, dominant, and efficient cause was a cyclone, tornado, or windstorm, then the policy did cover the loss, and they must find for the plaintiff. This instruction fully stated the law and the issue of fact to be decided by the jury, and there can be no objection to it unless it arises out of the restriction written in the policy exempting the company from liability for any loss occurring by reason of high water, floods, or freshets; and the precise question is whether there was evidence which required this instruction

to be qualified by any of those asked for by the insurance company. The testimony showed that the bridge was broken by the heavy schooners and barges driven against it by the cyclone. This was the testimony of men who were on the vessels when they went through the bridge, driven up the river by the wind, and who saw the different spans of the structure when they fell. The only direct testimony which qualified this in any way was that of one of these witnesses who says that one span of the bridge was down before the schooner he was on reached it. He testifies, however, that that span was blown down by the wind; that the water was not very rough; and that the water did but little damage.

The inference is sought to be drawn on behalf of the insurance company that, as the water was so abnormally high, it must have damaged the bridge, and particularly the ends, which were not so high as the middle. But the principal damage was not at the ends, and in the middle the floor of the bridge was, as testified by the only persons who saw it, from five to six feet above the highest water during the cyclone. So far as the evidence discloses, it would have been mere speculation for the jury to have found that any part of the damage was caused by the high water, and there was no testimony whatever from which they could have found what proportion of the loss, if any, was attributable to that cause.

In Phillips on Insurance these rules are stated:

Section 1136:

"In the case of the concurrence of two causes of loss, one at the risk of the assured and the other insured against, or one insured against by A. and the other by B., if the damage by the perils respectively can be discriminated, each party must bear his proportion."

Section 1137:

"If, where the assured and the underwriters or different underwriters are each responsible for different causes of loss which concur in the loss, and the damage from each cause cannot be distinguished, the party responsible for the predominating, efficient cause, or that by which the operation of the other is directly occasioned as being merely incidental to it, is liable to bear the loss."

These rules are expressly approved in *Howard Fire Ins. Co. v. Norwich, etc., Co.*, 12 Wall. 194-196, and they are applicable to the defense in the present case, and justified the rejection of the defendant's prayers. These prayers all ask the court to submit to the jury to find that there was damage caused by the high water, or by the water in the grasp of the wind or under the influence of and made destructive by the wind, and, if they should so find, then, as to so much of the damage as was thus caused by the water, the plaintiff could not recover. Without deciding whether this was a correct statement of the law, we think these prayers were objectionable, because there was no evidence by which the jury could discriminate the amount of the water damage. The cause of loss which the insurance company was to be responsible for was the cyclone; the cause of loss which the bridge company was itself to bear was high water. The testimony on behalf of the plaintiff strongly tended to prove that the cyclone was the sole cause of the loss, and that no

damage resulted from the high water. The jury found that the cyclone was the predominating, efficient cause. The defendant produced no testimony by which, if there was any water damage, it could be discriminated and separated from the wind damage. The case, therefore, came within the rule that, when the damage from each cause cannot be distinguished, then the party responsible for the damage caused by the predominating, efficient cause is liable for the whole loss.

Finding no error in the rulings of the court, the judgment is affirmed.

---

AMERICAN FIRE INS. CO. v. CHARLESTON BRIDGE CO.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 98.

In Error to the Circuit Court of the United States for the District of South Carolina.

Before GOFF, Circuit Judge, and HUGHES and MORRIS, District Judges.

PER CURIAM. This is an action at law by the Charleston Bridge Company against the American Fire Insurance Company to recover for damage alleged to have been caused to the plaintiff's bridge by the cyclone of August 27, 1893. The policy was similar in terms to that sued on in case No. 97, October term, 1894 (Phenix Ins. Co. v. Charleston Bridge Co., 65 Fed. 628), in which the judgment has been affirmed. The case was removed under similar circumstances from the state court, and was submitted to the same jury, upon the same evidence, and with similar instructions and rulings. For the reasons stated in No. 97, the judgment is affirmed.

---

MUHLENBERG COUNTY v. DYER et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 261.

MANDAMUS—MODE OF REVIEW.

An application for a writ of mandamus, being a proceeding at common law, can be reviewed in the circuit court of appeals only by writ of error, not by appeal.

Appeal from the Circuit Court of the United States for the District of Kentucky.

E. Dudley Walker, for appellants.

Azro Dyer, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This is an appeal from a judgment of the circuit court of the United States for the district of Kentucky, awarding a peremptory writ of mandamus. The writ ran against D. J. Fleming and others, members of the funding board of Muhlenberg county, and required them to make and enter an order on their records directing Louis Reno, treasurer of Muhlenberg county, to

pay \$9,970.48, the amount admitted by him to be in his hands, less \$1,000 for expenses, to the relators below, Dyer and Gillett, as a credit upon the amount due to them on a judgment recovered by them in the same court against Muhlenberg county on certain bonds issued by the county, and held and owned by them. A motion is now made to dismiss the appeal on the ground that this court does not acquire jurisdiction to review a judgment of the circuit court, in mandamus, by appeal.

Section 11 of the act establishing this court provides "that all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the method and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeals." The same rules which govern the supreme court, therefore, in taking jurisdiction of an appeal or writ of error, obtain in this court. In *Ward v. Gregory*, 7 Pet. 633, it was sought, in the supreme court, to review a decision of the court of appeals for the territory of Florida, in mandamus, by appeal. "The court ordered the appeal to be dismissed, the proceedings by mandamus being at common law, and therefore the cases should have been brought up by writs of error." The same rule is laid down in *Insurace Co. v. Wheelwright*, 7 Wheat. 534, and in *U. S. v. Addison*, 22 How. 174-185. It is well settled that cases at law can be brought to the supreme court, and therefore to this court, only by writ of error. *Sarchet v. U. S.*, 12 Pet. 143; *Bevins v. Ramsey*, 11 How. 185; *Burrows v. The Marshall*, 15 Wall. 682; *Stringfellow v. Cain*, 99 U. S. 610; *U. S. v. Union Pac. R. Co.*, 105 U. S. 263; *Hecht v. Boughton*, Id. 235; *Woolf v. Hamilton*, 108 U. S. 15, 1 Sup. Ct. 139; *U. S. v. Hailey*, 118 U. S. 233, 6 Sup. Ct. 1049. On the other hand, cases in equity must come here by appeal. *Walker v. Dreville*, 12 Wall. 440; *McCollum v. Eager*, 2 How. 61; *Hayes v. Fischer*, 102 U. S. 121; *Blease v. Garlington*, 92 U. S. 1. In this case the record shows that the defendants below prayed an appeal, and that the same was allowed by the court, and that a citation issued to the plaintiffs below to appear at a session of this court, pursuant to such appeal, and to show cause, if any there be, why the decree rendered, in the said appeal mentioned, should not be corrected. It is true that the supersedeas bond which was given recites that the defendants below have presented a writ of error to the United States circuit court of appeals for the Sixth circuit to reverse the judgment rendered in the suit, and the condition of the bond is that the defendants shall prosecute their said writ of error to effect, and answer all damages and costs; but the wording of the bond cannot supply the absence of a writ of error, which, under the law, issues out of this court either by the clerk of this court or by the clerk of the circuit court. All the proceedings taken were expressly for an appeal, and give this court no jurisdiction to consider the cause, for the reasons above stated. The appeal is therefore dismissed, at the costs of the appellants.

## BROWN et al. v. CRANBERRY IRON &amp; COAL CO.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 87.

## WRIT OF ERROR—TO WHAT JUDGMENT LIES.

B. brought a suit in equity against the C. Co. for partition of certain lands. The C. Co. answered, denying B.'s title, and the court stayed proceedings in the partition suit, and gave leave to plaintiff to bring an action at law, which he did, in the ordinary form for the recovery of land, the C. Co. setting up in defense that B. was estopped to claim the land both by deed and by acts in pais. Upon the trial, before the same judge by whom the partition suit had been stayed, the question of estoppel by deed was reserved from the jury, and, in submitting the question of estoppel in pais, the judge stated that he could, as chancellor, have heard the evidence, and decided the whole controversy himself, but preferred to get the assistance of the jury. The jury found for the defendant, and judgment was entered upon the finding, to which exception was taken, and a writ of error allowed. The judge afterwards passed upon the issue of estoppel by deed in favor of the defendant, but no judgment was entered on that issue. *Held*, that the proceedings were anomalous, but, treating them as an action at law, the judgment upon which the writ of error was allowed was not final, since a decision upon both issues, of estoppel by deed and estoppel in pais, was necessary to a final decision of the action; and, if exception were taken to a judgment upon the former issue, as decided by the judge, the judgment upon the present writ would not end the case, and that, accordingly, such writ could not be entertained. Morris, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

This was an action at law by J. Evans Brown and William B. Carter against the Cranberry Iron & Coal Company to recover an undivided interest in certain lands, brought pursuant to leave given in a partition suit between the same parties. One issue was decided by the court without a jury. 59 Fed. 434. Upon another issue, judgment was entered, on the verdict of a jury, in favor of defendant. Plaintiffs bring error.

This case is somewhat peculiar in its character. Certain persons, Hoke, Sumner, and Hutchinson, had become the owners of a tract of land in North Carolina, known as the "Cranberry Iron Ore Bank." They offered it for sale in 1866 or 1867 to parties in New York. Before negotiations for the purchase were concluded, it was discovered that J. Evans Brown, one of the parties in this case, and A. C. Avery, as executor of Isaac T. Avery, claimed an interest in the minerals in the land. As the proposed purchasers were buying the land chiefly for the minerals in it, this claim induced them to break off negotiations. Thereupon Hoke, Sumner, and Hutchinson opened negotiations with Brown and Avery looking to the extinguishment of their claim, so that they could renew their negotiations with the persons in New York, and offer to them a perfect title. The claim set up by Brown and Avery was this: That Brown and Avery's testator had owned the minerals in this tract of land as tenants in common; that, by his deed, the testator, Avery, had released to Brown all his interest in the minerals in that part of the tract of land lying to the east of a road or path running through the land in a general direction north and south, so that Brown owned an undivided half of all the minerals in the land on the west of that road or path, Avery owning the other undivided half, and Brown was sole owner of all the minerals to the east of that road or path. This deed was not on record at the time of the negotiation. There was on record a deed between Brown and Avery, the recital of which

contained this information. The negotiations between Hoke and his associates and Brown and Avery, executor, ended in the conveyance by Avery, as executor, of an undivided half interest in the minerals in this land, and some weeks afterwards in the conveyance by Brown, through his attorneys in fact, of "the following tract of land, situate and being in the county of Mitchell, in the state of North Carolina; that is, the one-half of the mineral interest in said lands." Then follows a full description of the lands by metes and bounds. Habendum: "The one-half of the mines and mineral interests in said lands and the appurtenances thereto belonging" to Sumner and Hoke in fee. The consideration paid to Avery, executor, was \$17,000; that to Brown, \$22,000. These deeds having been executed, the purchasers, thinking they had a clear, unincumbered title in fee, completed the sale to the parties in New York, and, by mesne conveyance from the latter, the property has been conveyed to the defendant, the Cranberry Iron & Coal Company. This transaction between Brown and Avery, executor, with Hoke and his associates, was in 1867. The coal and iron company, having purchased, went to great expense in developing the mineral resources of the property, erecting buildings, constructing a railroad, and sinking shafts. But they have not actually mined, beyond a test or so, any of the land east of the road or path. They have been in actual use and cultivation of the whole surface. Some time preceding February, 1890 (the record does not state when), J. Evans Brown filed his bill in the circuit court of the United States for the Western district of North Carolina, against the Cranberry Iron & Coal Company, praying partition. He joined with him, as co-complainant, William B. Carter, to whom, some time after his deed to Hoke and his associates, he had conveyed one-half of the interest he now claims. His position is that his deed, by his attorney, conveyed only one-half of the interest in the minerals; that he had owned all the minerals in that part of the land east of the road or path, and that still the other half interest in the minerals on this east side remained in him. His prayer is for partition of this mineral interest,—one-fourth to himself, one-fourth to Carter, and one-half to the Cranberry Company. The answer of the Cranberry Company denied the title of the complainant. The record does not disclose the exact character of this defense. The judge who presided in the circuit court in equity stayed proceedings in the cause, and gave leave to plaintiff to bring and prosecute an action at law within one year, to establish his title as tenant in common to the land of which he prayed partition, the defendant in its answer having asserted sole seisin. Compare *Brown v. Coal Co.*, 40 Fed. 849. The action was brought in the form prescribed by the Code of North Carolina for the recovery of real property. The answer of the defendant interposed, as a first defense, a general denial of the plaintiff's title, and, by way of a second defense, set up certain facts constituting, as was claimed, estoppel in pais and estoppel by deed, thus precluding the plaintiff from claiming title as against the defendant. The cause, being at issue, was tried before a jury and the same judge who had presided in the court of equity. At this trial all other issues seem to have been abandoned, and the only issue presented was that of estoppel, the onus having been cast on the defendant. This aspect thus presented by the case is explained by the learned judge in his charge to the jury. The "suit has been brought, and the only question for you to determine at issue in this court is, is the plaintiff estopped from claiming title by deed, conduct, acts, or otherwise? As chancellor in the court of equity, I could settle the case myself, and I could have heard all the evidence and all the matter myself, but I preferred to get the assistance of the jury on certain questions of fact, and I have called you in for that purpose." The court reserved its opinion upon the question, were the plaintiffs estopped by deed? and submitted to the jury the other question: "Are the plaintiffs estopped by their acts, declarations, or otherwise from claiming any interest in the mines and minerals in the land described in the complaint?" They answered this question, "Yes." Judgment was entered on this finding. Exceptions having been taken in due course, a writ of error was allowed, and the case is before us on the exceptions and assignments of error. After granting the writ, the judge passed upon the issue of law stated by him at the trial, and reserved



by him, and held that the plaintiffs were estopped by the deed. No judgment has yet been entered on this issue. The sole question before us is on the writ of error.

Charles A. Moore, for plaintiffs in error.

Richard H. Battle, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and MORRIS, District Judge.

SIMONTON, Circuit Judge (after stating the facts). It is not easy to determine what this proceeding at law was. It began an action at law, growing out of a proceeding in equity brought under the direction and with the permission of the chancellor. The complainants claimed to be cotenants in certain mines and minerals with the defendant, and sought partition. The defendant denied their title, and set up sole seisin. This "was not a mere point of law or fact incidentally in dispute, but a general question of right, determinable as such by a law court, and requiring a decision, according to the course of that court, both of disputed facts and the law applicable thereto." The proper course, therefore, was to direct an action at law to be brought to determine the title. *Adams, Eq. (7th Ed.) 378*. And this is the constant practice of courts of equity in suits for partition when the title is in dispute. 3 *Pom. Eq. Jur.* § 1386, and note 3. But, when the case came before the law court, every other question was eliminated, and the only issue was this of estoppel, in pais as well as by deed,—an issue within the domain of equity jurisprudence, and cognizable by such a court. *Pom. Eq. Jur.* § 802. When this issue was submitted to the jury, it was with the purpose of aiding the chancellor in coming to his conclusion, submitted in his discretion, and not as a matter of right. This he himself distinctly asserted in his charge. It is not excepted to. In this respect the proceeding assumed the form of an issue for a jury. Such an issue is directed when an incidental question of fact is so involved in doubt, by conflicting or insufficient evidence, that the court considering the inefficacy of written evidence is desirous of referring it to the verdict of a jury. *Adams, Eq. (7th Ed.) 375*. If this be an issue out of chancery, the finding of the jury and the judgment entered thereon are not reversible on bills of exception and writ of error here. The error, if any exist, must be removed, and corrected in the court ordering the issue. *Johnson v. Harmon*, 94 U. S. 372; *Watt v. Starke*, 101 U. S. 250; *Brockett v. Brockett*, 3 How. 691; 2 *Daniell, Ch. Prac. (3d Am. Ed.) 1106*; *Wilson v. Riddle*, 123 U. S. 615, 8 Sup. Ct. 255. If, however, it be an action at law, brought under the direction and by leave of the court, then the court of equity does not assume to interfere with the course of proceedings in the court of law, and all errors made at the trial must be corrected in that court or by writ of error to the appellate court. *Watt v. Stark*, 101 U. S., at page 250; *Bootle v. Blundell*, 19 Ves. 500; *Adams, Eq. (7th Ed.) p. 378*; *Smith, Ch. Prac. 90*. Treating this record as an action at law, reviewed on writ of error, the result of which must be conclusive of the issues presented, the first inquiry

is, is it ripe for a hearing in this court? As an action at law, it must be governed by the course of proceeding in a court of law. This case, as presented in the court below, involved two issues,—one determinable by the court alone; the other submitted to the jury. One issue was: "Did the deed of Brown estop him and his privy from denying the title of defendant?" The other issue was: "Are the plaintiffs estopped by their acts, declarations, or otherwise from claiming any interest in the mines and minerals in the land described in the complaint?" Each issue was independent of the other. The decision of both was absolutely necessary to a final decision of the action. The jury found the issue of fact in favor of defendant. That issue is here. The judge has ruled upon the other issue also in favor of defendant. That ruling is not here. If it be not excepted to, it ends the action. If exception be taken hereafter, then our conclusions upon this writ of error will not end the case. In other words, it is not here on a final judgment; and cannot in this record be disposed of. Let the case be remanded to the circuit court for such proceedings as may be necessary, each party to pay the costs by them or it incurred in this court.

MORRIS, District Judge (dissenting). I do not concur in the opinion or judgment of the majority of the court. The disposition we are required to make of this case depends, in the first place, upon whether the case tried below, in which the writ of error was allowed, was an issue out of chancery, or an independent action at law to try title. If it was the former, it is not properly before us, and cannot be until there is a final decree in the chancery case; if the latter, then it is before us on writ of error to the rulings of the court below, and I think we should consider the exceptions and assignments of error. So far as the pleadings in the record disclose, there is nothing to connect this case with any suit in equity. It begins, like any common-law action, with a summons commanding the Cranberry Iron & Coal Company to appear and answer the complaint of J. Evans Brown and William B. Carter. The complaint filed alleges that the plaintiffs are each seised in fee simple of an undivided fourth interest in the mines, minerals, and mineral interests in certain described lands, and that the defendant is wrongfully and unlawfully in possession, and withholds the same from the plaintiffs; and the plaintiffs demand judgment that they be let into possession of the said undivided one-half interest, and for damages and costs. The defendant answered, alleging that it was sole owner of the land described, and of all the mineral interests therein, and it also filed a special plea, in which it alleged that its grantors had obtained from the plaintiff Brown, in 1867, a deed intended to grant all his (the said Brown's) mineral interest in the land in suit under the circumstances set out in the plea, which estopped the plaintiffs from making any claim whatever to said property. A jury was impaneled to try the issue made by the pleadings between the parties, and, after hearing the evidence and receiving the instructions of the court, the following question was submitted to the jury

for their verdict: "Are the plaintiffs estopped by their acts, declarations, or otherwise from claiming any interest in the mines and minerals in the land described in the complaint?" The jury, for their verdict, answered, "Yes." Thereupon judgment was entered that the plaintiffs were not the owners of an undivided one-half interest in the mines and minerals in the lands described in the complaint, and that they take nothing by their writ, and that the defendant have judgment for its costs. It was further "adjudged" that said finding, together with all the evidence and the charge of his honor, be forthwith reported to the court of equity. This is the first reference anywhere in the record to any equity suit, except that some allusion is made to it in the judge's charge. Bills of exceptions were signed by the judge, and a writ of error was allowed as in actions at law. There is nothing in the record to show that the case tried by the jury was an issue out of chancery sent to a court of law to be tried in order to inform the conscience of the chancellor; on the contrary, except from some allusions by the judge in his charge and the order that the findings, evidence, and charge be reported "to the court of equity," we should not know there had been any equity case connected with this litigation. From the briefs of counsel, we gather that a suit for partition had been instituted in equity by Brown and Carter against the Cranberry Iron & Coal Company, and that the defendant corporation in that suit, by its answer, denied that Brown and Carter had any interest in the land; and thereupon, as the briefs state, the court required the complainants to bring an action against the respondent at law to try title. If we are to take these statements from the briefs of counsel on both sides as informing us that there were partition proceedings in an equity court prior to the instituting of the present suit, it would seem that the equity court proceeded properly. If a suit is instituted for partition by a complainant whose right to partition is denied because he is alleged to have no title or interest in the premises as to which partition is prayed, it is the duty of the equity court either to dismiss the bill, or to retain it for a reasonable time to afford the complainant an opportunity of establishing his title at law. The rule is that a party whose title is disputed or is suspicious must establish his title at law before he comes into chancery asking a partition. If he files his bill for partition, the equity court may, in its discretion, retain the bill until he has done that which he ought to have done before he filed it; and it must always be borne in mind that an equity court is not the proper tribunal to try title to land when the legal title is involved, and when no question to be determined is of peculiar equity cognizance. *Hipp v. Babin*, 19 How. 271; *Lewis v. Cocks*, 23 Wall. 466. Where the legal title is involved, the equity court does not send issues to be tried by a jury in order to ascertain the truth of disputed facts for its enlightenment, but lets the party who is out of possession bring his action of ejectment, and suspends its own proceedings until the legal title is made clear by the judgment of a court of law. 3 Pom. Eq. Jur. § 1385; 1 Story, Eq. Jur. § 653; 2 White & T. Lead. Cas. Eq. 900; 2 Daniell, Ch. Prac.

1151, note 5; *Cox v. Smith*, 4 Johns. Ch. 271; *Currin v. Spraul*, 10 Grat. 145; *Boone v. Boone*, 3 Md. Ch. 497; *Obert v. Obert*, 10 N. J. Eq. 98; *Read v. Huff*, 40 N. J. Eq. 233.

As stated in *Watt v. Starke*, 101 U. S. 250:

"Where a court of chancery suspends proceedings in a cause in order to allow parties to bring an action at law to try the legal title, it does not assume to interfere with the course of proceedings in the court of law, and a motion for a new trial must be made to that court; but, when it directs an issue to be tried at law, a motion must be made to the court of chancery."

So it is the practice, when issues are sent to a court of law, to enter no judgment on the verdict, but the judge of the law court certifies to the chancellor what the verdict was. 2 Daniell, Ch. Prac. 1119. The chancellor may disregard such a verdict, but a judgment in an ejectment suit establishing title would stand upon a different footing.

In the case now before us, in my opinion we are not at liberty to consider whether there was set up by the defendant's answer in an equity suit a title based upon matters properly cognizable in equity, such as made it proper for the equity court to proceed and adjudicate with regard to it, or as to which the chancellor might properly send issues to be tried by a jury in a law court for his enlightenment as to a question of fact. We do not know from the record what the equity suit was, and have only before us in this record an action at law regularly begun and tried, the verdict of the jury, the judgment of the court entered upon the verdict, and exceptions to the rulings of the court regularly taken during the progress of the trial, and brought here by writ of error. In his charge to the jury the judge began with some introductory remarks with regard to the commencement of the litigation in the equity court. These were mere side remarks which he himself told the jury to disregard, and told them that it was their duty to find the facts according to their own view of the evidence. The remarks of the judge on this subject were not excepted to. The issue submitted to the jury and their verdict were sufficient to support the judgment for defendant, which was entered, and which was conclusive against the plaintiffs' title. If the verdict could not be supported without a construction of the deed, and the plaintiffs' case required an instruction to the jury as to the effect of the deed, then the verdict was a mistrial, and we should reverse. It seems to me we must either affirm or reverse.

By plaintiffs' twentieth instruction, the court was asked to say that the deed was no estoppel. The court refused this instruction, and gave no instruction covering it. That refusal was excepted to, and, if the jury were left to consider the deed, it was error, unless we are satisfied that the deed was an estoppel of itself. The issue put to the jury was: "Are the plaintiffs estopped by acts, declarations, or otherwise?" This issue might appear to have been broad enough to include estoppel by the deed, but the judge does not seem to have treated it so. Treating it as an issue of estoppel in pais, the construction of the deed was immaterial, and under that issue, when the jury found that the plaintiffs were estopped, the defendant was entitled to judgment. That judgment, in my opinion, is conclusive

against the plaintiffs, unless they can show, under this writ of error, that there was error in some ruling during the trial of that issue. The opinion filed by the judge, after the judgment was entered, was a mere statement of his reasons for refusing the twentieth instruction, or for not granting a new trial, or for some other purpose of his own, and is not before us except as an argument in favor of some ruling he has made during the trial, and before the judgment entered. It is not in the bill of exceptions, and it could not be excepted to. The case was a trial by jury, and only what took place before the jury can be examined. If the case was not properly put before the jury or they were misdirected, we must reverse. What can the judge now do if we send the case back? The term at which the judgment was entered is past. He could not grant a new trial, and he could not now put anything more into the bill of exceptions, and we can never look at anything but what is in the pleadings and the bill of exceptions. The defendant, to succeed, was not obliged to show that the plaintiffs were estopped both by the deed and by their acts and declarations; either one was sufficient. If, irrespective of the construction of the deed, the acts of the plaintiffs estopped them, then the defendant had a right to rely on that estoppel in pais; and, if the jury found for the defendant on that issue, it was entitled to judgment without considering the deed. The judge was of this opinion, and, when the jury found the estoppel, he entered judgment on the verdict. If they had found for the plaintiffs on the question of estoppel, he would probably, as appears from his opinion, have not discharged them, but would have instructed them that the deed was itself an estoppel, and directed a verdict for defendant. The judge says he had reserved that question, and it is plain he thought that the only issue submitted to the jury was the estoppel in pais, and that, when the jury found their verdict on the estoppel in pais, he considered that ended the controversy, and afterwards wrote out his views about the proper meaning of the deed, to show that he was right in refusing the plaintiffs' twentieth instruction.

I think the case is properly before us for examination of all the exceptions taken at the trial, and I am obliged to dissent from the opinion of the majority of the court, holding the judgment is not final, or that the record is incomplete, and that the exceptions and assignments of error are not before us for our examination.

---

DREUTZER v. FRANKFORT LAND CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 204.

CIRCUIT COURT OF APPEALS — JURISDICTION — APPEAL FROM ORDER DENYING MOTION TO VACATE INJUNCTION.

The circuit court made an order on January 23d, restraining defendant from prosecuting certain proceedings at law, upon condition that plaintiffs should file a bond to pay any judgment against them in the suit, in which the injunction was granted, such injunction to continue, if the bond was filed until the further order of the court. The bond was filed in due time.

Subsequently, on March 2d, defendant moved to dissolve the injunction, upon the same grounds upon which he had originally opposed it, and the additional ground that the sureties on the bond were insufficient. This motion was denied by an order entered March 9th. An appeal was taken from this order on April 6th. *Held*, that the order of March 9th was not an order granting or continuing an injunction, within section 7 of the act establishing the circuit courts of appeals (11 C. C. A. xv.), and was not appealable.

Appeal from the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

This was a suit by the Frankfort Land Company and Franklin S. Anderson against G. A. Dreutzer for an accounting. An order was made enjoining the defendant from prosecuting certain proceedings at law. A motion by defendant to dissolve the injunction was denied. From the order denying such motion, defendant appeals.

This is an appeal from an order of the circuit court of the United States for the Northern division of the Eastern district of Tennessee denying a motion to dissolve an interlocutory injunction. Appellees have moved to dismiss on the ground that the appeal was taken too late. The motion and the appeal on its merits have been heard together. The bill was filed by citizens of other states than Tennessee against a citizen of that state to compel an accounting by the defendant for moneys alleged to have come into defendant's hands as agent for the corporate complainant in the subdivision, improvement, and sale of a large quantity of land at Frankfort, Tenn. The bill averred that the transactions were numerous between the parties; that equitable aid was necessary to obtain discovery and to prevent a multiplicity of suits concerning many different items; and prayed that the defendant, who had already obtained a judgment at law as to one item in a state court, and had begun in the same court a suit at law with respect to another, might be enjoined from suing out execution on his judgment, or further prosecuting his suit at law, and might be compelled to litigate all matters of controversy in this cause. On the filing of the bill and affidavit, the court made the following order:

"Let an order issue restraining the defendant from collecting the judgment already obtained, or taking further steps in the suit now pending brought by him in the circuit court of Morgan county against the complainant, the Frankfort Land Company, until further order of this court or a judge thereof. Notify the parties or their solicitors to appear at the courthouse at Knoxville, Tenn., on the fourth Monday of January, 1894, and show cause why an injunction may not issue as prayed for.

"This January 9th, 1894.

D. M. Key, Judge."

In accordance with this order the cause came on for hearing as to a preliminary injunction on January 23, 1894. The entry in the record recites that the motion was heard on bill and answer and exhibits, and proceeds: "And said motion being fully argued by both sides, and considered by the court, is disallowed and overruled as to the said judgment, but is allowed and sustained as to said pending suit in said circuit court of Morgan county, provided the complainant shall, within three weeks from this date, execute and file with the clerk of this court a good and sufficient bond, with approved securities in the penalty of \$3,000, conditioned to abide the judgment of the court in this cause, and to pay whatever sum may by the final judgment and decree of this court be found to be due the respondent, G. A. Dreutzer, with costs. Said restraining order will remain in force from this date during said three weeks' time, and continue in force until the further order of this court, provided said bond is filed within said time, but will stand dissolved without further order at the expiration of three weeks if said bond is not filed." On the 5th day of February, 1894, a bond was accordingly filed by the complainants, with sureties, whose sufficiency was certified to by the county clerk where they lived. On March 2d following, the solicitors for defendant filed the following motion: "Now comes the defendant above named, and

upon the record in the above-entitled cause, and the affidavits of John W. Hall and G. A. Dreutzer and the certificate of Thos. A. Morris, filed herewith, moves the court to dissolve the injunction in this cause upon the grounds: (1) Said injunction was improvidently and erroneously issued, in violation of the statute in such case provided, and is not warranted by the facts alleged in the bill and before the court. (2) There is no equity on the face of the bill. (3) The alleged equities of the bill are fully met and denied by the answer. (4) The bond filed by the complainants upon obtaining said injunction is not in compliance with the order of the court, but is an intentional evasion of said order, and is insufficient under the order of the court, the sureties thereon being insufficient." The affidavits and certificate referred to in the motion concerned only the sufficiency of the sureties on the bond. After notice, the motion was heard by the court on March 9, 1894, and the following order was then made: "In this cause the motion of respondent to dismiss the injunction is denied and overruled, but it is ordered that complainants proceed to take their proof with diligence, or the injunction will be dismissed hereafter. It is further ordered that Lewis Tillman be, and he is, appointed special master for the purpose of stating the full account between the parties. Said Tillman will appoint time and place for hearing proof, and he is authorized to take the same on giving reasonable notice to parties or their solicitors, and will make and file this report as soon as practicable." An appeal from this order was allowed April 6, 1894, and has been duly perfected.

John J. Tracy and John H. Collier, for appellant.  
Templeton & Cates, for appellees.

Before TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge (after stating the facts). Section 7 of the act establishing the circuit courts of appeals is as follows:

"That where upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals. Provided, that the appeals must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal." 11 C. C. A. xv.

The section introduced into federal appellate procedure a novelty. Before its enactment, there was no method of reviewing on appeal an interlocutory order or decree of the district or circuit courts. Congress accompanied this remedial provision with the condition that it should be taken advantage of by the aggrieved party within 30 days after it accrued. This condition is to be given effect, and is not to be made nugatory by a construction which would put it in the power of the aggrieved party to extend the limitation indefinitely. It is clear, therefore, that when, after a hearing of both sides, an injunction has been granted by the circuit court to continue in force for a fixed time,—as, for example, until a hearing on the merits,—the enjoined party cannot, after the expiration of 30 days from the order granting the injunction, acquire a new right of appeal by the filing of a motion to dissolve the injunction, and an order of the court denying the motion. Such an order neither grants nor continues the injunction within the meaning of section 7 of the act. Even if no such order is made, the injunction remains in force until the time fixed in the order granting it for its expiration. And the

denial of the motion to dissolve the injunction adds nothing to its force or effect. The question may be more doubtful when the injunction is granted until the further order of the court. It may be argued, with some plausibility, that the form of the order impliedly invites a further test of the validity of the order by a motion to dissolve, but we are not disposed so to construe it when it appears that a full hearing has been had by the court on affidavits and argument. We think that an injunction until the further order of the court granted after full hearing is, in effect, the same as one granted until the case can be heard on its merits, and that a motion to dissolve such an injunction is, in effect, a mere motion to rehear a question already decided. Unless such motion to rehear is made within the time within which an appeal can be taken, we think it should have no effect to enlarge the limitation. It is not at all difficult to satisfy the meaning of the expression, "order continuing an injunction." It generally happens that a preliminary injunction expires at the entry of a decree on the merits. Such a decree may grant a perpetual injunction, and yet, because of an order referring questions of damages to a master, still be only interlocutory in its character, and not reviewable as a final appeal until the coming in of the master's report, and its confirmation by the court. *Blount v. Société Anonyme*, 6 U. S. App. 335, 53 Fed. 98.<sup>1</sup> Such a decree would be an interlocutory decree continuing an injunction. So, too, a court may, for good reasons, grant an injunction until the next term of the court. An order giving the injunction force thereafter would be an order continuing an injunction, because, without such order, the injunction would stand dissolved by lapse of the time fixed in the original order. Sections 718 and 719 of the Revised Statutes are as follows:

Section 718. "Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

Section 719. "Writs of injunction may be granted by any justice of the supreme court in cases where they might be granted by the supreme court, and by any judge of a circuit court in cases where they might be granted by such court. But no justice of the supreme court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the circuit judge of the circuit or the district judge of the district. And an injunction shall not be issued by a district judge, as one of the judges of a circuit court in any case where a party has had a reasonable time to apply to the circuit court for the writ; nor shall any injunction so issued by a district judge continue longer than to the circuit court next ensuing, unless so ordered by the circuit court."

Thus it appears that an injunction granted by a district judge as a member of the circuit court, after a hearing in chambers, will not continue longer than to the next session of the circuit court. If the circuit court continues the force of the injunction, its action is an order or decree continuing an injunction, and an appeal may



be taken from it within 30 days therefrom. It is not necessary for us to decide whether a restraining order issued *ex parte* under section 718 to continue in force till the decision on the motion for a preliminary injunction is appealable, though we are inclined to think that it is not, because appeals are permitted only to orders of injunction; and the foregoing sections suggest a statutory terminology in which a temporary restraining order issued *ex parte* is to be distinguished from an order of injunction, though, of course, their operation and effect are quite the same. More than this, the appeal is allowed from an order granting an injunction "upon a hearing in equity," which would hardly describe an order made on an *ex parte* application. An order of injunction, issued on a motion after notice, though preceded by a temporary restraining order issued under section 718, would therefore be an order "granting" an injunction, rather than an order continuing it. In the light of the foregoing construction of section 7 of the circuit court of appeals act, we have little difficulty in holding that this appeal was not brought in time. The order granting the injunction was made, after full hearing, on January 23, 1894, and was operative from that date without further action of the court, though it was liable to be defeated in case the complainant should make default in giving the bond required. That order was certainly appealable under section 7. The time within which the appeal could be allowed expired 30 days thereafter. No motion to rehear the issue decided or to dissolve the injunction was made within that time. The injunction was issued on condition of the execution of a bond with approved sureties. The bond was filed February 5th, with a certificate of the sufficiency of the sureties by the clerk and master of the state chancery court of the county where the sureties lived. A motion to dissolve was then filed, March 2, 1894, on the same grounds upon which the granting of the injunction, January 23, 1894, had been resisted, and on the additional ground that the bond filed did not comply with the order of the court, because insufficient. This last ground was addressed to the discretion of the court, and could hardly be the subject of review here. The bond having been held sufficient, the order of injunction must be considered as in effect from the date of the entry, because the condition of its granting had been complied with. The order denying the motion to dissolve did not continue the injunction. Without such ruling by the court, after the filing of the bond, the injunction would have remained in force. The necessity for the ruling of the court arose, not by reason of the order of injunction, but by reason of the motion to dissolve. It follows that the order of March 9, 1894, was not an order continuing an injunction, and that no appeal lay therefrom under the seventh section of the circuit court of appeals act, and that, though the order of January 23d was appealable, the time for allowing the appeal expired more than 30 days before this appeal was allowed. This requires us to dismiss the appeal without considering the assignments of error, and it is so ordered.

## UNITED STATES ex rel. MUDSILL MIN. CO. v. SWAN.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 269.

## 1. JURISDICTION OF UNITED STATES COURTS—POWER OF CIRCUIT COURT OF APPEALS TO ISSUE MANDAMUS TO TAKE JURISDICTION.

It seems that where a circuit or district court refuses to hear a cause for want of jurisdiction, and the question thus decided may be heard, on certificate, in the supreme court, under section 5 of the act establishing the circuit courts of appeals (11 C. C. A. vii.), it would not be within the power of the circuit court of appeals by mandamus to compel such circuit or district court to take jurisdiction of the cause, but such power is vested in the supreme court whenever remedy by appeal or writ of error or certificate is not adequate.

## 2. SAME — WHAT QUESTIONS OF JURISDICTION MAY BE CERTIFIED TO SUPREME COURT.

It seems that the cases in which the question of jurisdiction of the circuit or district courts may be taken by certificate directly to the supreme court, under section 5 of the act establishing the circuit courts of appeals, are those involving the initial questions of the jurisdiction of such courts, whether in law or equity, over the subject-matter and the parties, and not those in which a question arises as to whether a court of law or of equity is the proper forum for the working out of rights properly within the particular federal jurisdiction for adjudication.

## 3. SAME—EQUITY—GARNISHMENT.

The statutes of Michigan (2 How. Ann. St. c. 277) provide that, where any sum remains unpaid upon any judgment or decree, if the plaintiff shall file with the clerk an affidavit that any person has money or property of the defendant, and he is justly apprehensive of loss unless a writ of garnishment issue, such a writ shall issue, upon which such person shall be summoned to appear, and make disclosure of any property of the defendant. The proceeding is declared to be one in trover, or for money had and received, against the garnishee, and a jury may be impaneled, and a judgment rendered for or against him. *Held*, that such garnishment proceedings are proceedings at law, and, whether or not they can be entertained by the courts of Michigan on their equity side, the federal courts in equity cannot entertain such proceedings or issue writs of garnishment.

## 4. REFUSAL TO TAKE JURISDICTION—ADEQUACY OF REMEDY BY APPEAL.

It seems that an order quashing a writ of garnishment, under the Michigan statute, for want of jurisdiction, and dismissing the garnishee with his costs, is a final order, an appeal from which would furnish an adequate remedy to the party aggrieved, and a mandamus is unnecessary for the purpose.

This is a petition for mandamus against Judge Swan, United States district judge for the Eastern district of Michigan, to compel him, sitting in the circuit court of the United States for that district, in equity, to take jurisdiction of a proceeding in garnishment, under the statutes of Michigan, instituted by the relator, the Mudsill Mining Company, for the purpose of collecting the balance due on a decree entered in that court in favor of the relator for about \$150,000. The original suit was brought by the Mudsill Mining Company against Orville A. Watrous and Stewart A. Van Dusen, to set aside the sale of a silver mine, on the ground of fraud, and to recover the purchase price paid. The circuit court dismissed the bill, and the complainant appealed to this court, where the decree of the circuit court was reversed, and the cause was remanded, with instructions to enter a decree against Watrous for the amount of the purchase money received by him and interest, amounting to about \$150,000, and a decree for a less sum against Van Dusen. 61 Fed. 163. The mandate of this court was complied with, and a proper decree entered. Shortly after the decree was entered, the attorney for the complainant filed in the circuit court, in the same cause in equity, an affidavit averring that

Willard I. Brotherton, Henry N. Watrous, and Henry W. Jennison, all of Bay City, Mich., had money and property of Orville A. Watrous in their custody, and that he was justly apprehensive of the loss of the amount due on the decree, unless a writ of garnishment should issue to the persons named. The writ was issued on the affidavit by the clerk of the court in equity, and the three garnishees, being served, appeared, and moved to quash the writ on numerous grounds, one of which was that a circuit court of the United States in equity has no jurisdiction to entertain a proceeding in garnishment under the statutes of Michigan. Upon this ground Judge Swan granted the motion, and quashed the writ in the following order (entered November 7, 1894):

"The Mudsill Mining Co. et al., Complainants, vs. Orville A. Watrous and Stewart A. Van Dusen, Principal Defendants, and Willard I. Brotherton, Henry N. Watrous, and Henry W. Jennison, Garnishee Defendants.

"On reading and filing the motion of the said garnishee defendants to quash the writ of garnishment heretofore issued in this cause, and after hearing counsel for both parties, on motion of Chester L. Collins, Esq., of counsel for said garnishee defendants, it is ordered: That the writ of garnishment issued in said cause at the instance of the plaintiffs be, and the same is hereby, quashed, and held for naught. But the effect of this order is hereby suspended, pending a review of the order, until the further order of this court, directing that it become absolute. Henry H. Swan. District Judge."

Thereupon the present petition for mandamus was filed by the Mudsill Mining Company as relator, in which, after setting out the facts as given above, and averring that the order to quash the garnishment proceeding was made because the court deemed that it had no jurisdiction to entertain it, and that the petitioner has no adequate legal remedy to secure this right save by mandamus, the relator prays that a writ may issue "directed to the circuit court of the United States for the Eastern district of Michigan in equity, requiring said court to vacate and set aside said order of November 7, 1894, quashing the writ of garnishment in the cause above named, and directing said court to proceed with all convenient speed to the execution of such process." The respondent appears and answers, setting out the facts as they appear of record and as they are stated above.

John H. Bissell and Otto Kirchner, for relator.

Chester L. Collins, for respondent.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the case as above), delivered the opinion of the court.

Section 12 of the act of congress of March 3, 1891 (26 Stat. 729), establishing circuit courts of appeals, provides that those courts "shall have the powers specified in section 716 of the Revised Statutes of the United States." Section 716, Rev. St., provides that:

"The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In so far as the writ of mandamus is necessary for the exercise of the jurisdiction of this court as conferred by law, we have no doubt of our power to issue it. Where, therefore, a circuit or district court fails to execute a mandate of this court in a cause brought here by appeal or writ of error, it is not to be questioned that we may compel its execution by mandamus. *Gaines v. Rugg*,

148 U. S. 228, 13 Sup. Ct. 611. It is to be observed, however, that by the fifth section of the circuit court of appeals act, appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court "in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." By the sixth section<sup>1</sup> of the same act the circuit courts of appeal are given power "to exercise appellate jurisdiction to review by appeal or by writ of error final decisions in the district and the existing circuit courts in all cases other than those provided for" in the fifth section. It would seem to be clear, therefore, that where a circuit court or a district court refuses to hear a cause for want of jurisdiction, and the question thus decided may be heard on certificate in the supreme court under section 5, it would not be within the power of this court by mandamus to compel such circuit or district court to take jurisdiction of the cause, but that such power is vested in the supreme court whenever remedy by appeal or writ of error on certificate is not adequate. Just what is meant by the word "jurisdiction" in the first paragraph of section 5 has not yet been exactly defined by the supreme court. It is a term which is given a varying meaning. Thus a bill which states no ground for equitable relief is often said not to be within the jurisdiction of a court of equity, and yet it would hardly be a reasonable construction of the paragraph referred to that such a question could be carried by certificate of the circuit court direct to the supreme court. There is strong ground for thinking that the first paragraph of that section was intended to apply only to the initial questions of the jurisdiction of a United States district or circuit court, whether in law or equity, over the subject-matter and parties, and not to questions whether a court of equity or of law is the proper forum for the working out of rights properly within the particular federal jurisdiction for adjudication. In the case at bar, Judge Swan refused to enforce under the statutes of Michigan the payment of a money decree by the issuance of a writ of garnishment in equity, because he conceived it not to be within the power and jurisdiction of a circuit court of the United States on its equity side to do so, but he did not deny that such a proceeding could be had on the law side of the court. Could such a question, on his certificate, be carried direct to the supreme court, under section 5 of the court of appeals act? We think not, for the reason suggested above; and, if not, then it is the subject-matter of review in this court by proper proceeding.

If an adequate remedy for Judge Swan's refusal to enforce a writ of garnishment can be had by appeal, there is no ground for the issuance of a mandamus. *Ex parte Baltimore & O. R. Co.*, 108 U. S. 566, 2 Sup. Ct. 376. This depends in part on the question whether the order quashing the writ of garnishment was a final order. It seems to us that it was, because an execution for costs could issue

against the complainant in favor of the garnishees, who were, by his order, finally dismissed from the proceeding. A final decree had already been rendered in the case. This was a proceeding to enforce that by bringing in new parties against whom judgment was asked. The proceeding was dismissed, and they were entitled to their costs. In the case of *Ex parte Baltimore & O. R. Co.*, above cited, it was sought to obtain a mandamus to compel a circuit court to take jurisdiction of a proceeding in replevin in which the circuit court had quashed the writ. It was held that error would lie, and furnished an adequate remedy, and therefore mandamus would not lie. Still the fact that appeal or error will lie does not always prevent the issuance of mandamus, because the former, though it exists, is not always an adequate remedy. Such is generally the case where the appellate court is asked by mandamus to compel compliance with its mandate by the lower court, which has failed to comply because of a misconstruction of the meaning of the mandate. *Gaines v. Rugg*, 148 U. S. 228, 243, 13 Sup. Ct. 611. It is said accordingly in support of the writ that it is here sought to compel the court below to enforce the mandate of this court. But this court never considered the question whether garnishment under the statutes of Michigan was a proper remedy in equity for enforcing a money decree, and there was nothing in the mandate intended to decide that question. The point considered and decided by Judge Swan was one subsequently arising, and, although his decision thereon is of a class usually controllable by mandamus, namely, refusals to take jurisdiction, we are nevertheless inclined to think that appeal would be an adequate remedy. But we do not propose to rest our decision of the case upon this point, for we are clearly of the opinion that, even if mandamus is the proper remedy, Judge Swan was right in quashing the writ.

The proceeding in garnishment is provided for in Michigan by 2 How. Ann. St. c. 277. The first section of that chapter (8058) as amended (3 How. Ann. St. p. 3751), provides that "in all personal actions arising upon contract, express or implied, brought in the several courts or municipal courts of jurisdiction, whether commenced by declaration, writs of *capias*, summons, or attachment, and in all cases where there remains any sum unpaid upon any judgment or decree rendered in any of the several courts herein before mentioned, \* \* \* if the plaintiff \* \* \* shall file with the clerk of said circuit court at the time of, or after the commencement of said suit, or at any time after rendition of judgment or decree, an affidavit" that any person has money or property of defendants, and that he is justly apprehensive of loss unless a writ of garnishment issues, "a writ of garnishment shall be issued, sealed and tested in the same manner as writs of summons and directed to the sheriff, reciting the commencement of the suit or the rendition of the judgment or decree against the principal defendant," and commanding the sheriff to summon such person to appear in court to make disclosure of all property or money of defendant held by him, and thenceforth to pay no money or property to the principal defendant. The statute

in further sections provides that, if plaintiff is not satisfied with the disclosure, he may have an examination of the garnishee. Section 8068 provides that the affidavit for the writ of garnishment shall be held and considered as a declaration by the plaintiff in trover against the garnishee as defendant, or for money had and received, and, where examination is had, the affidavit is to be considered denied, except so far as admitted, and "thereupon a statutory issue shall be deemed framed for the trial of the question of the garnishee's liability to the plaintiff." Section 8070 provides for the trial of the issue by a jury duly impaneled, and section 8072 provides for the entry of the judgment on the verdict. In Michigan, the division of jurisdiction between courts of equity and courts of law is still maintained, and, in view of the wording of the statute, it cannot be doubted that the legislature intended the proceedings in garnishment to be tried on the law side of the court. Could implication of this be made stronger than by the direction to consider the action as trover, or assumpsit for money had and received? But the argument is pressed on us that the garnishment proceedings are expressly provided for in all cases where there remains any sum unpaid upon any "judgment or decree," and that the two terms are purposely used, in this juxtaposition, to insure a strict technical construction of their meaning, by which the one includes all determinations of a court of law, and the other those of a court of equity. It may be so, but it does not necessarily follow that the proceeding in garnishment is to be conducted in the same forum where the decree is rendered. There is nothing in the statute to prevent the proceeding in garnishment to collect an amount due on a decree in equity from being instituted and tried on the law side of the court.

But whether the writ of garnishment can issue under the statute from a Michigan court of equity or not, it is very certain that no such writ can issue from the equity side of the federal court. Section 913 of the Revised Statutes of the United States is as follows:

"The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the circuit and district courts shall be according to the principles, rules and usages which belong to courts of equity and of admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the supreme court, by rules prescribed from time to time, to any circuit or district court, not inconsistent with the laws of the United States."

Rule 8 of the general equity rules adopted by the supreme court of the United States under the foregoing section provides that:

"Final process to execute any decree may, if the decree be solely for the payment of money, be by writ of execution in the form used in the circuit court in suits at common law in actions of assumpsit."

Section 914 of the Revised Statutes of the United States is as follows:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms

and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

Common-law rule No. 40 of the circuit court of the United States for the Eastern district of Michigan provides that writs of execution and proceedings thereunder shall be in conformity with the laws of Michigan, and that "the parties to such execution shall be entitled to the same rights and privileges given to them by virtue of the laws and practice aforesaid."

The argument is that, as the owner of a judgment in assumpsit could, under the foregoing section and rule, have the aid of garnishment proceedings to collect his judgment in the circuit court of the United States in Michigan, equity rule 8 gives him the same remedy to enforce the decree on the equity side of the court. Such a construction of equity rule 8 is not warranted. The constitution of the United States requires that the distinction between common-law and equity procedure shall be maintained, and the two jurisdictions cannot be confused and mixed either by a state statute or rules of the federal court. A proceeding in garnishment under the Michigan statute is a common-law suit. It is true, it is merely an ancillary action, but its procedure is all according to the course of the common law. The verdict of the jury is not merely advisory, as where the aid of a jury is sought by the chancellor in equity, but it has all the force and effect of a verdict at common law, and, if garnishment proceedings are begun in the federal court, the same effect must be given to the verdict as required by the statute in the state court. A state statute cannot confer on a federal court of equity jurisdiction in trover or assumpsit, whether those actions are merely ancillary and auxiliary or are independent suits. No authority has been cited to sustain a contrary view, while the supreme court of the United States has often had occasion to lay down the principle we have above stated. *Hurt v. Hollingworth*, 100 U. S. 100-103; *Bennett v. Butterworth*, 11 How. 669; *Thompson v. Railroad Co.*, 6 Wall. 134; *Bronson v. Schulten*, 104 U. S. 410; *Comstock v. Herron*, 5 C. C. A. 266, 274, 275, 55 Fed. 803. There is nothing in *Clark v. Smith*, 13 Pet. 195, *Fitch v. Creighton*, 24 How. 159, or *Broderick's Will*, 21 Wall. 520 (cited for relator), which conflicts with the principle that federal courts of equity cannot hear and determine suits to be tried according to the course of the common law. In *Clark v. Smith*, supra, it was held that, the legislature of Kentucky having created a right by determining what should be a legal title and what should be a cloud upon it, and having at the same time provided a remedy substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, such a right would be recognized and such a remedy enforced in federal courts of equity. And this is as far as any decision has ever gone. An enlargement of equity jurisdiction by state statutes to try issues between suitors according to the course of the common law is impossible in federal jurisprudence.

It is pressed upon us that, if this remedy by garnishment is not available to the petitioner, he is without any. If this were true, it

would not authorize the assumption by the court below of a jurisdiction not conferred by law. But we see no reason why it was not open to the petitioner to obtain relief by supplemental bill in the nature of a creditors' bill. The petition for mandamus is dismissed, at the costs of the plaintiff.

---

PRESCOTT et al. v. HAUGHEY et al.

(Circuit Court, D. Indiana. February 13, 1895.)

No. 8,950.

1. NATIONAL BANKS—FRAUDULENT REPRESENTATIONS BY DIRECTORS—LIABILITY IN ACTION FOR DECEIT.

Directors of a national bank who, in the pretended performance of duties imposed upon them by law, use their official station to make false and fraudulent representations, which are believed and acted on by others, are liable to one defrauded thereby in a common-law action of deceit, and the right to maintain such action is not precluded by the liability imposed in the national banking law for violation of its provisions.

2. REMOVAL OF CAUSES—FEDERAL QUESTION—VIOLATION OF NATIONAL BANKING LAW.

A complaint alleged that defendants, directors of a national bank, published advertisements, statements, and reports representing that the bank was solvent and prosperous, knowing such representations to be false and the bank to be hopelessly insolvent, intending thereby to deceive the public and plaintiffs; that plaintiffs had no knowledge that said representations were false, and the bank insolvent, and, relying on said representations, were thereby induced to deposit with the bank a certain sum; that said representations deceived plaintiffs, and by reason of the premises they had been damaged in said sum. *Held*, that the representations charged, if made by the directors under color of their office, were entirely outside of their official duties, and the cause of action stated was a common-law cause of action for deceit, presenting no federal question which could sustain a removal of the cause from a state court. *Bailey v. Mosher*, 11 C. C. A. 304, 63 Fed. 488, distinguished.

This was an action by William B. Prescott, president of the International Typographical Union, and others, against Theodore P. Haughey and others, the directors of the Indianapolis National Bank, to recover moneys deposited in said bank by the International Typographical Union, and lost through its insolvency. The action was brought in a court of the state of Indiana, and was removed to the federal court by the defendants, on the ground that a federal question was involved. Plaintiffs moved to remand.

William V. Rooker, for complainants.

Miller, Winter & Elam, Anderson & Du Shane, Hawkins & Smith, Baker & Daniels, R. W. Harrison, Duncan & Smith, and A. J. Beveridge, for defendants.

BAKER, District Judge. This was an action instituted in the superior court of Marion county, Ind., and removed into this court by the defendants, on the ground that it involved a federal question which gave this court jurisdiction. The parties, both plaintiffs and defendants, are all residents and citizens of the state of Indiana, and were such at the time of removal. The ground on which the



right of removal is bottomed is "that the plaintiffs in and by said suit seek to recover from the defendants a sum of money, exclusive of interest and costs, exceeding in amount two thousand dollars, as damages sustained by the plaintiffs by reason of misfeasance and nonfeasance of duty on the part of the defendants as directors of the Indianapolis National Bank." It is insisted by counsel that the plaintiffs cannot maintain any action against the defendants for or on account of the matters stated in the complaint, because such matters do not constitute any breach of duties imposed upon them by the acts of congress as directors of the bank, and because in no acts done or omitted by them as directors of said bank have they violated any duties imposed upon them as such directors in any such manner as to create a right of action in favor of the plaintiffs against them upon the facts stated in the complaint. It is further insisted that, if any cause of action exists for the alleged wrongful acts complained of, it is a cause of action which must be prosecuted by the receiver of the insolvent bank for the benefit of all the creditors thereof. The question for determination, therefore, depends upon the construction which ought to be placed upon the complaint.

If the complaint is one which seeks to recover damages for the wrongful acts of the defendants which gave a right of action to the bank, it has passed by the appointment of a receiver for the bank to him, and he is the proper party to sue for and recover the same as an asset of the bank for the benefit of its creditors. The complaint is in four paragraphs, and, so far as material to the determination of the question before the court, they are in substance alike. The first paragraph of the complaint alleges, in substance, that the defendants have been and are the directors of the Indianapolis National Bank, and that as such directors, and seeking for a long time, to wit, two years last past, to induce the public generally, and the plaintiffs, to deposit money and do banking business with said bank, they repeatedly made in writing and signed, and thereafter published and caused to be published, from time to time, divers advertisements, statements, and reports, pretending thereby to represent and show the condition of said bank; that in and by said advertisements, statements, and reports the defendants represented, and intended to represent, that said bank was solvent, and was doing a large and prosperous business; that the plaintiffs, having a right to rely and relying upon said representations, were thereby induced to deposit with said bank \$35,000, which was entered to their credit on the books of said bank; that the plaintiffs had no knowledge that said representations were false, and that said bank was insolvent; that each of said defendants at all times knew that said bank was hopelessly insolvent; that said representations were false, fraudulent, and deceptive, and were known so to be by said defendants; that in making and causing said representations to be made said defendants intended to deceive the public generally and the plaintiffs; that said advertisements, statements, and reports came into the hands of the plaintiffs and to their knowledge in the ordinary course of business; that said defendants ought to have known and

did know that said advertisements, statements, and reports would come, as they did come, into the hands and to the knowledge of the plaintiffs, and that the plaintiffs would rely and were relying on the representations thereby made; that said representations did deceive the plaintiffs, and by reason of the premises they have been damaged in the sum of \$35,000, for which amount they demand judgment.

It is apparent that the cause of action does not sound in tort for any acts of misfeasance or nonfeasance on the part of the defendants, as directors, causing damage or loss to the bank. It does not appear that the bank has suffered any injury by reason of the fraudulent acts complained of. On the contrary, it became possessed of \$35,000 of the moneys of the plaintiffs as the direct and intended result of the false and fraudulent representations of the defendants. Hence the bank, if not benefited, certainly was not injured by the fraudulent acts of its directors. It is therefore certain that neither the bank, nor the receiver who now represents it, could maintain any action for the wrongs complained of. Unless the plaintiffs can maintain an action for the redress of the injury which they alone have suffered, the defendants cannot be made answerable for their false and fraudulent conduct. It would be a matter of just reproach if the law were so impotent as to afford no redress to a party who had been deprived of his money or property by false and fraudulent representations. The fraudulent representations charged in the complaint, if made under color of their office, were entirely outside of the official duties of the directors. Neither the law nor the obligations of their office made it any part of their duty to utter and publish false and fraudulent advertisements, statements, and reports in regard to the condition of the bank. The tort for which they are sued was committed in their private and personal capacity, because the law does not confer upon such officers any authority to commit frauds of the character complained of. These directors have used their official stations to enable them to perpetrate a fraud on the plaintiffs entirely outside of the legitimate scope of their duties. It could, in no event, become a part of their duties to procure money to be deposited in the bank by false and fraudulent representations.

Morse, Banks (page 133), says:

"If bank directors do not manage the affairs and business of the bank according to the directions of the charter, and in good faith, they will be liable to make good all losses which their misconduct may inflict upon either stockholders, creditors, or both. They may be held to account to an injured party in a court of chancery, or they or any of their number who shared in the wrongdoing may be sued at law for damages."

In 3 *Suth. Dam.* 587, 588, it is said:

"If the person making the representations which are material, and which he intends shall influence another, knows them to be false, the case is clear. Some question has been raised whether positive representations made without knowledge, and believed to be true by the party making them, will sustain an action for damages in the nature of deceit. But the doctrine which seems supported by the great weight of authority is that if a person states as of his own knowledge material facts which are susceptible of knowledge, to one who

relies and acts upon them as true, it is no defense, if the representations are false, to an action for deceit, that the person making them believed them to be true. The falsity and fraud consist in representing that he knows the facts to be true of his own knowledge, when he has not such knowledge. It is not necessary that the false representations be made to deceive the plaintiff in particular."

The case of *Society v. Underwood*, 9 Bush, 609, was an action against the directors of a bank to recover of them personally damages for loss of deposits wrongfully converted, and it is there said:

"The question here presenting itself for our decision is whether the directors, who had knowledge of these alleged wrongful sales, can be held to answer personally for the deposits so converted. Appellees insist that they cannot be so held, because of the want of privity between the depositors and themselves. They concede that for gross negligence or mismanagement upon their part, resulting in loss to the bank, they may be held to account to it; but urge that, inasmuch as their undertaking was to the corporation, they can be proceeded against by it alone, and that these appellants must look to the bank, and not to them. This position is plausible, but it cannot, in our opinion, be maintained. Bank directors are not mere agents, like cashiers, tellers, and clerks. They are trustees for the stockholders; and, as to their dealing with the bank, they not only act for it and in its name, but, in a qualified sense, are the bank itself. It is the duty of the board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community have the right to assume that the directory does its duty, and to hold them personally liable for neglecting it. *Morse, Banks*, 76, 77. Their contract is not alone with the bank. They invite the public to deal with the corporation, and when any one accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and, if they fail in either, they violate a duty they owe, not only to the stockholders, but to the creditors and patrons of the corporation."

See, also, *Graves v. Bank*, 10 Bush, 23, 1 *Thomp. Nat. Bank Cas.* 492.

The case of *Bartholomew v. Bentley*, 15 Ohio, 659, was a suit by an individual creditor of an insolvent bank against the officers of the bank to make them personally liable for losses sustained by the plaintiff as the holder of bank bills, by reason of his relying and acting upon false representations made by them. The court there said:

"It may be regarded as a well-settled principle that for every fraud or deceit which results in consequential damage to a party he may maintain a special action on the case. The principle is one of natural justice, long recognized in the law; and it matters not, so far as the right of action is concerned, whether the means of accomplishing the deception be complex or simple,—a deep-laid scheme of swindling or a direct falsehood, a combined effort of a number of associates or the sole effort of a solitary individual,—provided the deception be effected, and the damage complained of be the consequence of the deception. A valid act of incorporation, or an invalid and pretended right to exercise corporate franchises, is alike powerless to secure the guilty from the consequences of their fraudulent conduct, where it has been knowingly resorted to as the mere means of chicane and imposition, and used to facilitate the work of deception and injury. Were it otherwise, it would be a reproach to the law. If the defendants, with the design to defraud the public generally, have knowingly combined together, and held forth false and deceptive colors, and done acts which were wrong, and have thereby injured the plaintiff, they must make him whole by responding to the full extent of that injury; and they cannot place between him and justice, with any success, the charter of the German-American Bank of Wooster, whether it be valid or void, forfeited or in esse. \* \* \* Nor is it material that there should have been an

intention to defraud the plaintiff in particular. If there was a general design to defraud all such as could be defrauded by taking their paper issues, it is sufficient, and the plaintiff may maintain his suit provided he has taken the paper, and suffers from the fraud. \* \* \* It is first said that to allow bill holders, who have been defrauded, to sue the members of the company individually at law will produce endless litigation and when applied the remedy cannot by any possibility do equal justice to all the creditors or to the members of the company. It may be that numerous suits will be prosecuted. \* \* \* And yet the doctrine that because they have cheated thousands they are safer than they would be if only one man had suffered does not obtain in courts of justice. \* \* \* Again, it is said the fund sought is a trust fund, and a bill in chancery is the proper remedy. There would be much propriety in the position, were it in point of fact true that a party who has been defrauded by the act of another has no redress save out of the fund composed solely of the proceeds of the imposition. In that case strict equity might require that all those whose injuries had been the source of the fund should share equitably in it. But the rule that a person sustaining damage by fraudulent acts of another can only look to a particular fund of the wrongdoer for redress never existed anywhere."

The cases of *Cross v. Sackett*, 6 Abb. Pr. 247, and *Ward v. Sackett*, 2 Bosw. 645, were actions by purchasers of stock of a corporation to recover of directors money paid for stock, upon the ground of false representations made by the directors in a prospectus and other advertisements in regard to the value of the stock. In these cases it was held that the actions could be maintained, and that "there is no wrong or fraud which the directors of a joint-stock company, incorporated or otherwise, can commit which cannot be redressed by appropriate and adequate remedies."

The case of *Cazeaux v. Mali*, 25 Barb. 578, was an action brought by a stockholder of a corporation against its officers and directors to recover of them personally the loss sustained by him by depreciation in the value of the stock caused by the fraudulent issue of stock beyond the authorized amount. It was there held that the action was properly brought by the stockholder in his own name, without joining other stockholders, the injury to each stockholder being separate and distinct from that sustained by the others, and that the action was well brought against the defendants.

The case of *Morgan v. Skiddy*, 62 N. Y. 325, was an action brought by the purchaser of the stock of a corporation against the directors personally to recover the money paid for the stock, upon the ground that the plaintiff had been induced to purchase the stock by false representations made in a prospectus issued by the defendants. It was there held that the action was properly brought by the plaintiff, and was maintainable against the defendants, as directors.

The same principle is held in England in *Johnson v. Goslett*, 3 C. B. (N. S.) 573, and *Clarke v. Dickson*, 6 C. B. (N. S.) 452. In the recent case of *Peek v. Derry*, 37 Ch. Div. 541, 585, which was an action of deceit against the directors of the corporation founded upon misrepresentations in a prospectus, the result of the cases is thus summed up by Lopes, L. J.:

"If a person makes to another a material and definite statement of a fact which is false, intending that person to rely upon it, and he does rely upon it, and is thereby damaged, the person making the statement is liable to the person to whom it is made (1) if it is false to the knowledge of the person making it; (2) if it is untrue in fact, and not believed to be true by the person mak-

ing it; (3) if it is untrue in fact, and is made recklessly, for instance, without any knowledge on the subject, and without taking the trouble to ascertain if it be true or false; (4) if it is untrue in fact, but believed to be true, but without reasonable grounds for such belief."

The case of *Delano v. Case*, 121 Ill. 247, 12 N. E. 676, was an action by a general depositor in a bank against the directors for negligence in permitting it to be held out as solvent, when in fact it was, at the time, insolvent. It was there held if the directors of a bank are guilty of negligence in permitting it to be held out to the public as solvent when in fact it is insolvent, and thereby induce one to deposit his money with the bank, which he loses by reason of its insolvency, he may recover of such directors personally, in an action on the case, the damages he may thereby sustain.

The case of *Seale v. Baker*, 70 Tex. 283, 7 S. W. 742, was an action by a depositor in an incorporated bank against the directors for the recovery of damages sustained by the insolvency of the bank, in which he was induced to deposit money by false representations of solvency made to the general public by the directors, who knew, or ought to have known, that such representations were false. It was there held that the action was properly brought by the depositor, and that it was maintainable against the directors personally, whether such fraudulent representations were made with the intent to defraud or not. See, also, *Neall v. Hill*, 16 Cal. 145; *Marshall v. Bank*, 85 Va. 676, 8 S. E. 586; *Wallace v. Bank*, 89 Tenn. 630, 15 S. W. 448.

The case of *Salmon v. Richardson*, 30 Conn. 360, was an action against Richardson and others, as directors of the Bridgeport Insurance Company, for an injury resulting to the plaintiff from the fraudulent representations of the directors concerning the assets and condition of the company, whereby he was induced to insure his property in the company. It is there said:

"The defendant Richardson claims that the publication complained of is charged to have been made by the defendants acting as directors of the insurance company, and that no action can be maintained against them for anything done by them while acting in that capacity. We will not stop now to inquire whether, upon the true construction of this count, the false and fraudulent publication complained of is charged to have been made by the defendants when acting in their official or in their personal character, because we think that the law regarding the defendants' liability, in any aspect of it, is not as the defendants claim. \* \* \* Directors of a corporation, in the management of its affairs, are the power which gives expression to its will, but it is no part of their duty to perpetrate crimes or frauds in its name or for its benefit; and, whatever the liability of the corporation may be, the individuals who, under cover of their office as directors, commit frauds like those charged against these defendants, ought to be, and in our judgment are, upon the clearest principles of law and justice, accountable for their conduct in a civil action at the suit of the injured party. It is true that the contract of insurance was made with the corporation, and not with the directors, and that no suit could be maintained upon that contract against such directors, whatever agency they may have had in making it. It was the contract of the corporation, and not of its directors, and there was therefore no privity of contract between the plaintiff and these defendants. But this action is not founded upon any contract, or to obtain damages for the breach of one. The plaintiff's claim is that these defendants, availing themselves of the facilities afforded by their office and position of directors, have perpetrated a flagitious fraud upon him for the benefit of the corporation, and their own pecuniary

profit and emolument as stockholders thereof; that they individually made, and concurred in the making and publishing of, the statement that the affairs of the company were in a sound and prosperous condition, knowing it to be false, and intending to deceive and defraud all property holders who might be induced thereby to insure their property in that company; and, whether directors of a corporation are to be regarded as its agents or its elements, impartial justice and public policy both require that as all natural persons are, so they should be, held responsible to third persons for the misfeasances by them in fact committed or commanded."

See Cooley, Torts (2d Ed.) 578, 579, and notes.

In 1 Mor. Priv. Corp. § 573, it is said:

"It has often been decided that directors are liable for fraudulent representations as to the financial condition of the company, whereby others are induced to give credit to the company, or to purchase its obligations or shares of stock. If directors issue reports or prospectuses intended for general circulation, and to advertise and give credit to the company with the public, they are responsible for the natural consequences of their action in this respect; and, therefore, if the reports or prospectuses are false, and were made fraudulently, any person into whose hands they come, in the ordinary course of events, and who is misled thereby, has his action against the directors; it is not necessary that the misrepresentation be made by the directors directly to the party complaining."

It is insisted that the case of *Bailey v. Mosher*, 11 C. C. A. 304, 63 Fed. 488, and the cases therein cited, hold a contrary doctrine, but, as we understand that case, it is not inconsistent with the doctrine of the cases above cited. It was an action against the directors of the Capitol National Bank of Lincoln, Neb., to recover damages for false representations made by them to the plaintiff, who was thereby induced to loan money to the bank. The contention on the part of the plaintiff was that the complaint stated a common-law action to recover damages for deceit. On the part of the defendants it was contended that the action was one to recover damages for official misconduct involving a violation of the provisions of the national banking act. The court construed the complaint as one for the recovery of damages for misfeasance in the performance of duties imposed upon them by the national banking act, and held that for such breaches of duty the right of action accrued to the bank, and an action therefor could only be prosecuted by the receiver of the insolvent bank against the directors for the benefit of all its creditors. It is apparent that the court gave a construction to the complaint not contemplated by the plaintiff.

In the case in hand the plaintiffs seek to recover damages for an injury which could in no event give a right of action to the bank or to its receiver, or to any other creditor than the plaintiffs. If the frauds complained of do not give a right of action to the plaintiffs, the defendants will entirely escape liability for fraudulent representations, as shown by the complaint, of the most flagitious character. I do not believe the law is justly obnoxious to such a reproach. In my opinion, the settled doctrine of the law is that if, in the pretended performance of duties imposed upon them by law, the directors of a bank use their official station to make false representations, which are believed and acted upon by third parties, they are liable to respond for the injury done to the one defrauded thereby, and that the liability provided for in the national banking act

cannot be deemed to preclude the right to maintain a common-law action of deceit for such false and fraudulent representations.

It is further insisted that if a cause of action may be maintained against the directors personally, for making false representations to the injury of a depositor, it is not maintainable unless such representations are made in writing, and signed by the party to be charged; citing 3 Burns' Rev. St. Ind. 1894, § 6634 (Rev. St. 1881, § 4909). In view of the construction placed upon the complaint, it is neither necessary nor proper to express any opinion on its sufficiency to withstand the objection growing out of the above-cited provision of the statute of frauds. Having reached the conclusion that the complaint presents common-law causes of action for deceit, it follows that no federal question is presented, and the case must be remanded to the court of the state from which it was removed. Let the case be remanded to the superior court of Marion county, Ind., at the costs of the defendants.

---

PLATT v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court, E. D. Pennsylvania. November 27, 1894.)

No. 1.

RAILROAD RECEIVERSHIPS—DIRECTIONS TO RECEIVERS—MEMBERSHIP IN LABOR ORGANIZATIONS.

The R. R. Co., in 1887, adopted a rule that no one would be employed by it who was a member of a labor organization, unless he would agree to withdraw therefrom; and, from that time, required every applicant for employment to sign an application, representing that he was not a member of any such organization, or that, if he was, he would withdraw therefrom. Some years later, receivers of the railway company were appointed, and continued the same rule and practice. Certain employes of the receivers petitioned the court to restrain the receivers from acting upon a notice, issued by them, stating their intention to discharge any employes who were members of labor organizations, unless they severed their connection therewith before a certain date. It appeared that all the petitioners had either obtained employment by canceling their membership in such organizations, or had had notice of the rule, and been employed, in violation of it, by subordinate agents, without the knowledge or consent of the receivers; and no others, differently situated, asked to be made parties. *Held*, that the petitioners, who had thus violated a known rule, had no standing to seek to restrain its enforcement; and that, in any event, the court would not direct the receivers to abrogate a rule, established by the owners of the property, and believed by them, and by the receivers, to be advantageous in its management, and which involved nothing unlawful.

This was a petition by Levi Hicks and others, employes of the receivers appointed in the main cause, for directions to such receivers.

Francis Rawle and Day & Montague, for petitioners.

Samuel Dickson and Thomas Hart, Jr., for receivers and railroad company.

DALLAS, Circuit Judge. The subject-matter of this litigation was first brought to the attention of the court by the joint petition (filed

October 8, 1894) of Stephen E. Wilkinson and Thomas McDermott and George H. Ruppel, "acting for themselves and all employes of the Philadelphia & Reading Railroad Company, who are members of an unincorporated voluntary association called the 'Brotherhood of Railroad Trainmen.'" The object of the proceeding was to obtain an order restraining the receivers from acting in pursuance of a notice which had been issued by them, and which is referred to in the petition as follows:

"On or about the 15th day of August last, your petitioners were notified that all members of said association must dissolve their connection with the same on or before October 8th instant, or, failing to do so, would be discharged from the service of the receivers."

The receivers filed an answer to this petition, wherein they stated that Stephen E. Wilkinson was unknown to them; that George H. Ruppel had been employed by them only about one week before the petition was filed, and that he had, as part of his application for employment, declared in writing that he was not, and if employed by the receivers would not become, a member of any labor organization; and that the similar written declaration of Thomas McDermott was supposed to have been destroyed by fire, and unless it should be found there was no present intention of dismissing him. Upon the presentation of the case thus made, it was admitted that Stephen E. Wilkinson was not in the service of the receivers, and, indeed, from the petition itself, it appears that his supposed right of interference was based solely upon the ground that he is "the chief executive officer of the association known as the 'Brotherhood of Railway Trainmen.'" I, however, then thought, as I still think, that neither that association, nor he as its chief officer, had any legal standing to be heard in complaint of any action taken or proposed by the receivers, or to invoke or advise the court's disallowance of any measure adopted or contemplated by them in the performance of the duties assigned to them. They have made no contract with or through this association, and none had been so made by the company. All contracts of hiring or employment have been made directly with the men employed, and Mr. Wilkinson, personally or officially, is a stranger to them. He, or the association which it may be assumed he represents, has, in law, no more connection with them, or with the relation which they create, than has any other person or organization whatsoever. His participation in the proceeding was therefore voluntary and without interest, and his inclusion as a party to the petition was not a mere misjoinder,—it was without color of right. As to the remaining petitioners, the case, in view of the matters set up by the answer, was not pressed, and it is clear that it could not, as to either of them, have been persisted in with success. It could not have been reasonably insisted that the receivers should be compelled to continue Mr. Ruppel in their employment notwithstanding the fact that he had obtained admission to it by making a declaration which was either not true when made, or was immediately afterwards falsified, and the disclaimer of intention to discharge Thomas McDermott of course ended the matter as to him.

The original proceeding having been thus terminated, it was, in



strictness, incapable of revival by the introduction of new parties plaintiff, and the averment, as to them, of a different state of facts. But as no matter of substance demands the enforcement of this principle of equity pleading, and as the objection was not insisted upon when it would have been pertinent, it may well be waived now. The fact is that leave was asked, and was granted, to file an intervening petition; and accordingly (October 8, 1894) the petition of Levi Hicks was filed, wherein it is alleged that he is an employé of the receivers, and is a member of the Brotherhood of Railway Trainmen, and, upon information and belief, that the statements contained in the preceding petition are true. This petition was amended on October 27, 1894, and again on November 13, 1894. The answer to it, as at first presented, was filed on October 12, 1894; and the first amendment was answered on November 5, 1894, and the second amendment on November 19, 1894. The petition of George S. Riley was filed on October 27, 1894, and the answer of the receivers thereto was filed on November 5, 1894. Upon the application of the counsel for the petitioners, the case was assigned for hearing, and, on the day appointed, was fully argued. The case having been thus heard on the petitions, as amended, and the several answers thereto, the answers are to be taken as true (2 Daniell, Ch. Prac. p. 982); and applying this rule to the cases of Levi Hicks and George S. Riley, the facts before the court, so far as deemed to be material, may be concisely stated. Both of these persons are in the service of the receivers, and both are members of the unincorporated association known as the "Brotherhood of Railway Trainmen." A rule was adopted by the railroad company in the year 1887, and has since been maintained by it and by the receivers, to the effect that no one would be employed in its service who was a member of such an association, unless he would agree to withdraw therefrom. Levi Hicks was employed as brakeman on October 20, 1893. The established form of application representing that the applicant was not a member of any labor organization, or that, if such a member, he would withdraw therefrom, was presented to him for signature, and thus the rule above mentioned was especially brought to his notice; but he then declined to state whether or not he was a member of such an organization, and thereupon he was employed, but by a subordinate agent of the receivers, and without their knowledge or that of their general superintendent. On or about August 15, 1894, he was notified by the latter that, unless he would give up his membership in the Brotherhood, he would be discharged. He still, however, retained both his membership and his employment, and on October 8th, the day on which his original petition was filed, and after it had been presented, the general superintendent had an interview with him and others of the employed, at which "no threat was made of discharge, but reference was made to the agreements under which the men had entered the service of the company, and to the rules of the company, and they did agree to withdraw." The proposed discharge of George S. Riley has no connection with his membership in the Brotherhood of Railway Trainmen, but is caused solely by his failure to satisfactorily perform his duties.

The circumstances disclosed in the case of Levi Hicks do not entitle him to the interposition of a court of equity on his behalf. Without animadverting upon his participation in the equivocal and exceptional means by which he secured his present employment, it may, at least, be said that his assumption that the fact that he so secured employment imposes upon the receivers an obligation to retain him in it, ought not to be sustained. Even if they should not be permitted to dismiss an employé because of a fact known to them when they employed him, still they should not be compelled to keep in their service one who, without their knowledge, entered it in conscious violation of a long-established regulation, though with the connivance or negligent assent of some minor official. The notice of August 15, 1894, was therefore rightfully given, and should have been regarded. The receivers had done nothing which, upon any reasonable ground, could be set up to deprive them of that freedom of action which, in such matters, employers and employed are alike and always at liberty to exercise. When unaffected by contractual obligation, the right to determine their personal relations pertains to all men, and is no less inviolable than is their right to form them according to their own will and pleasure. Mr. Hicks might certainly leave the service of his employers for any cause or without cause, and I know of no principle upon which the like privilege could be denied to them. As was said by Mr. Justice Harlan in *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 317:

"It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. \* \* \* The rule, we think, is without exception that equity will not compel the actual, affirmative, performance by an employé of merely personal services any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character. The right of an employé, engaged to perform personal service, to quit that service, rests upon the same basis as the right of his employer to discharge him from further personal service. If the quitting in the one case or the discharging in the other is in violation of the contract between the parties, the one injured by the breach has his action for damages, and a court of equity will not indirectly or negatively, by means of an injunction restraining the violation of the contract, compel the affirmative performance from day to day, or the affirmative acceptance, of merely personal services."

The promise made by Mr. Hicks after his petition had been filed may have been, and probably was, influenced by a desire to assure his retention of his place notwithstanding his failure to respect the notice of August 15th, but it was not induced by any threat then made, nor does it appear that his participation in this proceeding was objected against him. If it had been, I would not have hesitated, upon attention being called to it, to make it quite plain that no man can be prejudiced by applying to the court for relief to which he thinks he is entitled. But there is nothing of the kind in this case. The purpose to discharge Mr. Hicks, unless he would resign from the association, was communicated to him about two months prior to October 8th, and his promise of that day was given simply in the exercise of his right of election between the alternatives which had been previously presented to his choice. The fact is that he did agree to sever his connection with the Brotherhood, and,

though in making his selection he was doubtless confronted by a dilemma, it is obvious that he was not in any legal sense subjected to compulsion. But it is not necessary that I should, and I do not, rest my judgment upon this tardy agreement. It is at least certain that by making it Mr. Hicks acquired no better position than he occupied before, and, without it, I am of opinion that the receivers would have been justified in dismissing him upon ground peculiar to him, and wholly irrespective of the broad question which he has attempted to inject into his case. It results that the petitioner Hicks has not made out a case entitling him to the relief which he seeks, and it is even more manifest that the case of George S. Riley is utterly devoid of equity.

Here discussion might well end, and both petitions be dismissed. This matter has been pending since the 8th day of October, but no person other than those who have been mentioned has asked to intervene. These petitioners assert that they represent other unnamed employes of the receivers, but it has not been shown that they do, and, if it had been, it could not be assumed that such others are better situated than the petitioners themselves. But, even if to be regarded as class bills, these petitions could inure to the benefit of persons only whose claim to relief is the same as that of the specified complainants, and whose equal title is founded upon the same alleged equity. The case of the actual plaintiffs cannot be strengthened by an averment that the case of some other person or persons, if presented, would be stronger. But it is contended that the general proposition which has been discussed at bar should be abstractly considered, and without regard to the merits of the particular cases in which it has been propounded,—that the court, being informed that receivers of its appointment are alleged to be pursuing a wrongful course, should investigate their conduct at the instance of any informer, though himself without standing to complain of it, and, if it should find that wrong has been done or is purposed, should prohibit its continuance or commission. I cannot assent to this. It is hardly necessary to say that, in an ordinary case, an injunction will not be awarded except at the suit of a party threatened with injury, and I am unable to perceive why, in the case of a receivership, a court of equity should be moved to restrain its receivers, or to admonish them as to their duty, at the instance of an accuser who is not interested either in the cause or in the particular subject to which his accusation relates. Any such practice would be anomalous. It would not be supported by either reason or authority. Its effect would be mischievous. If receivers were required to answer with respect to their official acts at the suit of a mere meddler, the administration of their trust might be impeded by the constant and repeated intrusion of causeless objections; and, if the courts were to examine every criticism which might be volunteered for their attention, they would simply invite any litigious busybody to add his chimeras to the burden which cases of this kind legitimately impose upon the judges. Yet, as the counsel of the petitioners have earnestly urged me to inquire, as of my own motion and independently of suggestion, whether these receivers should not be directed

to abandon the position with respect to labor organizations in which a rule of the railroad company has placed them, I have carefully and fully considered the matter, and, waiving the irregularity in this case, I will, so far as I deem it to be proper that I should do so, briefly indicate my views upon the question thus pressed for decision.

The rule which is attacked was established, not by the receivers, but by the railroad company itself, and several years before these receivers or their predecessors in office were appointed. Therefore the question is not whether a policy originated by the receivers should be sanctioned, but whether they should be forbidden to continue in force a regulation which they found in operation when they assumed control of the business. It is to be observed, too, that it is not essential to the proper determination of this question that the character or objects of the association called the "Brotherhood of Railway Trainmen" should be either approved or condemned. In the argument submitted for the petitioners much has been said in condemnation of it, and in support of the claim that it is not only a lawful body created for beneficent purposes, but is one of a class which public policy encourages and upholds. I think, however, that the court should not needlessly enter upon the investigation of this claim. The Brotherhood of Trainmen is not a party to this proceeding, and therefore its constitution, conduct, and motives should not be unnecessarily scrutinized. If I entertained an unfavorable opinion of it, it would be manifestly improper for me to seek occasion to express that opinion; and it would, I think, be scarcely less objectionable for me to obtrude any declaration in its favor. The ground upon which it is supposed that the courts should avail themselves of every pretext to discuss and rule upon the good or evil influence and tendencies of such associations is, in my judgment, the very ground upon which they should endeavor to firmly maintain a judicious reserve with respect to them. If, indeed, an inquiry as to their status and aims would involve the consideration of "vexed and new questions," of "the greatest social problem of the day," and of "the burning question of modern times," then surely the announcement of a "policy of courts" concerning them should not be attempted, but avoided. The solution of social problems, and of vexed, new, and burning questions, has not been confided to the judiciary. Courts are established to administer the will of the legislature as embodied in law, and not the personal, it may be discordant, views of the judges themselves on matters of public concern. Evils resulting from the inconsiderate conduct of either employers or the employed "are to be met and remedied by legislation"; and, "in the absence of legislation to the contrary, the right of one in the service of a quasi public corporation to withdraw therefrom at such time as he sees fit, and the right of the managers of such a corporation to discharge an employé from service whenever they see fit, must be deemed so far absolute that no court of equity will compel him, against his will, to remain in such service, or actually to perform the personal acts required in such employments, or compel such managers, against their will, to keep a particular employé in their serv-

ice." *Arthur v. Oakes*, 11 C. C. A. 209, 63 Fed. 319. The real question, is not whether the Brotherhood of Railway Trainmen is or is not inimical to the general welfare, but whether these receivers should be ordered to retain its members in their service, despite the company's pre-existing rule to the contrary, and against their own unanimous judgment. If such an order ought to be made, it must be because the action to be restrained would injuriously affect the interests the receivers have in charge, or would be contrary to law, or unjust to those immediately concerned. If there is any other consideration upon which the direction asked for could be based, counsel have not suggested it nor do I perceive it.

There is absolutely nothing before the court which would warrant it in holding that the trust property is likely to be injuriously affected by the receivers' enforcement of the company's rule. No one interested in that property has said so, and the receivers, who, presumably, are best qualified to form an opinion on the subject, and who cannot be assumed to be untruthful, have united in the statement that they believe it to be to the interest of their trust that the rule referred to should be enforced. I accept this—the only evidence on the subject—as conclusive. I am not competent to form an independent judgment upon it; and in this district the practice of the court has always been to rely largely upon the discretion of its receivers with respect to the policy and details of their management, especially where, as in the present instance, it is not challenged by any person who is entitled to question it.

That the contemplated action is not unlawful is too plain for argument. That it contravenes public policy is asserted, but how can this be established? I know of no means of ascertaining the policy of the public in relation to personal rights, but by consulting the public laws. This particular association is not a corporation, but if it was it would not follow, as seems to be supposed, that it could rightfully insist upon the retention of its members in the service of another corporation, against its will. Neither is the argument advanced by showing that in some states it has been declared by statute to be a penal offense for any employer of labor to coerce or compel any person to enter into an agreement not to join any labor organization, as a condition of such person's continuance in such employer's service. I need not consider the effect of these enactments within the territorial limits of the sovereignties by which they have been enacted. It is enough to say that they are not to be found upon the statute book of the state of Pennsylvania, or of the United States, and therefore they are neither applicable to this case nor mandatory upon this court; and if any inference as to the "policy," either of the federal government or of Pennsylvania, can rationally be deduced from the existence of such laws in certain of the states, it would seem to be that, by abstaining from similar legislation, congress and the General Assembly of Pennsylvania have indicated their dissent from its principle. At all events, public policy cannot, in the absence of law, be enforced by courts of justice. Policy may direct the legislature in commanding what is right, and prohibiting what is

wrong, but the law alone determines for the courts the rightful or wrongful nature of any conduct which is submitted to judicial investigation.

I do not doubt the authority of a court of equity to restrain its receivers from treating those whom they employ unjustly or oppressively; and when its power in that behalf is properly invoked, and the allegation of injustice or oppression is sustained, the protection which such a court may afford should be promptly and efficiently accorded. This, in my opinion, is and should be the law; but has a case of injustice or oppression been made out in the present instance? The rule complained of was promulgated as long ago as the year 1887, and the receivers emphatically assert their belief, which is not controverted, that no employé has since entered the service in ignorance of its existence, or joined the Brotherhood of Railway Trainmen without being aware that by so doing he violated it. There is some uncertainty as to the number of the receivers' employés who have become members of the Brotherhood, but it is certain that they constitute a very small proportion of the whole force. To release these particular men from the operation of a rule which was known to them when they took employment, and which, except possibly in a few instances occurring through the oversight or neglect of some subordinate agent, they expressly accepted, would be unfair to the others; and to wholly abrogate the rule or to suspend its operation generally would open the door to a complete reversal of a policy which was deliberately established by the company several years ago, and which has since been pursued. In short, the court is asked, in a proceeding ostensibly instituted to obtain an order for the guidance of the receivers during the brief period of their control, to enter a decree the practical effect of which would be to permanently annul a regulation adopted by the owners of the property, and this without the consent of those now interested in it. I have not been convinced that there is anything in this case which would justify compliance with this request. It is possible there may be a few men—there cannot be many—to whom the strict enforcement of the rule would occasion some hardship, but no such case has been made known, and the answers of the receivers display no vindictive feeling or disposition to harshness. I have no hesitation in relying upon them to deal fairly and discriminatingly with any case which may reasonably call for peculiar consideration. The several petitions mentioned in this opinion are dismissed.

---

WADLEY v. BLOUNT et al.

(Circuit Court, W. D. Virginia. January 31, 1895.)

1. EQUITY—POWER TO RESTRAIN CRIMINAL PROCEEDINGS AT LAW.

The jurisdiction of a court of equity to restrain proceedings at law extends to criminal as well as civil proceedings, where such criminal proceedings are instituted by plaintiffs who have previously sought the aid of the court of equity to maintain their rights as against the parties against whom the criminal proceedings are instituted, the subject-matter of both proceedings being the same.

**2. SAME.**

H. brought a suit in equity, in a federal court, against the W. Co., alleging its insolvency, and seeking ascertainment of its liabilities, and the appointment of a receiver. B. and others, creditors of the W. Co., afterwards filed their petitions, asking to be made parties complainant, and charging mismanagement of the affairs of the corporation, and were accordingly let in as parties. A master was appointed to investigate the conduct of the affairs of the company, who examined witnesses, including one W., the president of the company, and made a report, finding said W. indebted to the company in a large sum. Subsequently the creditors filed an amended and supplemental bill against the company, W., and others, seeking a personal decree against W. for such indebtedness. While the cause was in this position, the creditors held a meeting, agreed to submit to W. a proposition to settle the claims against him for 50 cents on the dollar, and, in case he should not accept, to proceed criminally against him. Their proposition being declined, they caused an indictment for embezzlement to be found against W. in a state court, using for that purpose, before the grand jury, the depositions taken in the federal court, and causing their counsel to be summoned as witnesses before the grand jury. W. then filed his bill against the creditors who had instituted such criminal proceedings and the prosecuting officer of the state to enjoin the further prosecution of the indictment. *Held*, that all the defendants should be enjoined until the final determination of the first suit, and until the further order of the court, from prosecuting such indictment.

**3. COMITY—BETWEEN COURTS—LIMITS.**

Judicial comity does not require a court, which has complete jurisdiction over a cause pending and undetermined before it, to allow the use by another court of the pleadings and depositions filed in such cause, before they have been considered for the purpose for which they were intended, and in a cause involving the same subject-matter and parties, over which the court desiring to use them has assumed jurisdiction after the making and filing of such papers.

**4. CRIMINAL LAW—USE OF DEPOSITION TAKEN IN A FEDERAL COURT BEFORE A STATE GRAND JURY.**

It seems that a deposition and master's report, taken and filed in an equity cause in a federal court, cannot, in any proper way, be used before a grand jury in a state court to secure the indictment of the person giving such deposition.

This was a suit by H. G. Wadley against Blount & Boynton, Paul Hutchinson, as administrator of Charles Hutchinson, deceased, J. L. Gleaves, prosecuting attorney for Wythe county, Va., and others, to restrain the prosecution of an indictment in the county court of Wythe county, Va.

D. F. Bailey, Joseph C. Wysor, and Blair & Blair, for plaintiff.

J. A. Walker, M. M. Caldwell, and J. L. Gleaves, for defendants.

GOFF, Circuit Judge. This case is before me on motion of defendants to dissolve the injunction granted on the 8th day of June, 1894, as prayed for in plaintiff's bill. In order to fairly understand the questions involved in this controversy, and to appreciate those now disposed of, it is necessary that the main points raised in the case of Paul Hutchinson, administrator of Charles Hutchinson, deceased, et al., against the Wytheville Insurance & Banking Company, and in the petition filed therein in the name of Blount & Boynton and others against said defendant and others, as also in the amended and supplemental bill, in the nature of a cross bill, filed in said cause by Blount & Boynton et al. against H. G. Wadley and others, to all of

which reference is made in the pleadings and exhibits of this case,—it being in fact a proceeding filed in and made part of said original cause,—should be referred to and briefly set forth. The first-mentioned bill was filed on the 5th day of October, 1893, by Paul Hutchinson, a citizen of the state of Iowa, against the Wytheville Insurance & Banking Company, a corporation organized under the laws of the state of Virginia, and doing business at Wytheville, in the western district of Virginia. The object of the suit was to ascertain the liabilities of said company, which was alleged to be insolvent, to secure the appointment of a receiver, and for such action as is usual in what is known as a "Creditors' suit." On the 6th day of October, 1893, this court appointed H. J. Heuser receiver of the assets of such company, directing him to take charge of its property, and see to the management of its business; and he duly qualified as such, proceeding with the discharge of the duties assigned him. On the 18th and 19th days of the same month, Blount & Boynton and other creditors of said Wytheville Insurance & Banking Company filed their petitions in said cause, and, at their request, were made parties complainants therein; they claiming that they had valid claims against said company, which were set forth, amounting to many thousands of dollars in the aggregate. They charged mismanagement of the business affairs of the company, asking for the appointment of a master commissioner, the removal of the receiver, and for other action and relief, not required to be fully alluded to here. The court refused to remove the receiver, but appointed Preston L. Gray, as master, with instructions to investigate the conduct of the affairs of said company, in what way it had been managed, and of what its assets consisted; also, that he ascertain in what manner the funds of the company had been invested, and how the same had been disposed of; that he report the liabilities of the company, showing the sums due its policy holders and other creditors, the amounts theretofore paid its officers as salaries, in whose name the funds of the company have been kept, and such other matters relating to the business of said company as any party to the suit might request. The said master, after due notice to the parties, proceeded to execute the orders of the court, for that purpose taking charge of the books, papers, correspondence, and records of the company, and calling and examining as a witness the plaintiff, H. G. Wadley, relative to his management of the business affairs of such company, of which he had been president. The said Wadley was so examined on the 8th day of February, 1894, being fully questioned, by the master, by counsel for said company, and also by his own counsel, as well as those who represented the creditors; the same being in the form of a deposition taken before said master. The object of this examination was to fix an individual liability on said Wadley, by showing the unlawful diversion by him of the assets of the said Wytheville Insurance & Banking Company. The master filed his report on the 27th day of April, 1894, in which it is set forth that Wadley is indebted to the company in the sum of \$196,342.24. On the 25th day of May, 1894, the said creditors filed an amended and supplemental bill against such company, Wadley, and others, rendered



necessary or advisable, it was supposed, because of the developments brought out by the examination before, and the report made by, the master; the intention being to secure a personal decree against said Wadley for the sum so shown by the master of his indebtedness to the company. On the 29th of May, 1894, on the motion of such creditors, the court removed Heuser, as receiver, and appointed, to succeed him, H. B. Maupin, and also recommitting the report to the master, in order that additional proof relative to certain claims against the company might be taken. Numerous exceptions have been noted to the master's report, all of which are as yet undisposed of. The suit is still pending, and the questions raised by the pleadings and proofs are unadjudicated.

On the 16th day of May, 1894, in the county court of Wythe county, Va., an indictment against said H. G. Wadley was returned by the grand jury then attending that court, in which he was charged with the embezzlement and misappropriation of the funds of the Wytheville Insurance & Banking Company, in the particular instances and amounts as reported by the said master in his report so filed in this court. The bill I now consider was presented on the 8th day of June, 1894, in which, after reciting much of the history of the litigation to which I have made reference, it is charged that the same creditors who so submitted themselves to the jurisdiction of this court, and who so petitioned this court to consider and adjudicate the matters referred to in said suits, are the identical parties who, acting by counsel employed by them for that purpose,—the same counsel who so represented and now represent such creditors in this court,—caused said indictment to be instituted, and are now conducting the criminal prosecution founded thereon; and, also, it is charged therein that the same matters, rights, and issues are involved in said criminal procedure, as are set forth in the civil pleadings so theretofore submitted by such creditors to the determination of this court; that Wadley is the same person pursued by them in their proceedings in the civil suits in this court and in the criminal procedure in the county court of Wythe county, Va. It is also alleged that Wadley has been taken into custody by the said county court, and is now held under a bail bond to appear and answer said indictment. And it is further charged that after said master had made up his report, and when the nature of the same and the contents thereof had been communicated to said creditors, they and their counsel, after consultation together, decided to and did offer a proposition for the settlement of the debts mentioned in the report to the said Wadley, they agreeing to accept fifty cents on the dollar in full satisfaction of their said claims, the said offer being communicated to Wadley by a committee of the creditors appointed for that purpose at the consultation alluded to, and being by him promptly rejected; it being set forth in the same, which was reduced to writing, that it was only to remain in force for the period of 10 days. The plaintiff now charges that said offer was intended as a threat, the object being to intimidate him, and force him to pay the debts of said company. The said proposition, showing the terms thereof, the names of the creditors who participated in it, and the

counsel who represented them, is filed as an exhibit with the bill, in which it is also charged that after the plaintiff's deposition was taken by the said master, and before the said meeting of creditors was held, and their offer of adjustment made to him, he was threatened by them with a criminal prosecution if he did not settle with them the debts they claimed to be due and payable to them by said company. It is also alleged in the bill that such creditors procured a copy of the report as made by Master Commissioner Gray (the same not having as yet been submitted for the action of this court), and used it as evidence before said grand jury, portions of it having been read for that purpose to such jury by counsel for said creditors, who had caused themselves to be summoned as witnesses, in order to thereby obtain the finding of the indictment against Wadley. It is also charged that they also so used a copy of the deposition of the plaintiff so taken by the master, and now filed in said cause.

The plaintiff insists that his rights as a citizen of the United States were thus violated, as it is provided in the fifth amendment of the constitution that no person shall be compelled in any criminal case to be a witness against himself; and that, in pursuance of this provision, congress has enacted section 860 of the Revised Statutes, prohibiting the use of pleadings and evidence taken in judicial proceedings as testimony in criminal prosecutions. As I dispose of this case on other grounds, I will not discuss the questions relating to the use of copies of the master's report and plaintiff's deposition in the criminal procedure in Wythe county court, in the state of Virginia, but, in passing them by, will remark that I cannot conceive of any proper way by which such papers could have been used as evidence before the grand jury of that county, under the circumstances as set forth in the bill and proceedings of this cause; and, but for the uncontradicted testimony of a number of witnesses, I would not think it possible that such action could be had before any grand jury duly impaneled by any court in this country. Nor will I intimate by any ruling on the matter at this time that any court of the state of Virginia will during the trial of a criminal cause permit such copies or evidence of that character to be offered for the consideration of the jury. Should I be mistaken in this, the remedy would, I think, be plain, and the relief without doubt.

There are other allegations in the bill, relative to the action of said creditors and the rights of the plaintiff, but I do not find it necessary to allude to them now. On consideration of the bill, the exhibits, and the proceedings had in the original cause, I directed an order in substance restraining the further prosecution of said indictment until the matters referred to by plaintiff could be heard and determined by this court. The creditors have filed their joint answer, in which they admit the allegations of the bill, relative to the proceedings in this court, in the suit of Paul Hutchinson, administrator, etc., against the Wytheville Insurance & Banking Company, and their connection with the same. They admit that this court, to the fullest extent, obtained complete jurisdiction over the subject-matter of and the parties to said suit; but they insist that Wadley himself was not a party thereto. They admit the examination of

Wadley before the commissioner, and his cross-examination by their counsel, and claim that he was not called by them, but that he voluntarily submitted himself for such examination. A considerable portion of their answer is devoted to a statement, from the standpoint of said creditors, of the manner that Wadley managed the business affairs of the companies with which he was officially connected, especially the Wytheville Insurance & Banking Company; and they set forth how it was that he despoiled it and them of their assets. They admit the offer of compromise, and deny making threats of criminal prosecution, or that their counsel procured themselves to be summoned as witnesses before the grand jury, or that they read a copy of said deposition before it. They also admit that they employed counsel to assist the attorney for the state in the prosecution of the indictment returned against Wadley in the county court of Wythe county, insisting that it was entirely proper for them to do so. Other statements in the answer I do not deem it necessary to call attention to now.

The defendant J. L. Gleaves files his separate answer, in which he claims that he is the attorney for the commonwealth for Wythe county, Va., and that it is his duty to prosecute said Wadley on the indictment so found, and that this court has no right, authority, or jurisdiction to enjoin and prohibit him from so doing. He claims that he was not a party to the litigation pending in this court, and not familiar with the proceedings had therein, and he admits that this court obtained in proper and lawful manner complete jurisdiction over all the parties and the issues involved in the suit of Hutchinson, administrator, etc., against the Wytheville Insurance & Banking Company. He denies that the creditors who submitted themselves to the jurisdiction of this court are the parties who are conducting the criminal proceedings against Wadley, and insists that the state of Virginia, acting through her grand jury, instituted the same, and that he in his official capacity has charge of it. He also denies that "any federal record" was unlawfully used, in procuring said indictment, but that it was returned on the evidence of witnesses regularly summoned by him for that purpose. The other matters set out in the answer of defendant Gleaves, as to what transpired in the county court of Wythe county subsequent to the finding of the indictment against Wadley, or as to what can be made to appear from the books, records, and papers of the Wytheville Insurance & Banking Company relative to his misappropriation of the funds of that institution, are not material to the points on which I think this case must be decided.

After examining the entire record of all the mass of litigation drawn into this controversy, I find that, so far as the questions now presented are concerned, the greater part thereof can be eliminated as not germane, and that the real issue is a simple one, elementary in character,—not "startling and unusual," as counsel have claimed,—the decision of which follows as matter of course when we apply the facts, as found and admitted, to the law, about which there is no controversy. That this court, by proceedings instituted in October, 1893, obtained jurisdiction over the property of the

Wytheville Insurance & Banking Company, and over the parties to said suits, including those who came in by petition as well as those who appeared before the master, is, I think, beyond controversy. The court took the assets of said company into its custody, and placed them in the possession of its receiver, and it directed its master to make and state an account, showing what application had been made of the funds of the company, where the same were, who the creditors are, and the sums due them. In executing this order of the court, the master had all the creditors of the company before him, as well as the company itself, and Wadley, the president thereof, as to whom the said creditors were particularly endeavoring to make such a case as would establish his individual responsibility for their claims. That the order of this court justified such proceedings before the master, the creditors, their counsel, and the master evidently believed, and the court is not now disposed to differ with them. That Wadley himself was, after the filing of the petitions by Blount & Boynton and others, in October, 1893 (in which he was charged with misappropriation of the funds of said company, and required to answer the special interrogatories therein propounded, and defend himself before the master), in effect a defendant to said suit, is well established by the authorities. *Buerk v. Imhaeuser*, 8 Fed. 457; *Carter v. City of New Orleans*, 19 Fed. 659; *Seegee v. Thomas*, 3 Blatchf. 11, Fed. Cas. No. 12,633; *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449. Under all the circumstances of this case, it would be inequitable to permit the creditors who filed their petition against Wadley, and who insisted before the master that he was individually responsible and liable to them for their debts against said company, to now contend that the one who has been so proceeded and reported against is not and has not been a party to the suit. They are estopped in a court of conscience from making such a claim, by their words and acts, and by the record they have made in this case. Independent of this, the cross bill makes Wadley a formal party to the litigation, subjecting him beyond all question to the jurisdiction and decree of the court, and entitling him to its protection relative to all matters affecting the questions fairly involved in the pleas yet to be determined by it.

The question, then, is, shall a court which has first acquired jurisdiction of the parties to, and the subject-matter of, a controversy, retain the exclusive control of the same until it has fully disposed of the questions raised by the pleadings before it? The authorities answer this question in the affirmative; the decisions are all one way; and the rule is the same in both civil and criminal cases. The only matter to be determined is as to the court first securing jurisdiction. If that be a court of the state, then the courts of the United States must not and will not interfere. The state courts should observe the same rule, and they generally do. This court will not permit its process to be used, either civil or criminal, by parties engaged in litigation in the courts of the state of Virginia, relative to the subject-matter of such litigation, thereby impeding the administration of justice by rendering it impossible for those materially interested

therein to properly prepare and submit their case for the decision of that court the jurisdiction of which was first prayed for and granted; nor will it, I deem it proper to add, tolerate any such interference by the courts of that state with judicial proceedings regularly before it and exclusively within its jurisdiction.

The suggestion made in the answer of the attorney for the commonwealth that judicial comity requires that one court shall grant to another the use of its records and copies of the papers in its custody, and that it will also direct its officers to obey a subpoena duces tecum relative thereto, when satisfied that the same are material as evidence in a case pending in the court issuing such summons, is, as a general proposition, true; but it would be extending the matter of courtesy beyond reasonable limits for that court which has complete jurisdiction over a cause pending before and undetermined by it to authorize or consent to the use by another court of the pleadings, commissioners' reports, and depositions filed in said cause, before they have been considered for the purposes for which they were intended, it appearing, also, that the court so desiring them designs to use them in a case over which it had assumed jurisdiction even after the making and filing of the particular papers asked for, and which involved the same parties and the identical subject-matter as does the case so before it. No precedent can be found for such a request, and I indulge the hope that no court will ever so rule as to furnish an authority that would justify such a proceeding.

It appears that the county court of Wythe county was fully advised of the pendency in this court of the litigation referred to; that it expressed a desire to prevent the improper use of copies of certain parts thereof before its grand jury; and that counsel called its attention to the fact that the matters set out in the indictment were the same as those involved in said suit, insisting at the same time that said indictment had been procured by the unlawful use of said copies, and also suggesting that the prosecution of the same, under the circumstances, would be discourteous to this court. I trust I may be permitted to say that it would have been well had that court then recalled and exercised the judicial comity to which its able and energetic prosecutor now so eloquently alludes.

On the question of jurisdiction, and the right of the court first acquiring it to retain exclusive control of the subject-matter and the parties until it has fully disposed of the questions submitted to it, if authority is desired, it can be found in the following cases: *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.*, 6 Biss. 197, Fed. Cas. No. 14,401; *Sedgwick v. Menck*, 6 Blatchf. 156, Fed. Cas. No. 12,616; *Judd v. Telegraph Co.*, 31 Fed. 182; *Schuehle v. Reiman*, 86 N. Y. 270; *Hagan v. Lucas*, 10 Pet. 400; *Williams v. Benedict*, 8 How. 111; *Taylor v. Carryl*, 20 How. 583; *Freeman v. Howe*, 24 How. 450; *Buck v. Colbath*, 3 Wall. 334; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135; *Railroad Co. v. Gomila*, 132 U. S. 478, 10 Sup. Ct. 155.

I find from the testimony in this case that after the creditors of the Wytheville Insurance & Banking Company had intervened and been

made parties complainants in the said suit of Paul Hutchinson, administrator, etc., against that company and others, and after they had proven their claims before the master, and he had formulated his report, they, in a meeting called and held for the purpose of determining the proper course for them to pursue, in the light of the case as shown by said report and Wadley's deposition, concluded to submit to him (the said Wadley) an offer to adjust the debts reported by said master (as to which it was claimed he was individually liable) at the rate of fifty cents on the dollar; at the same time having an understanding among themselves that, if he declined such proposition, they would procure his indictment in the county court of Wythe county, and prosecute him for the misappropriation of the funds of said company, the money required to carry on such criminal procedure being arranged for at the same meeting that the offer of compromise was agreed to. And also do I find that, when such offer was declined by Wadley, they proceeded to procure his indictment, using for that purpose a copy of his deposition so given before the master of this court, and evidently procuring the summoning of their counsel as witnesses before the grand jury (some of whom declined to go before that body unless they were first duly subpoenaed so to do), and having them assist in the preparation of the bill of indictment and in the prosecution of Wadley under it. That the criminal procedure, when first suggested, was intended to aid the creditors in adjusting their debts with Wadley is, I think, without doubt; and the fact that the effort failed is, so far as the matter now before me is concerned, immaterial. The circumstances were, it must be conceded, unusually anomalous, such as to naturally cause excitement and indignation; yet, nevertheless, the evidence discloses conduct that cannot be justified, and is far from being conducive to the fair administration of justice; that is, in fact, most reprehensible, dangerously near the borderland that divides impropriety from criminality, and I truly hope that never again in this jurisdiction will an effort be made to duplicate it.

We now have nothing to do with the questions which involve the guilt or innocence of Wadley, on the charges set forth in the indictment, or his liability because of mismanagement by him of the affairs of said Wytheville Insurance & Banking Company, as alleged in the proceedings before referred to. Those matters, in the regular discharge of judicial procedure, in due time and place will be considered and disposed of. We are now concerned in seeing that all the parties to this litigation, plaintiffs and defendants, creditors and debtors, accusers and accused, shall each and all have every proper opportunity to fairly present their respective claims, and also that the court is neither delayed nor hampered in reaching a just conclusion.

If circumstances can exist under which it is proper for a court of the United States to restrain parties from prosecuting a cause in a state court, they certainly are now before us, and that there are cases where it is entirely proper so to do has been declared by courts worthy of our confidence and commanding our respect. It is claimed that section 720 of the Revised Statutes of the United States pro-

hibits the granting of an injunction in cases like the one I now consider, but such insistence is without merit. That section is to be construed in connection with section 716, which gives to the courts of the United States the power to issue all writs necessary to the exercise of their respective jurisdictions, and agreeable to the usages and principles of law. If a United States court has first obtained jurisdiction of a case, it can then always take such action as may be required to maintain its authority and enforce its decree; and, under such circumstances, section 720 of the Revised Statutes is not applicable. *Fisk v. Railroad Co.*, 10 Blatchf. 518, Fed. Cas. No. 4,830; *French v. Hay*, 22 Wall. 250; *Dietzsch v. Huidekoper*, 103 U. S. 494; *Sharon v. Terry*, 36 Fed. 365; *President, etc., v. Merritt*, 59 Fed. 6. That an injunction may be issued under such circumstances is now well established by the decisions, and that it may apply to a criminal as well as a civil suit is not without precedent. A careful examination of the authorities leads me to the conclusion that in cases where a criminal prosecution has been instituted while a civil suit was pending involving the same subject-matter, and the parties procuring the indictment are the same as those who instituted the civil suit, the court whose jurisdiction was first sought, and before which said civil proceeding is so pending and undetermined, will restrain the parties from prosecuting the indictment until it can hear and dispose of said suit.

In Story's Equity Jurisprudence (volume 2, § 893) it is said:

"There are, however, cases in which courts of equity will not exercise any jurisdiction by way of injunction to stay proceedings at law. In the first place, they will not interfere to stay proceedings in any criminal matters, or in any cases not strictly of a civil nature; as, for instance, they will not grant an injunction to stay proceedings on a mandamus or an indictment or an information or a writ of prohibition. But this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in equity; for, if they are, the court possesses power to restrain them personally from proceeding at the same time, upon the same matter of right, for redress in the form of a civil suit and of a criminal prosecution. In such cases the injunction is merely incidental to the ordinary power of the court to impose terms upon parties who seek its aid in furtherance of their rights."

In Beach's Modern Equity Practice (volume 2, § 761) we find the following:

"It is a rule of almost universal application both in England and in this country that a court of equity has no jurisdiction by injunction to restrain a criminal proceeding, whether it be by indictment or summary process, unless the criminal proceeding be brought by a party to a suit already pending in the equity court, and to try the same right that is in issue there."

On this subject, see the following authorities: *Turner v. Turner*, 15 Jur. 218; *Mayor of York v. Pilkington*, 2 Atk. 302; *Lord Montague v. Dudman*, 2 Ves. Sr. 396; *Attorney General v. Cleaver*, 18 Ves. 220; *Kerr v. Preston*, 6 Ch. Div. 463; *Spink v. Francis*, 19 Fed. 670, 20 Fed. 567; *Eden, Inj.* p. 42, c. 2; *Jeremy, Eq. Jur.* bk. 3, p. 308, c. 2; 3 *Wood. Lect.* 56; 3 *Daniell, Ch. Prac.* p. 1721; *In re Sawyer*, 124 U. S. 200, 211, 8 Sup. Ct. 482, in which Mr. Justice Gray, in delivering the opinion of the court, said:

"The modern decisions in England, by eminent equity judges, concur in holding that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there."

For the reasons mentioned, I shall sustain the plaintiff's bill, and continue in force the restraining order heretofore granted. Other questions, interesting in character, and of great general importance, are raised by the plaintiff, and were discussed by counsel; but I do not find that their consideration is essential to the disposition of this case, and therefore I shall not now allude to them. I will pass a decree declaring that, as the equity jurisdiction of this court first attached to both the parties and the subject-matter involved in this litigation, it will be improper to use the pleadings, proofs, and papers filed herein, or any of them, or copies thereof, in any proceeding, civil or criminal, in any other court, against any party to this suit, while it is pending in and is unadjudicated by this court; and an injunction may issue restraining such use, and enjoining all of the parties hereto, including their attorneys, clerks, and agents, either directly or indirectly, and the attorney for the state for Wythe county, Va., from all further prosecution of the indictment now pending in the county court of said county, in the name of the commonwealth of Virginia against H. G. Wadley, in which he is charged with the embezzlement of the funds of the Wytheville Insurance & Banking Company, until the final hearing shall have been had and disposition made of the said cause of Paul Hutchinson, administrator, etc., against the Wytheville Insurance & Banking Company and others, and the petitions and supplemental, amended, and cross bill filed therein, and until the further order of this court.

---

SAVINGS & LOAN ASS'N et al. v. ALTURAS COUNTY et al.

(Circuit Court, D. Idaho. September 1, 1893.)

No. 53.

CONSTITUTIONAL LAW — OBLIGATION OF CONTRACTS — EFFECT OF DIVISION OF COUNTY UPON ITS BONDS.

The county of A. issued bonds under an act of the legislature providing that 10 per cent. of such bonds should be paid in 10 years from the date of issue, and 10 per cent. annually thereafter until fully paid; that taxes should be levied to provide for the payment of principal and interest; and that the faith, credit, and all taxable property within the limits of the county, as constituted at the time of issuing the bonds, should be pledged for the payment thereof, but that segregated territory must be relieved of such taxation when the county acquiring such territory should pay to the county losing the same the corresponding proportion of the indebtedness of such county. After the issue of the bonds the county of A. was divided, parts of its territory being erected into two new counties, part annexed to B. county, and part remaining as A. county. The act making such division provided that the proportionate shares of the debt of A. county should be ascertained, in the manner therein provided, upon the basis of the assessed valuation of the lands contained in the several counties, as reconstructed, in the year prior to the division, and that the new counties and B. county should deliver to A. county their interest bearing warrants for their proportional shares of such debt; 10 per cent. thereof payable in eight years, and



10 per cent. annually thereafter until fully paid. *Held*, that such act did not impair the obligation of the contract of A. county with the bondholders, and did not give the bondholders a right to proceed in equity against the separated counties to enforce contribution.

This was a suit by the Savings & Loan Association and others, holders of bonds of Alturas county, against the counties of Alturas, Elmore, Logan, and Bingham, to obtain contribution by said several counties, and payment of complainants' bonds. Defendants demur to the bill.

Texas Angel, for complainants.

S. B. Kingsbury and Richard Z. Johnson & Son, for Elmore and Logan counties.

F. E. Ensign, A. F. Montandon, and R. F. Butler, for Alturas county.

GILBERT, Circuit Judge. The complainants, who are several owners of bonds issued by Alturas county, bring this suit, in behalf of themselves and of all other holders of like bonds who may join therein, to recover upon interest coupons of said bonds, against the counties of Alturas, Logan, Elmore, and Bingham, upon the ground that, at the time the bonds were issued, Alturas county included the counties of Logan and Elmore and a part of Bingham, together with the present county of Alturas. The prayer of the bill is that, upon entry of judgment against said counties, the proper officers of all of said counties so segregated from the original county of Alturas pay to the county treasurer of the present Alturas county the amount found due from each, to be applied to said judgment, and that, if no tax is levied in any of said counties for that purpose, the proper officers thereof be commanded to levy and collect a tax therefor, in addition to other authorized taxes, and that the treasurers of said counties be commanded to pay the same to the treasurer of Alturas county, and that if the county of Alturas shall not have paid its portion of said interest, or levied a tax therefor, then that a like order be made for the levy and assessment and collection of a tax for the purpose, and that the treasurer of said county pay on said judgment all sums that shall come into his hands for such purpose. There is further prayer that the decree accord as nearly as practicable with the act of the legislature of Idaho of date January 25, 1887, in the mode and manner of ascertaining and determining the proportion of the interest and principal of said bonds which shall become due after the entry of said decree, and provide for an annual levy, assessment, and collection of taxes, as above prayed for, until the final payment and satisfaction of said bonds. The demurrers of the defendants raise the questions of the want of equity in the bill, and multifariousness.

The act under which the bonds were issued was enacted by the territorial legislature of Idaho on January 25, 1887, and is found in the Revised Statutes of Idaho (sections 3602 to 3607, both inclusive). Section 3602 provides:

"The board of county commissioners of any county may issue negotiable coupon bonds of their county for the purpose of paying, redeeming, funding

or refunding the principal and interest of any of the following indebtedness of their county, when same can be done, at a lower rate of interest and to the profit and benefit of the county. Said bonds shall be issued as near as practicable in denominations of one thousand dollars each, but bonds of the denominations of five hundred, and one hundred dollars may be issued when necessary. Said bonds must bear interest at the rate of not to exceed eight per cent. per annum, to be paid on the first day of January and the first day of July in each year, at the office of the county treasurer, or at such bank in the city of New York as may be designated by the board of county commissioners, at the option of the holder thereof; such bonds to be redeemed by the county in the following manner: Ten per cent. of the total amount issued, to be paid in ten years from the date of issue, and ten per cent. annually thereafter until all of said bonds are paid, making the last bonds redeemable twenty years from the date of issue. But said bonds or any part thereof, may, at the option of the county issuing the same, be redeemed at any time after five years from the date of their issue; provided, such time and option be stated upon the face of each bond, and each bond must be redeemed in the order it is numbered."

Section 3603 requires that each bond "recite that it is issued in conformity with the provisions of this chapter and this chapter must be printed upon the back of each bond."

"Sec. 3605. The board must cause to be levied annually upon all the taxable property of the county, in addition to other authorized taxes, a sufficient sum to pay the interest on all bonds disposed of in pursuance of the provisions of this chapter, and must at least one year before such bonds become due, and in time to, provide the means for the payment, cause to be levied a sufficient additional sum to pay said bonds as they become due, and all such taxes must be levied, assessed and collected as other county taxes, until the bonds so issued are fully paid including the interest thereof; the faith, credit, and all taxable property within the limits of the county as constituted at the time of such issue are, and must continue pledged, and the proper officer of the county must continue to assess and collect on all the taxable property within such limits, the necessary taxes to pay said bonds and interest thereon as the same becomes due; but the segregated territory must be relieved of such taxation when the county acquiring such territory pays to the county losing the same, the same proportion of the whole indebtedness of the county as the assessed value of the property in the segregated territory bears to the assessed value of the property in the whole county, as constituted before the division thereof. Should the tax for the payment of interest on any bonds issued under the provisions of this chapter, at any time not be levied or collected in time to meet such payment, the interest must be paid out of any moneys in the county general or current expense fund of the county, and the moneys so used for such payment of interest must be repaid to the fund from which so taken out of the first moneys collected from taxes.

"Sec. 3606. It shall be the duty of the county treasurer to apply the funds derived from the sale of the bonds to the payment of the indebtedness herein mentioned, and to no other purpose; and it shall be the duty of the county officials to levy, collect and apply the tax herein provided for the payment of interest and redemption of the principal of the bonds in the manner specified and for no other purpose; and any failure to comply with the conditions of this chapter by the proper officers or any neglect or refusal to levy and collect any such tax, as aforesaid, shall be deemed a misdemeanor, and any county official guilty of the same must, upon conviction, be fined in an amount equal to the sum that should have been levied, or for any misappropriation he shall be fined in an amount equal to the sum so misappropriated, and imprisoned in the county jail for a term of not less than three months nor more than twelve months."

The bill alleges that on July 30, 1886, Alturas county was indebted, mostly upon warrants, in the sum of \$285,000, and that the warrants bore interest at 10 per cent. per annum, and that for the

purpose of funding said debt at a lower rate of interest the said bonds were issued in the years 1887 and 1888; that all of said bonds were sold prior to the 7th day of February, 1889, at which date the legislature of the territory of Idaho passed the act creating out of Alturas county the counties of Elmore and Logan, attaching a portion thereof to Bingham county, and continuing the remainder of the original county as Alturas county. The act provides as follows:

"Sec. 7. The indebtedness of Alturas county at the date of the passage and approval of this act shall be apportioned between the counties of Alturas, Elmore, Logan and Bingham counties, in the same proportion that the taxable property of the three counties have acquired from Alturas county, and that the four counties bear to each other as shown by the assessment roll of the year 1888 in Alturas county, and at their regular meeting in April, 1889, the boards of commissioners of the four counties mentioned shall, respectively, appoint each a competent accountant who shall meet at the town of Hailey and proceed to audit and ascertain the amount of indebtedness to be paid by each of the aforesaid counties to Alturas county, and they shall apportion all moneys in the treasury of said Alturas county, in the same proportion that they apportion the debt, but in apportioning the debt and bonds, they shall make no apportionment of the bonds issued for the erection of the court house or other public buildings in Alturas county, nor of any cash on hand to pay said bonds and interest, and they shall make out four certificates, one to be delivered to the board of commissioners for each county, showing the total indebtedness of Alturas county, its character, whether bonded or otherwise, and also the proportion to be paid by each county, and such accountants shall be allowed a reasonable sum for their services, to be paid by the county appointing each respectively.

"Sec. 8. Immediately after filing of the certificate of the proportion of the indebtedness named in the preceding section (7) the auditors of Elmore and Logan and Bingham counties, under the supervision of their respective boards of commissioners, must draw his warrant in sums of five hundred dollars, but one warrant may be drawn for a less amount in order to pay a fractional part of the debt, and not transferable, and bearing interest at the rate of seven per cent per annum, in favor of Alturas county, to the full amount of the indebtedness apportioned to their respective counties the interest on said warrants to be paid on first day of January and first day of July in each year at the office of the county treasurer of Alturas county, or at such bank in the city of New York as may be designated by the board of county commissioners of Alturas county, such warrants to be redeemed by each respective county in the following manner: Ten per cent. of the total amount issued to be paid in eight years from the date of the issue and ten per cent. annually thereafter, until all of said warrants are paid, making the last warrants redeemable eighteen years from the date of issue, and the money so received from the counties of Elmore, Logan and Bingham by Alturas county, shall be applied only to the payment of the present indebtedness of Alturas county, or the securities into which it has been funded." Laws 1888-89, p. 35.

It is the contention of complainants that the act creating the new counties is void, so far as it affects the bondholders, for the reason that it impairs the obligation of their contract; and thereupon they base their right to bring this suit against all of the counties embraced within the original territory of Alturas county.

The power of the legislature of a state or territory to change the territorial limits of its counties is plenary. Counties may be divided, and the legislature may apportion the public property and the indebtedness, or the division may be made without such apportionment. In the latter case the presumption arises that apportionment was not considered necessary. In such a case the old corpora-

tion owns all the property within its new limits, and is alone responsible for all the debts contracted by it before the act of separation was passed. *Laramie Co. v. Albany Co.*, 92 U. S. 315. Neither is the paramount authority so vested in the state to change the organization of its municipal corporations restricted by contracts entered into by the municipality with its creditors or private persons. *Amy v. Watertown*, 130 U. S. 319, 9 Sup. Ct. 530; 1 Dill. Mun. Corp. § 170; *Cooley*, Const. Lim. 229, 230. The constitutional inhibition against the enactment of laws which shall impair the obligation of contracts, although, by its language, it is directed against the action of states only, is made applicable to the territories by statute. Rev. St. U. S. § 1891. The obligation of a contract has been defined to be "the law which binds the parties to perform their agreement." *McCracken v. Hayward*, 2 How. 612. The impairing act, which is prohibited, may be directed against the validity of the contract itself, or against the remedy by which performance is enforced. But it is not every change in the remedy that will amount to an impairment of the obligation of the contract. In *Bronson v. Kinzie*, 1 How. 311, the court said:

"Although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But, if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the constitution."

In *Von Hoffman v. City of Quincy*, 4 Wall. 535, Mr. Justice Swayne said, speaking for the court:

"It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of modifying the remedy, impair substantial right. Every case must be determined upon its own circumstances."

In *Antoni v. Greenhow*, 107 U. S. 774, 2 Sup. Ct. 91, the court said:

"It is well settled that changes in the forms of action and modes of proceedings do not amount to an impairment of the obligation of a contract, if an adequate and efficacious remedy is left."

The particulars wherein it is said that the statute dividing Alturas county impairs the obligation of the complainants' contract are as follows:

1. It is urged that the act took away from Alturas county the money it had on hand to pay the interest for the year 1889, and apportioned it among the newly-created counties. If it could be shown that this feature of the legislation prevented the payment of the interest for the year 1889, or in any way prejudiced the substantial rights of the bondholders, the objection would be well taken. But such is not the case. The interest for that year has been paid, together with the interest due January, 1890, and a portion of the interest which fell due July, 1890. But, even if the interest of 1889 had not been paid, it could not be said that the division of

the moneys in the possession of Alturas county when the act took effect worked any hardship to the bondholders, or affected injuriously their contract. The act of segregation, while it apportioned among all the four counties the funds then in the treasury of Alturas county, made full provision for the repayment of an equivalent amount to that county by the counties separated therefrom. The resources of Alturas county for the payment of its liability were not thereby lessened or impaired.

2. It is claimed that no provision is made in the act of segregation for the payment by the segregated counties of their proportion of the interest from the date of the act to the date of the issuance of the warrants. No support for this contention can be found in the language of the act, or any legitimate construction of the same. The act requires the immediate determination of the proportionate liability of each of the segregated portions of the county, and the immediate execution of the warrants, drawing interest at 7 per cent. per annum, the interest payable in January and July of each year. The warrants are to be for the "full amount" of the respective portions of the indebtedness. Neither of the counties could escape any measure of its liability by delaying the execution of the warrant. The warrants, whenever drawn, must be in such amounts as shall discharge the debts severally imposed upon the counties at the time of the segregation.

3. It is objected that the act provides, as a basis of apportionment of the debt between the segregated portions of the original county of Alturas, the assessed valuation of the property of that county as it stood in the year 1888, while the funding act provides for an annual assessment upon all the taxable property of the county to pay the annual interest on the bonds, and provides for a further assessment at least one year before the maturity of the bonds, to pay the principal thereof, and that thereby the faith, credit, and all taxable property within the limits of the county, as then constituted, were, and must continue, pledged to the complainants until the payment of the bonds, principal and interest. The question raised by this objection is one that concerns the equitable adjustment of the bonded indebtedness between Alturas county and the counties of Elmore, Logan, and Bingham. It may be, as urged by the complainants, that the apportionment of the debt, as fixed by the act of segregation, has been rendered unfair and unjust to the present county of Alturas by the unequal changes which have ensued in the values of the assessable property which was originally pledged to the payment thereof. But until it can be shown by proper averments that the security of the bondholders is thereby impaired, so as to interfere with or prevent the recovery of the debt and interest due or to become due thereon, or some portion thereof, the court cannot, upon that ground, interfere, or declare nugatory the action of the legislature. The legislature had the power, at the time of dividing Alturas county, to impose upon the new county of Alturas the obligation to discharge all of the indebtedness of the old corporation. Instead of doing so, it saw fit to make an apportionment of the indebtedness upon all of the newly-created counties upon the basis of

the assessable property of the original county of Alturas, as the values then stood. Its action in so doing cannot be questioned either by the present county of Alturas or by the bondholders. If there is hardship to Alturas county in the apportionment, the only recourse of that county is to the legislature. *Laramie Co. v. Albany Co.*, supra.

4. It is further specified that the statute dividing Alturas county makes no provision for levying or collecting a special tax in the other counties for the payment of their proportionate part of the indebtedness. It was not necessary that express provision should have been made for such taxation. The duty and authority to draw warrants for the payment of their respective portions of the indebtedness carried to the other counties, by implication, the duty and authority to provide for the payment of the warrants when due. Such provision could be made only by taxation. In *Association v. Topeka*, 20 Wall. 660, the court said:

"It is therefore to be inferred that, when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such inference."

The doctrine of that case is followed in *U. S. v. New Orleans*, 98 U. S. 393; *Ralls Co. Ct. v. U. S.*, 105 U. S., 735; *Parkersburgh v. Brown*, 106 U. S. 501, 1 Sup. Ct. 442; and *Quincy v. Jackson*, 113 U. S. 337, 5 Sup. Ct. 544.

5. It is said that the obligation of the complainants' contract is impaired by restrictions placed upon their remedy, rendering the same more difficult, if not futile, and practically inoperative. The argument is that, if any of the four counties should fail to appoint accountants to apportion the debt, the bondholders would be compelled to apply for mandamus to compel such apportionment, and that, if the accountants should fail to meet, it would be necessary to again resort to mandamus to compel their meeting, and that a further mandate might be necessary to compel their agreement upon an adjustment, and the question might then arise whether the action of the accountants would be subject to control by mandamus, and that, after the apportionment, mandamus might be required to compel the issuance of warrants, none of which acts were necessary under the funding act in force when the contract was made. I deem it a sufficient answer to this argument to say that the necessity of resorting to any of these extraordinary remedies is not made apparent from any of the facts set up in the bill. The right of action of the bondholders is now, as before the division of Alturas county, against that county alone. No reason is suggested in the bill why a judgment against Alturas county may not be enforced. The bill, it is true, contains an allegation, upon information and belief, that Alturas county is insolvent, and unable to pay said interest coupons unless the other counties are compelled to pay each its just proportion thereof; and there is a further allegation, upon information and belief, that Elmore and Bingham counties have made no such payment since the segregation. Conceding that these averments are

true, it does not follow that the complainants have the right to resort to equity. These facts, as alleged, do not change the status of the bondholders with reference to Alturas county, and do not suffice to change their right of action against that county into a suit in equity against the defendants. With the action of the other counties, their neglect to apportion the debt, their failure to issue warrants or to pay the same, the bondholders have no concern. Alturas county is required to meet the payments due upon the bonds. Her resources for that purpose are pointed out. A portion of the money she is to raise by taxation; the remainder she is to collect from the other counties. If the other counties neglect or refuse to issue the warrants, or to pay the same when due, Alturas county has her remedy against them. The bill alleges that for the interest due on the bonds in January, 1890, action was brought, and judgment was rendered, against Alturas county, and that the judgment has been satisfied. No sufficient reason is suggested why the same remedy may not now be pursued to recover the money sought to be obtained by this suit.

It is claimed that precedents are found for this proceeding in the cases of *Morgan v. Beloit*, 7 Wall. 613; *Mt. Pleasant v. Beckwith*, 100 U. S. 514; and *Brewis v. Duluth*, 9 Fed. 747. On examination of those cases, however, it will be seen that in each there existed a ground of equity jurisdiction entirely distinct from any presented in this case. In *Morgan v. Beloit*, the legislature had created a city, carving it out of a region which was previously a town only, and had enacted that all bonds previously issued should be paid, when due, by the city and the town, in the same proportion as if said town and city were not dissolved. A ground of equity jurisdiction was held to exist in the fact that both the town and city were necessary parties to a computation and adjustment of the amount to be paid by each. In *Mt. Pleasant v. Beckwith*, a municipal corporation had been legislated out of existence, and its territory had been annexed to two other corporations. No provision had been made in regard to the payment of the indebtedness of the old corporation. It was held that the remedy of the creditors of the extinguished corporation was in equity against the corporation succeeding to its property and powers. In *Brewis v. Duluth*, it was alleged in the bill of complaint that the village of Duluth had been created, by act of the legislature, out of a part of the city of Duluth, and that, in the village thus created, all of the business part of the city, its houses, the harbor, railroad depot, and tracks, nearly all the dwelling houses, 19-20 of the taxable property, and all the population, excepting about 100 inhabitants, were included, and no provision was made for the payment of the debts of the city by the village, unless creditors would accede to certain terms imposed by the legislature, whereby they would necessarily be delayed in the collection of their debts. The court held that the statute interfered with the rights of creditors, because "the corporation which had created the debt was shorn of its population and taxable property to such an extent that there was no reasonable expectation of its meeting its recent indebtedness," and overruled a demurrer to the bill which was brought

against both the city and the village to enforce payment of the debts. Upon the final hearing in that cause, however, upon proof which convinced the court that the city of Duluth was still able to meet its liabilities, notwithstanding the division of its territory and assets, the bill was dismissed. *Brewis v. Duluth*, 13 Fed. 334. So far from sustaining the complainants' contention, the inference to be drawn from these decisions is that in any case where an existing municipal corporation is, by statute, divided, and the existing indebtedness is, either by implication or by express enactment, imposed upon the old corporation, the creditor has no recourse to the segregated territory, unless it appear that the old corporation is, by the statute, shorn of its ability to meet the payment.

It becomes unnecessary to consider the question of multifariousness, since the demurrer must be sustained for want of equity in the bill.

---

HOYT v. GLEASON et al.

(Circuit Court, N. D. Ohio, E. D. October 10, 1892.)

No. 5,019.

1. DEDICATION—CONTROL OF PUBLIC SQUARE—FOLLOWING STATE COURTS.

In 1796, the C. Land Co., the owner of the land upon which the city of C., Ohio, was afterwards built, by a map laying out such city, dedicated a part of the land for a public square, marked "common" on said map. There was no written or other specific definition of the purposes for which such public square was intended to be used. The fee of the land composing the square was subsequently vested, by an act of the territorial legislature, in the county in which it lay, in trust for the purposes intended. After the incorporation of the city of C., in 1826, the control of the square was vested in it by the legislature. In 1888 the legislature created a board of monument commissioners, and gave it authority to control the uses of said square to the extent of placing upon it a soldiers' monument. The courts of Ohio had decided that the board of monument commissioners was a public authority, lawfully constituted to control the public uses of the square to that extent. H., an owner of land abutting on the square, which she held by mesne conveyances from the C. Co., the original dedicator, sought to enjoin the use of the square for the monument. *Held*, that the federal court was bound by the decision of the state court as to the authority of the monument commissioners to control the public uses of the square.

2. SAME—PUBLIC USE—OBLIGATION OF CONTRACTS.

*Held*, further, that, in view of the form of the dedication, the uses of the square were not limited, except to such as were public uses, and that the erection of a monument was a public use, and therefore not a violation of the contract of dedication.

3. SAME—CHANGE OF TRUSTEE.

*Held*, further, that no contract was implied by the dedication that the city of C. should be the irremovable trustee of the land constituting the square.

This was a suit by Emma A. Hoyt against W. J. Gleason and others, composing the board of monument commissioners of the city of Cleveland, Ohio, to enjoin the erection of a monument on the public square in that city. The plaintiff obtained a temporary restraining order, and now moves to have the same continued until final hearing.



Boynton & Horr and Webster & Angell, for complainant.  
L. Prentiss, J. M. Jones, and A. T. Brinsmade, for respondents.  
Before TAFT, Circuit Judge, and RICKS, District Judge.

RICKS, District Judge. The complainant, as a tenant in common, owns a part of the property known as the "Forest City House," which abuts upon the public square, in the city of Cleveland. She has filed her bill, and seeks, as such property owner, to enjoin the defendants from erecting upon the southeast quarter of said public square a monument or mausoleum to commemorate the services of the soldiers from Cuyahoga county who died in the army during the late Civil War. She avers that said public square, when the city thereafter to be incorporated was platted, was dedicated by the Connecticut Land Company, the original owners in fee of the land, as a common, for the enjoyment, use, and benefit of the public of said city when duly organized. She avers that said dedication gave to her, as a joint owner of property abutting said square, by mesne conveyance from said original grantor and dedicator, a vested right to have said common or public square forever applied for such public uses as the people of the city to be organized thereafter might determine, provided such uses were within the terms of the dedication. She further avers that the defendants, who are organized under the statutes of Ohio as a "board of monument commissioners," propose to erect upon said quarter of the public square a structure called a "soldiers' monument," which is in fact a stone building 44 feet square and 20 feet high, constructed upon an elevated stone esplanade about 100 feet square, out of which a stone shaft arises 120 feet high; and that this structure is of such proportions and shape as to monopolize the greater portion of that quarter of the square, and is to have such rules and regulations as to its control, when completed, as to limit and curtail the public in their right to its use and enjoyment; and, therefore, that said public square is to be applied to a use not a public one, within the spirit and scope of the dedication. She avers that the city has never legally given said defendants any authority to occupy said square for the purposes named; and that the sole power to grant the use of any part of said square for public purposes is vested in the park commissioners, who are a branch of the municipal government; and that said commissioners have repeatedly refused to allow the square to be occupied or used by the defendants for said monument. This misapplication of the use to which said common was dedicated by the legislative enactment authorizing said monument commissioners to occupy it for the purposes named, and their attempted use of the same for such purposes, the complainant avers, is in violation of her contract and vested rights by state authority, and is therefore in contravention of the constitution of the United States. The defendants answer that they are acting under the authority conferred by the legislative enactment of April 16, 1888, and that the power to determine the public uses to which the public square in Cleveland is to be applied is vested in the state legislature, which is the creator of

municipal corporations in Ohio, and vested with the power to define the limit of their municipal powers. The validity of the act under which they were appointed, and are now exercising their powers, has been affirmed by the supreme court in a suit involving substantially the same issues now presented for our consideration. It is contended that the decision of the supreme court construing the scope and validity of this act of the legislature is the voice of the highest judicial tribunal of the state, affirming the authority of the legislature to prescribe the public uses to which the public square of a city may be applied; and that this court, sitting within the state of Ohio, to administer the laws of that state, when not in conflict with the constitution and laws of the United States, must follow such decision. The principle claimed is undoubtedly correct. The supreme court of the United States, in repeated decisions, has well defined the class of cases in which the courts of the United States may construe the law for themselves, and in as many decisions has as clearly held that as to the scope and application of state laws, when not in conflict with the constitution and laws of the United States, the construction given to them by the highest courts of the state is binding upon us.

It is therefore important to determine how far the rights of the complainant in this case are fixed and controlled by the statutes of Ohio. At the time the dedication of the common or public square was made, in 1796, the city of Cleveland was not yet created. The fee to the public square so set apart for public uses was held in abeyance until the act of December 6, 1800, when it vested in the county in which the land was then located, "in trust to and for the purposes therein named, expressed or intended, and for no other use or purpose whatsoever." 1 Chase's St. 291. There was nothing upon the map or plat defining the use intended, except that the space denoting the present public square and streets about it was to be used as a "common." This was the word used in the statute. The dedication was for the public of the city of Cleveland, to be thereafter organized under authority of the legislature, and for its inhabitants. But to what uses was this dedication made? If the grantors had made the nature of their grant specific in written terms, there is no doubt but that the city of Cleveland (or even the legislature of Ohio, if vested with supreme authority over this trust, as claimed) would be held by the courts to strictly apply the common to the uses defined, and to no other. But no such written terms were stated. The grant was made as a common, or public square; and the uses to which it was dedicated are the uses to which the courts have held that property similarly dedicated in other cities in Ohio can be applied. We have, then, a dedication of this public square to public use, with the people of the city of Cleveland claiming to be sole trustee, to determine in what manner and to what public use it shall be applied. If we grant that the complainant has a vested right as an abutting owner of valuable property on the square to have it applied to the uses intended by the grantors, what is the nature and extent of this vested right? It cannot be to give to her or her grantees the right to say what shall constitute a pub-

lic use of this square. Her grantors, as the original donors of the square, did not see fit to clearly define the extent and character of the uses to which it should be applied, as they might have done if they intended or expected the uses to be limited or specific. They simply set apart an open space on the plat, and marked it "common." This leaves the nature and extent of the uses to which the common may be applied to be determined by the trustee, under proper legal principles, provided such uses are public uses. What are "public uses," within the meaning of a dedication so made, is well settled by repeated decisions in Ohio, beginning with the earliest reports of the supreme court, and following down to the latest. It has been held that a courthouse was a public use, to which such space or common might be applied.

In the case of *Langley v. Town of Gallipolis*, 2 Ohio St. 108, the supreme court has said:

"Such a place [a common], thus dedicated to the public, may be improved and ornamented for pleasure grounds and amusements, for recreation and health; or it may be used for the public buildings and place for the transaction of public business of the people of the village or city; or it may be used for purposes both of pleasure and business."

It appears from the stipulation as to facts filed in this case that two courthouses were once placed on this square,—one on the northwest quarter, and one on the southwest quarter. These public buildings have been removed, and the square, with streets running through it, has for years been open and unobstructed. We think it fairly established, then, by the decisions of the supreme court of Ohio and other states, that a public monument may properly be erected on a public square, and that such appropriation of public ground is a public use for public purposes. The size of the monument, its artistic merit, as well as the judgment exercised in the selection of the site, are not matters for the consideration of this court. They are within the discretion of the public authority to whom by law the control of the public square is intrusted. In this case no dedicated street is to be obstructed by the monument. The diagonal paths through the southeast quarter of the square are not highways in which the public have acquired a vested right, but they are, like the walks of a park, subject to change at will of the lawful authorities in control. The access to complainant's property will not be interfered with in the slightest degree. We therefore conclude that the use proposed is within the uses to which the square was dedicated.

As before stated, the supreme court of Ohio has decided that the soldiers' monument commission is a public authority, lawfully constituted by act of the legislature to control the public uses of the public square to the extent of erecting thereon the soldiers' monument. This decision determines finally the right of the legislature of Ohio, so far as the limitations imposed by the state constitution are concerned, to provide for the appointment of the commission, and to confer on it the powers given in the act. That decision is final as to the validity of that statute.

The only question, therefore, left to us upon which we can exer-

cise an independent judgment, is, as before stated, whether the act of the legislature under which the defendants are about to proceed violates the federal constitution by impairing the obligation of the contract of dedication from which the complainant has derived rights in the public square as an abutting property owner. The claim that this contract is impaired by an improper use of the square, not within the scope of its original purpose, we have already found to be untenable. It remains only to consider the second claim; i. e. was the city of Cleveland, by the contract of dedication, made the irremovable trustee to manage and control the uses of the public square, so that an attempt by the legislature to substitute another trustee is a breach of the contract? The dedication was made originally in 1796, and by subsequent record in 1801, by town plat recorded under the territorial statute in what was then Trumbull county, and in 1814, by record in the present Cuyahoga county. The plat was designated on its face as the plat of the city of Cleveland. By virtue of the statute, the public ground marked on the plat was vested in fee in the county for the uses therein specified, and none other. The present public square, as shown on the face of the plat, bears no name or descriptive title, but it is described in the survey recorded with the plat as the "square." It may be conceded that this constituted a dedication of the land as a public square to the public uses of the inhabitants of the future city of Cleveland and the neighborhood; i. e. to the uses of the local public, as distinguished from those of the public of the state at large. But from this no implication arises that the future corporation of Cleveland was to be the sole and irremovable trustee. The grant was not to the city of Cleveland. The fee was in the county, and is probably there still. After Cleveland was incorporated, in 1826, control over the square was vested in its common council. The city would never have acquired any control over the square but for an act of the legislature subsequent to the dedication. If so, may not the legislature of the state again change that control? The dedication was made before there was a state constitution, a state legislature, or an incorporated city. The dedicators must be held to have known that the whole people of Ohio had it in their power to impose such systems of local government as they saw fit upon any part of the state, including that part where it was intended the city of Cleveland should be. The presumption is not to be indulged, therefore, that they intended in their dedication to limit anything but the public uses to which the square should be put. They did not attempt to name the public authority which should control the square or common within those uses. Even if they had, they would have done this with the knowledge that the power of such public authority might be taken away, and another substituted at the will of the legislature, and would be presumed to have contemplated a possible change of trustee. As it was, no trustee was named; and it must be inferred that the whole question as to who should be the trustee of the uses was left to the sovereign power of the state.

We conclude, therefore, that it was no impairment of the original contract of dedication for the state, by act of the legislature, to substitute as trustee another local authority in place of the city to control the special public use to which this particular section of the square might be applied. The monument commissioners, in selecting that site, are therefore acting within the power lawfully conferred, and have a right to proceed with the work already begun. The temporary restraining order heretofore allowed will be set aside, and the application for a preliminary injunction be denied.

The conclusion we have reached is in accordance with the principles of law involved as we understand them, after patient examination. Our personal views as to whether the location chosen is the best and most suitable have not in the least influenced us. Those are considerations not presented in the record, and upon them we have no right to express an opinion. It is with the law of the case alone that we have dealt.

---

LAKE ERIE & W. R. Co. v. INDIANAPOLIS NAT. BANK et al.

(Circuit Court, D. Indiana. February 27, 1895.)

No. 8,973.

1. EQUITY PLEADING—REPLICATION.

Where a cause is set down for hearing on bill and answer, no replication having been filed, then the answer is to be taken as true in all its material allegations, whether responsive or not; otherwise the defendant would be precluded from proving the allegations which are only defensive. *Banks v. Manchester*, 9 Sup. Ct. 36, 128 U. S. 244, cited.

2. INSOLVENT BANK—PAYMENT OF DEPOSITOR.

A depositor is entitled to a preference in payment of the assets of a bank in the hands of a receiver where the deposit was made at a time when the bank was hopelessly insolvent, and the fact of such insolvency had been concealed by the bank. *Wasson v. Hawkins*, 59 Fed. 233, followed.

3. SAME.

In such case the whole of the deposit is charged with a trust, and an equal amount may be recovered from the receiver, who has received the specific money among the general mass of the bank's funds.

Miller, Winter & Elam, W. E. Hackedorn, and John B. Cockrum, for complainant.

Frank B. Burke and John W. Kern, for defendants.

BAKER, District Judge. This case has been set down for hearing upon the bill and answer of Edward Hawkins, as receiver of the Indianapolis National Bank. When no replication is filed by the plaintiff, and no issue is made upon the truth of the defendant's allegations, but the cause is set down for hearing on the bill and answer alone, then the answer is to be taken as true in all its material allegations, whether responsive or not; otherwise the defendant would be precluded from proving the allegations which are only defensive. *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36; *Brinkerhoff v. Brown*, 7 Johns. Ch. 217, 223; *Perkins v. Nichols*, 11 Allen, 542, 544. The bill seeks to have certain moneys and choses

in action deposited with the Indianapolis National Bank on the 22d and 24th of July, 1893, declared to be entitled to preference in payment out of the assets of the bank in the receiver's hands. Such preference is claimed on the ground that when the deposits were made the bank was, and for a long time had been, hopelessly insolvent; that the plaintiff had no knowledge of such insolvency, which was concealed from it; and that such moneys, and the proceeds of the choses in action so deposited, had come into the custody and possession of the bank examiner who first took possession of the bank upon its failure, and that the same had come into the possession of the receiver from such bank examiner. The principles applicable to the present case were fully considered by the court in *Wasson v. Hawkins*, 59 Fed. 233. It was there held that where money and checks are unsuspectingly deposited in a bank which is known by its managing officers to be hopelessly insolvent, a short time before the closing hour on the last day on which it does business, and the checks are subsequently collected, the whole of the deposit is charged with a trust, and an equal amount may be recovered from the receiver, who has received the specific money among the general mass of the bank's funds. Applying the doctrine of that case to the facts disclosed by the bill and answer, I am of opinion that the complainant is entitled to have a decree declaring that the sum of \$1,658.16 ought to be paid by the receiver out of the assets in his hands as a preferred claim, and that the residue of the complainant's claim is not entitled to preference, but ought to be allowed and paid pro rata with other unpreferred claims. A decree may be prepared in conformity with the foregoing views.

---

## NATIONAL WATERWORKS CO. v. KANSAS CITY.

## KANSAS CITY v. NATIONAL WATERWORKS CO.

(Circuit Court, W. D. Missouri, W. D. February 12, 1895.)

Nos. 1783, 1828.

## 1. LICENSE—ESTOPPEL.

The M. Ry. Co. permitted a waterworks company to construct a pipe line along the right of way to which the railway company had title in fee. With the full knowledge of the railway company, the waterworks company expended considerable sums in the construction of such pipe line, and continued, without interference, to use the same for a number of years in supplying a large city with water. *Held*, that the railway company would be estopped to revoke the license thus acted upon.

## 2. STATUTES—CONSTRUCTION—SEPARATE MATTERS IN SAME ACT.

The city of K. passed an ordinance permitting the N. Waterworks Co., in consideration of \$10,000, to lay and maintain pipes under the streets of said city for the purpose of conveying water to another city. No limitation of time was expressed. The \$10,000 was paid, and the pipes laid. The ordinance was passed under the authority of an act of the legislature. The third section of such act gave power to the city to grant the right to construct and maintain waterworks for such city, and the right to construct and maintain pipes under the streets for conveying water to other cities. The fourth section enacted that no grant, under the third section, should continue more than 20 years, and that any such grant

might be revoked at any time after 10 years, and then provided that the city might acquire title to the waterworks property, and established a full system of procedure for such acquisition of title. *Held*, that the third section of such act contemplated two distinct matters,—construction of waterworks in the city, and laying pipes across the city; that the fourth section related only to the former, and put no limit upon the duration of grants under the latter; and, accordingly, that the grant to the N. Waterworks Co., accepted and acted on by it, could not be revoked.

8. TITLE TO REAL ESTATE—EQUITABLE LIEN.

The N. Waterworks Co. was directed by a decree to convey to the city of K., in pursuance of a contract with such city, a clear title to its waterworks system, which included a supply station to which the company had the legal title, but from which it was supplying the city of C. with water under a contract for continuous supply. *Held*, that a conveyance of the legal title would not be accepted as a compliance with the decree, unless security were given by the company for the supply of the city of C. from independent sources.

4. SATISFACTION OF LIENS UNDER DECREE—PRACTICE.

The property to be conveyed by the waterworks company was incumbered with certain liens, to the discharge of which the city of K. was entitled to have the purchase money applied. There was a difference between the holders of such liens as to the amounts, respectively, applicable thereto out of such purchase money. *Held*, that the city would not be required to pay the purchase money, without protection from possible claims of lienholders; and, for that purpose, a commissioner would be appointed by the court to act with the agent of the waterworks company and the lienholders in receiving the money, and to see that proper releases were given to the city.

This was a suit by the National Waterworks Company of New York against the city of Kansas City, Mo., to enforce a contract for the construction and operation of a system of waterworks, and the purchase thereof by the city. The city filed a cross bill seeking to be relieved from the contract. A decree for performance of the contract was entered by the circuit court, and, on appeal to the circuit court of appeals, was modified, and affirmed as modified. 10 C. C. A. 653, 62 Fed. 853. Upon the filing of conveyances of the waterworks system, as directed in the decree, the city filed exceptions to their sufficiency, pursuant to leave reserved in such decree.

Louis C. Krauthoff, C. O. Tichenor, and Gardiner Lathrop, for National Waterworks Co.

John C. Gage, L. C. Slavens, O. H. Dean, F. F. Rozzelle, and Frank Hagerman, for Kansas City.

Before BREWER, Circuit Justice, and PHILIPS, District Judge.

BREWER, Circuit Justice. At the May term, 1894, of the court of appeals for this circuit, a decree was ordered to be entered in this case, by which, among other things, the National Waterworks Company was directed to execute and place in escrow with the clerk of this court, on or before December 1, 1894, good and sufficient deeds, assignments, releases, bills of sale, and other conveyances for the transfer to the city of Kansas City of the whole and complete waterworks system belonging to such company, including that portion thereof which is situated in the state of Kansas; and that within 30 days thereafter the city should file any exceptions it might have to the sufficiency of such conveyances. This decree was in obe-

dience to the mandate of that court duly entered in this court, and on the day named, to wit, the 1st day of December, 1894, the waterworks company delivered to the clerk certain deeds and releases, which deeds and releases it claims constitute a full compliance with the terms of the decree against it. Within the 30 days the city filed exceptions, and the question now submitted to us for consideration arises upon these exceptions.

A brief general statement of the condition of the waterworks plant will help to a clear understanding of the exceptions. The distributing system is in Missouri, and the legal title to this is in the National Waterworks Company. The supply works and a long flow line are in Kansas, and the legal title to them is in the Metropolitan Water Company. Upon the Missouri property are two mortgages or trust deeds of \$1,500,000 each. Upon the Kansas property are also two mortgages or trust deeds, one for \$900,000, and the other for \$2,000,000, which by the terms of the decree were to be fully released. The exceptions of the city run both to the deeds and the releases. It will be convenient to consider these separately.

And, first, as to the matter of title, we do not understand that any objection is made to the form of the conveyances, or doubt entertained that whatever of title is in the grantors is conveyed by the deeds, but the objection is that the grantors, especially the Kansas corporation, have not a perfect title to the property they attempt to convey. The exceptions to the title are as follows: First, that so much of the flow line as passes through the "Fowler Tract," as it is known, is subject to an obligation for the supply of water as a condition of the title received by the company from the owners of that tract; second, that the flow line, for a distance of about two miles from the Quindaro supply station southward, is on the Missouri Pacific right of way, and there simply by permission of the railway company,—a permission subject to revocation at any time, at the mere will of such company; and, third, that the Quindaro supply station and the flow line through the city of Kansas City, Kan., are so subject to the rights and powers of this latter city that it is impossible for the Metropolitan Water Company to vest in the city of Kansas City, Mo., a perfect, unincumbered, and permanent title thereto.

With reference to the first of these, it is understood that the company has obviated the objection by constructing a new flow line which does not pass through the Fowler tract, and so is not burdened by any conditions in the conveyance thereof.

As to the second, it is true that there is no deed or other writing from the Missouri Pacific Railway Company vesting in the water company a right, either temporary or permanent, to use the right of way for its flow line. But the testimony shows that the railway company has a fee-simple title to its right of way; that the water company had permission from the division superintendent of the Missouri Pacific Railway Company to construct its flow line thereon; that the railway company, under contract with the water company, carried the pipes and distributed them on such right of way; and that, in the year 1887, the water com-



pany, at considerable expense, dug a ditch and constructed the flow line along the tracks, and upon the right of way, thus establishing a connection between the supply station at Quindaro and the distributive system in the city of Kansas City, Mo. This work of construction was not done secretly or hastily, but publicly, and under such circumstances as to charge upon the railway company full knowledge thereof. No challenge of its occupation and use of the right of way has been made by the railway company during these intervening years. These facts establish a parol license so far executed as to vest in the water company a right of occupancy and use. I do not regard the permission given by the division superintendent as a contract binding on the railway company, but as one circumstance, with others, showing a knowledge by the company of what was being done on the right of way. The rule is recognized in this state, as elsewhere, that where one party enters upon the real estate of another under a parol license from the latter, and at large expense constructs an improvement which is necessary for the successful carrying on of the business of the licensee, the licensor is estopped to deny the right of the licensee to continue such occupancy and use so long as the necessities of his business require. Among other authorities, are the following: *House v. Montgomery*, 19 Mo. App. 170; *Baker v. Railroad Co.*, 57 Mo. 265; *Chiles v. Wallace*, 83 Mo. 84; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241; *Rerick v. Kern*, 14 Serg. & R. 267; *Campbell v. Railroad Co.*, 110 Ind. 490, 11 N. E. 482; *Wilson v. Chalfant*, 15 Ohio, 248; *Clark v. Glidden*, 60 Vt. 702, 15 Atl. 358; *Brewing Co. v. Morton*, 47 N. J. Eq. 158, 20 Atl. 286; *Duke of Devonshire v. Eglin*, 14 Beav. 530. In *Rerick v. Kern*, 2 Am. Lead. Cas. (5th Ed.) 569, Messrs. Hare & Wallace, after reviewing the authorities, say:

"From the cases which have been cited, we may deduce two things: \* \* \* A license cannot be revoked or withdrawn so long as it is essential to the possession or enjoyment of a vested right or interest, which has been created by the licensor, or placed, with his assent, in a situation where the continuance of the license is essential to its enjoyment. These inferences obviously result from the general rule that no one can recall a promise or declaration made with a view to influence the course of another after he has acted upon it, and thus placed himself in a position where he must necessarily suffer if it be withdrawn. An equitable estoppel arises, under these circumstances, to prevent the legal title from being used as a means of injustice."

The case in 47 N. J. Eq. 158, 20 Atl. 286, is in point, and the facts and rulings thereon are thus stated in the syllabus:

"(1) When a license has been so far executed that its revocation would work a fraud, actual or constructive, upon the licensee, equity will restrain such revocation, although its continuation results in an easement upon the lands of the licensor in favor of the lands of the licensee.

"(2) No distinction in equity arises out of the place where the works are erected under license, whether upon the lands of the licensor or licensee.

"(3) The owner of a brewery constructed, at considerable expense, a drain from the cellar of the brewery along the line of a neighbor's lot, by his consent, and connected it with a public sewer in a street upon which the brewery lot did not face, and maintained it for thirty years. No particular time was fixed for the continuance of the drain. Its continuance was of great consequence to the brewery, and worked little or no injury to the neighbor's lot. Held, that the presumption, from the circumstances, was that it was to con-

tinue as long as the necessity of the brewery required it, and that the owner of the adjoining lot should be restrained from disturbing it so long as the brewery lot was used for a brewery, or until a public sewer should be constructed in the adjoining street."

The case in 14 Beav., supra, is also very significant. In that case it appeared that the town of Grassington was much inconvenienced by the want of a supply of water, and it was discovered that a supply might be obtained by conveying it through certain lands, among them the land of the defendant, and it was charged that he consented that pipes therefor might be laid through his land. In his answer the defendant admitted that he had consented to the passage of the water through his land, but claimed that it was only upon consideration of his being paid a proper and reasonable price therefor, and alleged that no such price had been paid or agreed upon. There was evidence to show that he, without objection, saw the work in progress, and simply said to the workmen: "Take care that you don't stop up my drains in cutting through them, for, if you do, I shall tear up your water course." The works were completed, and used for a period of nearly 10 years, without any dispute or contest on his part; and it was held that he could not prevent the enjoyment of the right of passage, though entitled to payment of a proper consideration therefor, and the matter was referred to a master to ascertain what should be paid. Other authorities might be cited, but these are sufficient to show the course of decision.

There is nothing technical or arbitrary in the rule thus laid down, but it is founded on obvious principles of right and justice. It would be intolerable to permit the railway company, after assenting to the construction of this flow line at such expense,—a flow line by which supply works were connected with the distributive system of a large city,—and also assenting to the use of its right of way for such purpose for a number of years, to withdraw its assent, and break the connection so necessary for the successful operation of the waterworks system. As acts speak louder than words, so conduct is equally potent with writing, and the conduct of the railway company has been such that a court of equity would unhesitatingly say that it is estopped from asserting that it had failed to grant in the proper manner the right to such use of the right of way. These considerations apply with equal force to the objection that no proper grant in writing was made either by this railway company or the Union Pacific Railway Company of a right to place the water pipes underneath their tracks at other points, nearer to the distributive system. This exception, therefore, must be overruled.

The other exception embraces two matters: First, the permanence of the right to use the streets and alleys of Kansas City, Kan., for a flow line; and, second, the interests of Kansas City, Kan., in the supply station at Quindaro.

With reference to the first, it appears that on November 17, 1891, the city council of Kansas City, Kan., passed an ordinance, the first section of which is as follows:

"Section 1. That for and in consideration of the sum of ten thousand (10,000.00) dollars to it paid, the city of Kansas City, Kan., does hereby sell, and

transfer to the National Waterworks Company of New York, its successors and assigns, whether such successors and assigns be a natural person or a municipal corporation, located in this or any other state, the right to lay and maintain water mains under or over any stream and along, upon and across the streets, alleys and other public grounds of the city of Kansas City, for the purpose of conveying water to any city in this state or any other state; and there is also sold and contracted to said National Waterworks Company of New York, its successors and assigns, aforesaid, the right to maintain any and all water mains heretofore laid under, along, upon and across any such streets, alleys, and other public grounds."

The ordinance was accepted, and the \$10,000 paid. There is no limitation expressed as to the matter of time, and the language imports permanence of right, for it is "to lay and maintain."

It is contended, however, that whatever may be the scope of the ordinance, standing by itself, the act of the legislature under which it was passed (Laws Kan. 1891, p. 126) reserves to the city a right to terminate such use of the streets, alleys, and public grounds. Section 3 of the act reads as follows:

"Sec. 3. The mayor and council of such city may grant any person, company or corporation the right to construct, maintain and operate water works, and lay pipes within such city, for the conveyance of water for the use of such city and its inhabitants, as well as to contract with any person, company or corporation to furnish water for such purposes, and *may contract with or grant to any person, company or corporation the right to lay and maintain water mains under, along, upon and across the streets and alleys and other public grounds of such city for the purpose of conveying water to any city in this state or any other state.* And in case the mayor and council shall grant or shall have heretofore granted to any person, company or corporation the right to construct and maintain water works for the use and benefit of the city, shall contract or have heretofore contracted with any person, company or corporation to furnish water for such purposes, the mayor and council shall have the power to levy annually on all the property of said city, taxable according to law, a tax in addition to other taxes, not to exceed two mills on the dollar in any one year for that purpose, and to pay said person, company or corporation in full for such year for water furnished to such city."

Obviously this section contemplates two distinct matters: One, the construction of waterworks and the laying of pipes within the city for the supply of the city; and the other, that expressed in the clause in italics,—the laying and maintaining of water mains for the purpose of conveying water to a city in another state. The one is for the benefit of the city itself, while the other is for the accommodation of a city in another state. Each is independent of the other. The considerations justifying and the limitations appropriate to the one have no application to the other. They would naturally be placed in separate sections, if not in separate acts. Indeed, it is stated that the section was made out of two bills, consolidated in the course of passage through the legislature. The grant of power in this section is general, and without limitation. If this were the only section bearing on the matter, it would be beyond question that the city had the power to make a permanent contract for the use of its streets. But it is insisted that section 4 imposes a limitation, and a hasty reading gives countenance to such contention. The section commences in this way:

"No grant or contract provided for in the preceding section shall continue for a longer period than twenty years; and any such grant or contract may be

terminated at any time after the expiration of ten years from the making of the same, or such less time as may be fixed at the time of making such grant or contract; and the city may acquire title to the waterworks property, and all the rights, privileges and franchises thereto pertaining in the manner following: The city may, at any time after the expiration of ten years, from the making of such grant or contract, or after the expiration of such less time as may be stipulated in the franchise or contract, file a petition in the district court of the county in which such city is situated against the owner or owners of such waterworks and all others interested therein, which petition shall contain a general description of the waterworks property, praying that the city may be permitted to acquire title thereto in the manner provided for in this act."

Then follow provisions for notice, hearing, appraisement, and other proceedings, culminating in a deposit by the city of the amount of the award with the treasurer of the county, for the use of the owners or others interested in said works; and after them these words:

"From the time of the making of such deposit with the county treasurer, the city shall be the absolute owner of the entire waterworks property, and all rights, franchises, and privileges thereunto pertaining, free and clear of the claims of all persons theretofore interested therein."

Now, while the first clause in this section, which reads, "no grant or contract provided for in the preceding section shall continue for a longer period than twenty years," is broad enough to include, not merely grants and contracts for the construction of waterworks and the supply of the city with water, but also contracts for laying and maintaining water mains for the purpose of conveying water to a city in another state, yet, on careful examination, it will become very clear that such breadth of meaning is limited by the subsequent language of the section. The clause just quoted does not stand as an independent and separate provision, but is connected by the copulative conjunction "and" with succeeding provisions, and, as thus connected, must apply to the same subject-matter. Hence it is that grants and contracts, whose duration is limited, are those for the construction of waterworks and the laying of pipes to supply the city with water. The whole section contemplates but one thing, and that is the acquisition by the city of its water-supply system, and it would be resting upon the letter to hold that such single clause, by reason of its general words, includes other matters and other contracts than those within the scope of the balance of the section. It is familiar law that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. See *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511, and cases cited in the opinion.

It is unnecessary to rest upon the history of the passage of this act through the two houses of the Kansas legislature. It is enough to compare the two sections. While section 3 includes two distinct matters, section 4 treats of but one. All its sentences and parts of sentences must be taken as a declaration of the will of the legislature in respect to that matter. It must undoubtedly be so construed as to completely effectuate the manifest purpose of the law-making body, but to carry its operation further would be, not the upholding of a statute, but in reality the enactment of a law,—

judicial legislation. Obviously the legislature thought it wise to reserve to the city the right to acquire its own water-supply system, but it would be ungracious to hold that it meant to give to the city the power to break up the water-supply system of another city in a neighboring state. Of what profit can it be to a city in Kansas to injure a city in Missouri, and what will justify an imputation of an intent on the part of the legislature of Kansas to empower any of its cities to do such an injury? While, of course, the city council could not, by its own action, enlarge the powers given it by the legislature, yet the ordinance which it enacted shortly after the passage of this act may be considered in the light of a cotemporaneous construction of its scope and meaning. I am clearly of the opinion that the ordinance is within the power given by the act, and secures to the company and its assigns a permanent right.

With reference to the other matter, it appears that in the first instance the supply station for Kansas City, Kan., was near the mouth of Jersey creek; that afterwards the same interest, controlling the waterworks system of Kansas City, Kan., and Kansas City, Mo., constructed a supply station at Quindaro, from which alone the two cities have been supplied. The legal title to this property is in the Metropolitan Water Company, and unquestionably its deed conveys such legal title to the grantee named therein, Kansas City, Mo. The claim is that, the title being in a Kansas corporation, and the works having been constructed as a part of the waterworks system, and with the view of supplying Kansas City, Kan., with water, the property is held by the corporation subject to the duty of continuing such supply, and therefore that the conveyance of the legal title to Kansas City, Mo., conveys property burdened with a perpetual use, and is not a compliance with the decree of the court, which provided that it should receive its waterworks system free of all incumbrances. It is claimed, on the other hand, that the Jersey Creek supply station is adequate for the present needs of Kansas City, Kan.; that the distributive system of that city can be connected with it, and without any trouble wholly separated from the main flow line connecting the Quindaro supply station with the distributive system of Kansas City, Mo.; and that then all claims of rights of Kansas City, Kan., to the Quindaro supply station, or any use or benefit thereof, will be gone. While such separation can undoubtedly be made, and easily made, yet I am not satisfied that the claim as to the sufficiency of the supply station at Jersey creek can be sustained. The right of Kansas City, Kan., it is true, is not to have the present Quindaro works permanently used for its benefit, but its right is, as against the water company, to compel the latter to have somewhere an equally satisfactory supply station. There is in none of the ordinances of or contracts entered into between Kansas City, Kan., or any of the cities which were consolidated into it, and the waterworks company, or its predecessors, anything that subjects the particular supply station at Quindaro to the uses of Kansas City, Kan. Hence, the waterworks company can convey to Kansas City, Mo., a full, legal, and unincumbered title to that supply station, provided it

shall secure to Kansas City, Kan., another supply station adequate to the needs of that city. The waterworks company represents that it has purchased ground near its present station at Quindaro, and a right of way therefrom, and that it can, if required, construct both such needed supply station and a flow line therefrom to Kansas City, Kan. It says it has not done so because of the complications attending this litigation and the uncertainty as to its result. Giving to this excuse all the weight to which it can reasonably be entitled, it does not relieve the situation from the fact that Kansas City, Kan., has for the present, at least, an equitable claim upon the Quindaro station for the supply of water to its uses. Still, I think it is sufficient to justify the court, inasmuch as the legal title passes by the conveyance from the waterworks to Kansas City, Mo., in overruling the exception, on condition that satisfactory security is given for the construction of a proper supply station for the wants of Kansas City, Kan., but only upon condition that such security is given. Since the argument made on these exceptions, I have received a brief from the waterworks company suggesting two or three ways in which adequate security can be given for compliance with such condition. I do not know whether the city has fully considered the suggestions in such brief, and the various plans mentioned therein were not discussed in the argument; so I do not think that at present I ought to pass upon the sufficiency of either of the plans suggested. All that I am at liberty now to decide is that the exceptions must be sustained, unless there is provided by the waterworks company security satisfactory to the city, or, if objected to, approved by the court, that within such reasonable time as may be agreed upon or fixed the waterworks company shall provide a supply station and a flow line connecting it with the distributive system of Kansas City, Kan., which shall be fully adequate to the needs of that city. Thus much I decide as a judge.

May I be pardoned if I stop in the course of this opinion, and speaking, not as a judge, but as a friend, say that it seems to me here is a contingency in which the three parties interested, to wit, Kansas City, Mo., Kansas City, Kan., and the waterworks company, ought to enter into a mutual agreement obviating the present construction of such second supply station. According to the testimony, which is not questioned, the present supply station is adequate for the wants of half a million of people,—more, probably, than will be gathered about the mouth of the Kaw for the next quarter of a century. The construction of a second supply station is therefore, for the present, an unnecessary expense. If the three parties mentioned should enter into an arrangement by which the present works could be used for the supply of both cities; Kansas City, Mo., owning the supply station, would receive some compensation for supplying Kansas City, Kan., and in this way make an addition to its revenues. Kansas City, Kan., would receive, as at present, and without additional cost, its full supply of water, and at the same time if, during the life of its contract with the waterworks company, it should decide to purchase the waterworks plant, would have less money to pay, because there would be less of prop-

erty to purchase than if a new supply works were now to be constructed; while the waterworks company, in lieu of adding to its indebtedness by the cost of the new works, would simply make an annual payment out of its revenues for the water by it received from this station for the supply of Kansas City, Kan. I speak of this simply as a friend to the parties, and, although I am conscious that no little irritation and feeling have grown up between Kansas City and the waterworks company out of the present litigation, I cannot but think that a little reflection on the part of all will convince that some such arrangement is beneficial to all, and should be entered into.

Having said this much, I return and reiterate the proposition which, as a judge, I decide, that if no arrangement of this kind is made (and no court can compel parties to make a contract), the waterworks company must give satisfactory security for the construction of a second supply station for the benefit of Kansas City, Kan., or this exception to the title will have to be sustained.

I come now to the exceptions running to the matter of incumbrances. When the deposit of the title papers was made, an order was entered by this court that the \$3,000,000, the purchase price, and also the hydrant rentals, should, when paid to the clerk of this court, be forthwith transmitted to the Central Trust Company of New York. The thought was that it was entirely immaterial to the city what arrangement was made between the holders of the incumbrances, and, if they had agreed among themselves that the money should be put in the custody of the Central Trust Company for distribution, that was sufficient. A motion was immediately made by the city for a modification of this order, and on December 17th it was modified so as to direct—First, the payment to the Farmers' Loan & Trust Company, the trustee in the first mortgage or deed of trust, on the Missouri Property, of a sum sufficient to discharge the principal and accrued interest thereof; and, secondly, the payment of the balance to the Central Trust Company, with a reservation of the right and power, upon an objection by intervention of any creditor of the waterworks company, to withhold from the operation of the order a sum sufficient to provide for the payment of such creditor. On the argument of these exceptions, it was stated that some of the later bondholders do not agree to the arrangement which has been attempted to be made, and an intervening petition was presented in behalf of one of them.

It is undoubtedly true that it is a matter of no concern to Kansas City how the money which it pays is distributed among the various lien holders, if the liens on the property are discharged; but it is important to the city that those liens should be legally and fully discharged, and that it should not in the future be subjected to the defense of suits brought by various bondholders, claiming that their bonds have not been paid, and that they still remain liens upon the waterworks property. And it ought not to be compelled to trust to a third party, with whom it has no dealings, and over whose conduct it has no control, and whose right to enter satisfaction of the liens is not at the time, and under the circumstances of payment,

beyond question, to distribute the money which it pays among the lien holders in such a manner as to relieve the city and the property from further liability. The city is justified in insisting that the court shall see that the money it pays is so applied as to remove all outstanding liens upon the property. As the first mortgage or trust deed—that to the Farmers' Loan & Trust Company—is by its terms now due and payable, as it is entitled to be paid in full, and the trustee is authorized on behalf of the bondholders to receive payment and enter satisfaction, I see no objection to the first part of the modified order of December 17th,—that part which directs the payment to such Loan & Trust Company of the full amount of the principal and interest. The order should, however, provide that the payment be made upon the receipt of a satisfaction piece, fully releasing and discharging the property from the lien of such a mortgage or deed of trust. When the trustee shall have executed such a release, and received payment of the principal and interest, the bondholders can have no further recourse against the property, but must look to the trustee for the moneys which by the terms of the contract are payable to it for them. With regard to the latter part of the modified order, I am of opinion, as I intimated on the argument, that some additional provision should be made for the protection of the city. The balance of the money payable by the city is not sufficient to pay off the other liens in full; there has to be some scaling of claims. If all of the subsequent lien holders had entered into an agreement in respect to the amounts they are to receive, and the party to whom the money should be paid, it might be sufficient to direct simply the payment to such party; but in view of the fact that, as at present advised, all have not entered into any agreement, I am of opinion that the latter part of the order should be further modified, and that some one should be appointed as representative of the city to act in conjunction with the Central Trust Company. Fortunately, there is in Kansas City a gentleman whose character, abilities, and experience are such as to be a guaranty to the city that its interests will be protected, and whose reputation as a lawyer and jurist has become so far national that no bondholder, and no financial institution in the country, can hesitate to have him take part in the distribution of any sum of money. I refer to ex-Chief Justice Black, of the supreme court of the state of Missouri, and, if he will accept the appointment, an order may be entered designating him as a commissioner to act on behalf of the city, and providing that no money shall be paid except upon a check countersigned by him, and directing him to act in conjunction with the Central Trust Company, the party named by at least the majority of the subsequent lien holders, in distributing the money according to the terms of the agreement, all the time reserving a sufficient amount to satisfy the claims of those lien holders who do not enter into the agreement. I have no doubt that Judge Black's wisdom and experience will greatly facilitate the closing up of this matter. He will, of course, see that proper releases are executed by the various trustees and filed in the proper offices. By this arrangement the objections to the sufficiency of the releases tendered may be avoided, and at the



same time the rights of both parties be fully protected. The details of this order can doubtless be arranged by counsel. If not, they will be settled by one of the judges of this court. I think this is all that need be said in reference to the matter of the exceptions. The company has filed a motion for an order on the city to pay over the past-due hydrant rentals, or some portion thereof. I think they should be paid, but, as possibly the whole matter may be closed up shortly, I simply continue the motion for such order for 60 days.

PHILIPS, District Judge, concurs.

---

SAGADAHOC LAND CO. v. EWING et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 247.

RESCISSION OF CONTRACT—DELAY.

Rescission of a contract for purchase of lots of uncertain value, dependent on a speculative enterprise, asked because of false representations, will not be granted where suit is not brought till three and a half years after making the contract, and two years after the falsity of the representations must have been known, and the delay is unexplained.

Appeal from the United States Circuit Court for the Southern Division of the Eastern District of Tennessee.

Suit by the Sagadahoc Land Company against Boyd Ewing and others for rescission of contract and other relief.

This is an appeal from a decree dismissing appellant's bill on demurrer. The question is, therefore, whether a case for equitable relief was made on the face of the bill.

The appellant was an unincorporated association of persons residing in Maine, who joined in the bill and appeal as individuals. The defendants were the Cardiff Coal & Iron Company, a corporation of Tennessee; Boyd Ewing, receiver of the company's assets, appointed by the court below in another action; and 12 or more other persons charged in the bill with having organized the Cardiff Company. On October 9, 1893, the complainants filed their bill on behalf of themselves and all other creditors of the Cardiff Company. The bill averred that the organizers of the Cardiff Company obtained contracts for the purchase of large quantities of land in three of the eastern counties of Tennessee, and that such interests as were thereby acquired were vested in one of their number. That they then determined to sell the land in town lots, and sought to induce their purchase by circulars and advertisements containing material misrepresentations. That these misrepresentations were—First, that the Cardiff Company was an incorporated company with a capital of \$5,000,000, and a charter carefully drawn by skilled attorneys (when, as a matter of fact, the company was not organized until the day of the sale of lots, April 22, 1890); second, that the company had \$1,000,000 in cash, which had been set apart and appropriated for the purpose of making vast improvements on the land of the company in the city of Cardiff, where the lots were sold; third, that the company had all arrangements made speedily to carry out all the improvements and establish great industries at Cardiff; fourth, that the proceeds of sale would be also used in carrying out the plan and inducing immigration, so as to make Cardiff a town of 5,000 inhabitants and enhance the value of the lots; and, fifth, that the enterprise was backed by capitalists of large means and experience at or near Cardiff. That all these representations were false. That the company never had but \$140,000, and this sum it spent in advertising. That the complainants, relying on these representa-

tions, were induced by Rice, the vice president of the defendant company, to buy six lots for \$18,300, by his agreement to pay \$5,000 of the purchase price. That Rice gave a pretended note for his share to the company, with the secret understanding that it was not a real obligation. That the land originally purchased for the company was transferred to it by H. C. Young (in whose name it had been taken for the organization) in consideration of \$300,000 in cash and all the 50,000 shares of stock in the company, except enough to qualify the other defendants as directors. That by this transfer the stock was declared paid up. That H. C. Young's title to much of the land conveyed by him has entirely failed. That platted streets have been fenced up, and town lots have been devoted to agricultural purposes. That in no other way than as above stated have the stock subscriptions been paid, and that the pretended consideration received in payment of the subscriptions has failed utterly and was grossly insufficient at the time. That, by the charter of the Cardiff Company, its directors are personally liable for any fraud practiced in the sale of lands by the company, and that complainants seek to hold the directors in this bill liable for the losses sustained by complainants through the frauds above described. That complainants, by reason of the false representations by which they were induced to purchase lots in Cardiff, are entitled to have their contracts of purchase rescinded, and a decree for the money paid on the contract. The bill then proceeds as a creditors' bill to set forth that all the defendants are indebted to the company on their stock subscriptions, but that neither the company nor Ewing, its receiver, has made any call for the same or any attempt to collect them. That, by collusion with the defendants, one Bosworth was given judgment against the company, and brought a general creditors' bill in the court below, and had a receiver appointed. That, by fraud, the defendants, who are really indebted to the company, have made it appear to the court and its master that they are large creditors. That the defendants have bought in all the land of the company at a sale made by the receiver in that action. That the defendants who secured decrees in their favor for fictitious claims against the land company have transferred the same, to delay and defeat the claims of bona fide creditors of the company against them.

The prayer of the bill is as follows: "Premises considered, complainants pray leave of the court to file this bill; that they may be allowed to file this as a general creditors' bill, in behalf of themselves and of all other creditors of the said the Cardiff Coal & Iron Company, and that the bill be by your honors sustained as such; that copy and process issue, according to the rules of this court; and that defendants answer all allegations hereof fully and truly. They further pray that the debts reported to and decreed in favor of nonresident defendants, hereinbefore named, be attached and held subject to the orders of the court; that an assessment of stock sufficient to pay all debts of the corporation be made and collected; that, if necessary, the receiver in said cause of George F. Bosworth v. The Cardiff Coal & Iron Company et al. be made receiver in this cause, or a new receiver be appointed, and that the receiver be authorized, empowered, and directed to bring suit in foreign courts to collect assessments, or, if necessary, that complainants' contract of sale be rescinded, and that they have decree for moneys paid out and expended on said purchase; that all assets and debts be marshaled and offsets be made and priorities declared, and said corporations wound up and settled, and to this end that all necessary orders be made, process issue, and accounts taken. They pray that the pretended transfers and assignments by Cordley & Co. and Frank B. Cordley to defendants Geo. K. Nolte and A. E. Green be decreed to be a fraud, and done for the purpose of defrauding the complainants and others having claims against them, and that said property be held subject to the further orders of the court, as the rights of complainants and others may appear on the final hearing of this cause, and, if complainants have in anything mistaken their remedy, then they pray for such other, further, and different relief as they may be entitled under the facts and in equity and good conscience."

The defendant the Cardiff Coal & Iron Company, and Boyd Ewing as receiver, filed a demurrer to the bill, as follows: "The demurrer of the Cardiff Coal & Iron Company and Boyd Ewing, receiver, to the bill filed against them and

others in the above-entitled cause: These defendants the said company and the said Ewing, receiver, not confessing any or all of the matters and things in the bill of complaint contained to be true as alleged therein, do demur to said bill, and the separate part of the same, and for cause thereof assign and show: (1) That the bill does not state such a case nor contain any matter of equity entitling the complainants to any relief against these defendants. (2) That the bill is multifarious, with misjoinder of parties, in the following particulars, to wit: The bill is brought as a general creditors' bill to collect unpaid subscriptions and other assets, wind up the defendant company, and distribute its assets; and also brought as an individual bill by complainants as lot purchasers, to rescind and cancel their contract for purchase and to recover back purchase money,—the two causes of action, in purpose and effect, being wholly separate, independent, and antagonistic. (3) That so much of the bill as is filed as a general creditors' bill is not filed by any creditor at all, and so by no one of the class by whom it is brought. (4) That as creditors' bill it fails to show that complainants have any judgment, or even that they are simple contract creditors, without which this part of the bill cannot be maintained. (5) That as creditors' bill it appears that there is already pending a general creditors' bill, under which defendant Ewing is receiver, and another such bill in same court against same company cannot be maintained. (6) That so much of the bill as seeks rescission of complainants' contract of purchase shows the defendant company is insolvent, and in hands of the receiver, and being wound up, after which this right is gone. (7) That the same part of the bill shows the sale was early in 1890, and shows no excuse for not bringing this bill at an earlier date, and so much of the bill presents a claim stale and barred by laches, this being speculative property; that so much of the bill as prays rescission shows that the representations complained of were not of facts on which complainants might rely, but were speculative and promissory in nature and effect." The circuit court sustained the demurrer, and dismissed the bill.

John W. Yoe, John F. McNutt, and Tully R. Cornick, for appellant.  
Pritchard & Sizer (Clark & Brown, of counsel), for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the case, delivered the opinion of the court.

We may concede, without deciding, that the fact that the court below had taken possession of all the assets and property of the Cardiff Company by a receiver, and was in the course of administering its estate under a general creditors' bill, gave the court ancillary jurisdiction to hear and determine a controversy like that sought to be raised by this bill, without regard to citizenship of the parties; for, admitting the jurisdiction, it is manifest that, on general principles of equity, the court was right in dismissing the bill. The complainants had no standing at all to seek the relief they prayed, except on the theory that they were creditors of the company. They could not be creditors until the contract for the purchase of lots from the company, by the terms of which they were debtors and not creditors, was rescinded. Therefore, if their bill fails to state a good case for rescission, they must go out of court. They base their right to rescind on the falsity of representations made in March, 1890, and inducing their purchase in April following. They did not file their bill to rescind for three years and a half thereafter. The lots which they bought were of uncertain value, changeable from month to month, and dependent on the success of a

manifestly speculative enterprise. It was their duty, as soon as they learned that fraud had been practiced on them, at once to give notice of rescission and seek relief in the courts. There is not a line in the bill giving any reason for their delay in taking these steps. They waited, indeed, until after the court below, in another action, had taken possession of the assets under another creditors' bill, and had sold the property of the company under its decree, before asserting their right to rescind and to be considered creditors. The bill shows the collapse of the company by the appointment of a receiver and the abandonment of its enterprise, at least two years before the filing of the bill in this case. Certainly, if there had been any fraud in the sale of lots in April, 1890, the complainants were put on inquiry as to its existence. The proceedings in the other creditors' bill and the appointment of the receiver so affected the enterprise in which the complainants had embarked that they could not have been ignorant of them. *Foster v. Railroad Co.*, 146 U. S. 88, 13 Sup. Ct. 28. Under such circumstances, a delay of three years and a half, before attempting to rescind, cuts off the right to do so, even if it existed originally. "A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar relief when the property is of a speculative character, or is subject to contingencies, or where the rights and liabilities of others have been in the meantime varied. If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to be to his advantage." *Hayward v. Bank*, 96 U. S. 611-618; *Oil Co. v. Marbury*, 91 U. S. 587; *Grymes v. Sanders*, 93 U. S. 55; *Johnston v. Mining Co.*, 148 U. S. 360, 13 Sup. Ct. 585; *Mining Co. v. Watrous*, 9 C. C. A. 415, 437, 61 Fed. 163. If any cause of action exist in favor of the complainants against the directors of the company for fraud, this must be asserted by action at law. For these reasons we are of opinion that, on the face of the bill, complainants were not entitled to rescission because of unexcused delay, and therefore that the bill was rightly dismissed on demurrer. The decree of the circuit court is affirmed.

---

MEYER et al. v. KUHN et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 86.

1. SERVICE OF PROCESS—PUBLICATION—EFFECT OF MISNOMER.

When constructive service by publication is substituted by statute in place of personal citation, a strict compliance with statutory provisions is exacted, and it is essential that the publication shall correctly state the parties to the suit and their names. Accordingly *held*, that a publication of a summons to "Sarah E. Meyers" was not notice to one "Elizabeth Meyer" of the pendency of a suit against her, though coupled with a summons to the "unknown heirs of Henry Meyers, deceased," *Elizabeth Meyer*

being, in fact, the widow of one Henry Meyer, who left surviving certain children and heirs, and that a decree, rendered on default upon such summons and publication, was not binding on said Elizabeth Meyer.

2. SAME—VALIDITY OF JUDGMENT.

Where a bill bases the plaintiff's claim upon a tax deed, purporting to convey the entire interest in certain real estate, and the decree based on such bill is not binding upon the owner of a life interest in such property, because of defects in the publication of the summons, it cannot bind the owners of the estate in remainder.

8. EQUITY PRACTICE — AFFIRMATIVE RELIEF UPON ANSWER — PROCESS — WEST VIRGINIA CODE.

Code W. Va. c. 125, §§ 35, 57, provides that the defendant in a suit in equity may seek affirmative relief against the plaintiff or a codefendant by answer, with the same effect as by a cross bill, and that, when this is done, the case shall be decided upon the same principles as if a cross bill had been filed. The Code also provides that, in suits in equity, unknown and absent defendants may be served by publication in the manner therein provided. It seems, therefore, that, where a defendant seeks affirmative relief against his codefendants by answer, but no process is issued or order of publication taken on such answer against absent defendants, such absent defendants are not bound by a decree entered, upon their default, in favor of the defendant seeking such relief by his answer.

4. TAX SALES—VALIDITY OF DEED—WEST VIRGINIA STATUTE.

Under the statutes of West Virginia relative to tax sales and returns of delinquent lands, as interpreted by the courts of that state, a bill charging that the return of the sheriff of the list of delinquent sales, including certain land in controversy, was not filed and recorded within the time prescribed by law, that the affidavit annexed to the return was defective in certain specified points, that the complainants have redeemed the land, and that the claimant under the tax sale had actual personal knowledge of such redemption before taking his deed, and seeking to set aside such sale and deed, is good on demurrer.

Appeal from the Circuit Court of the United States for the District of West Virginia.

This was a suit by Elizabeth Meyer, widow of Henry Meyer, deceased, and Hannah E. Forbes, Emily A. King, and Levina R. Conrow, children, heirs, and distributees of the estate of Henry Meyer, deceased, against James I. Kuhn, Samuel S. Vinson, John N. Hauser, and Charles R. Henderson, to remove a cloud upon title to real estate. A demurrer to the bill was sustained, and complainants appeal.

Appellants, describing themselves as "Elizabeth Meyer, widow of Henry Meyer, deceased, and executrix of the last will and testament of Henry Meyer, deceased, and Hannah E. Forbes, Emily A. King, and Levina R. Conrow, children, heirs, and distributees of the estate of Henry Meyer, deceased, all of the city of New York, and residents and citizens of the state of New York," filed their bill against "James I. Kuhn and Samuel S. Vinson, citizens and residents of the state of West Virginia, and John N. Hauser and Charles R. Henderson, citizens and residents of the state of New Jersey," in the circuit court of the United States for the district of West Virginia, March 11, 1892, and a substituted bill, November 16, 1892. The bill charged that Henry Meyer, of New York, the husband of Elizabeth Meyer, and father of the remaining plaintiffs, owned an undivided one-half interest in and to a number of tracts of land in Wayne county, W. Va.; that Meyer died in June, 1875, testate, and his will was duly proved, probated, and filed, whereby he devised and bequeathed all his real estate and personal property to his wife, the said Elizabeth Meyer, for life and during widowhood, but, in case of remarriage, then one-fourth thereof for life, with remainder to his three daughters, Hannah, Emily, and Levina, and appointed his widow as ex-

ecutrix, with express power to sell or dispose of the real estate, or any portion thereof, in her discretion, at such prices and upon such terms as she might deem best. The bill further alleged that, upon the death of Meyer, plaintiffs became seised and possessed of the lands in question, and paid all the taxes thereon, up to and including the year 1880. That in 1882 plaintiffs owned an undivided one-half interest; defendant Hauser, an undivided one-eighth; defendant Henderson, an undivided one-fourth; John Phillips' heirs, an undivided one-eighth. That for the years 1881, 1882, 1883, and 1884 an undivided five-eighths interest in the tracts was taxed as belonging to the estate of Meyer. That the taxes were not paid, and the entire tracts were returned delinquent, regularly proceeded against, and sold December 14, 1885, and bought in by the state. That afterwards the said tracts were reported by the state auditor to the commissioner of school lands of Wayne county, in which the tracts were situated, and the commissioner began proceedings against said lands to procure their sale for the benefit of the school fund of the state, as provided by law. That thereupon plaintiffs John Phillips' heirs, Hauser, and Henderson filed their petition, setting up their title to the lands so being proceeded against, and asked to be allowed to redeem the same, and such proceedings were had as resulted in petitioners paying the taxes, interest, and damages due on the land so forfeited and sold, up to and including the year 1888, and upon the payment so made an order was entered by the circuit court of Wayne county on February 14, 1889, allowing redemption, and the clerk was directed to certify a copy of the order to the clerk of the county for record, so that the said lands might be entered upon the records of the county for taxation, which was done, and the order duly recorded. Plaintiffs further averred that they and their joint tenants were thereby fully reinstated in all their right, title, and interest in the said lands; that thereafter the heirs of Phillips sold and conveyed their interest to Samuel S. Vinson, and that plaintiffs, with said Vinson, Henderson, and Hauser, were the actual, legal, and equitable owners of the said tracts of land. The bill then alleged that, during the forfeiture for the nonpayment of taxes for the years 1883 and 1884, the five-eighths interest therein was erroneously placed on the land books of Wayne county, and charged with taxes for 1885 in the name of Henry Meyer's estate, and erroneously returned delinquent for the payment of taxes for 1885; and afterwards, on November 5, 1887, said interest was sold at delinquent sale, and purchased by defendant Kuhn at \$43.09, and by deed of December 2, 1889, conveyed to him. That thereafter defendant Vinson, unknown to plaintiffs, brought a suit for partition of the tracts of land among the various owners, "making the said Kuhn and these plaintiffs parties to the said suit, without seeking to settle who was entitled to the undivided five-eighths interest, but stating that he was the owner of one-eighth, Charles R. Henderson of one-fourth, your orators of one-half, and J. N. Hauser of one-eighth." That such proceedings were had in the circuit court of Wayne county in that suit as resulted in a decree of partition of the said land, one-eighth to Vinson, one-eighth to Hauser, one-fourth to Henderson, and one-half to the Meyers estate or Kuhn, but without decreeing that Kuhn had title to the one-half belonging to plaintiffs. That after the decree ordering a partition was entered, plaintiff in that suit and Kuhn had the commissioners allot and lay off the land in parcels, and afterwards, without any amendment of the bill or proceedings, had another decree entered decreeing that Kuhn owned one-half, Hauser one-eighth, Henderson one-fourth, and Vinson one-eighth, a copy of the record of said partition suit being filed as an exhibit, and prayed to be taken as a part of the bill. That afterwards Kuhn, by deed dated June 27, 1891, quitclaimed to Vinson the surface interest in a parcel of the land, reserving the minerals, "of none of which proceedings did your orators have notice, nor did they ever assent to said partition, but that the said James I. Kuhn is now endeavoring to assert his said title to the one-half interest of these, your orators, in said land, and claims to own and hold the same." The bill then set up various grounds upon which it was charged that the tax sale and conveyance to Kuhn were invalid; stated that their one-half interest was worth at least \$5,000; and averred that, at the time "the said Kuhn bought the pretended title to said land, he knew all the facts connected with the matter"; that at the time he

obtained the deed for said interest in the land, so purchased by him at the delinquent tax sale as aforesaid, he knew that the owners "had paid all the taxes due on said land, and redeemed the same, and that he took the same with full knowledge that the land had been redeemed, and had actual personal knowledge of the fact that said order of February 14, 1889, was made and entered by the circuit court of Wayne county, and that the taxes were all paid by the true owners, who had a title thereto superior to his (said J. I. Kuhn's) claim, and to all other claims, and that he was a purchaser by his own wrong, with full notice and knowledge." Plaintiffs tendered to Kuhn the full amount of the purchase money he paid for the land, with interest and costs, though denying that Kuhn had any right under the purchase, and prayed that the tax deed of October 2, 1889, and the quitclaim deed of Kuhn to Vinson of the surface of part of their land, be set aside as clouds, and be declared null and void; for an injunction; and that plaintiffs be quieted in the possession and title of the one-half interest in said tract; and for general relief.

In the record of the alleged partition suit, annexed to the bill, appeared a summons dated January 30, 1891, against "John N. Hauser, Chas. R. Henderson, Sarah E. Meyers, widow, in her own right, and as executrix of the will of Henry Meyers, deceased, and the unknown heirs of Henry Meyers, deceased, and J. I. Kuhn." This summons bore the indorsement of acceptance of service by J. I. Kuhn, February 23, 1891, but no return. The bill of complaint of Vinson purported to have been filed against the parties named in the summons, and alleged that Vinson was the owner of an undivided one-eighth, Hauser of one-eighth, Henderson of one-fourth, and Meyers in his lifetime of one-half interest in the tracts of land, and stated "that he has since died, leaving as his widow Sarah E. Meyers, who is the executrix of his will, and that the names of the heirs of the said Henry Meyers, deceased, are to the plaintiff unknown; that the plaintiff has used due diligence to ascertain their names, but has been unable to do so"; and that J. I. Kuhn claims five-eighths interest in said land by reason of a tax deed. The bill averred that the property was capable of being partitioned, and that partition would be advantageous to the parties in interest, and prayed for the appointment of commissioners, and for general relief. An affidavit of order of publication accompanied the bill, sworn to January 30, 1891, stating, upon information and belief, "that John N. Hauser, Charles R. Henderson, Sarah E. Meyers, widow of Henry Meyers, deceased, and the unknown heirs of Henry Meyers, deceased, are nonresidents of the state of West Virginia." The record showed an order at rules on the first Monday of February, 1891, as follows: "February Rules, 1891. Sum. Ex. on R. D. Bill filed and O. P. awarded. Decree nisi." The order of publication was as follows: "The object of this suit is to partition fourteen tracts of land situate on Kiah's creek, in Wayne county, West Virginia, and known as the 'Denner Lands.' This day came the plaintiff by his attorneys, and upon his motion, and it appearing from an affidavit filed with the paper in this suit that John N. Hauser, Charles R. Henderson, Sarah E. Meyers, and the unknown heirs of Henry Meyers, deceased, are nonresident of the state of West Virginia, it is therefore ordered that they do appear here within four weeks from the first publication of this notice, and do what is necessary to protect their interest herein." To this was attached the certificate of the newspaper publisher, under date May 15, 1891, "that the order of publication and notice hereto annexed was published once a week for four successive weeks, commencing on the 5th day of February, 1891, in the paper aforesaid." The record thus continued: "And afterwards, to wit, at rules held in the clerk's office of the Wayne circuit court on the first Monday in March, 1891, there was an order made, which order is in the words and figures following, to wit: March Rules, 1891. O. P. fully pub. and posted. Bill taken for confessed, and set for hearing." On Tuesday, May 26, 1891, an order was entered in the suit to the effect that the defendant Kuhn tendered and asked leave to file his separate answer to the bill, which was granted over plaintiff's objection, and the answer accordingly filed, and plaintiff Vinson replied thereto generally. The answer neither admitted nor denied the allegations that Sarah E. Meyers was the executrix of Henry Meyers, deceased, or that plaintiff owned an undivided one-eighth of the land.

or Hauser one-eighth, or Henderson one-fourth, and alleged that Kuhn was seised and possessed of an undivided five-eighths of the land, as would appear by his deed therefor dated October 2, 1889, which was filed therewith. The answer thus concluded: "This defendant avers that the said five-eighths of said lands were properly charged to the estate of said Henry Meyers upon the land books of said Wayne county, and were regularly forfeited and sold for the nonpayment of the taxes so assessed thereon, and by his purchase and deed aforesaid he became vested with all the title, right, estate, and interest of said Henry Meyer or his heirs therein, whether that interest and estate was five-eighths or one-eighth undivided thereof, and he prays that his said five shares be laid off to him in one contiguous boundary, and he will ever pray," etc. On the same day, May 26th, an order was entered appointing a guardian ad litem to represent the interest of the unknown heirs of Henry Meyers, deceased, and an answer filed by him committing the cause of said heirs to the protection of the court. On the same day a decree was entered as follows: "This day this cause came on to be heard upon the bill and exhibits herein filed, and the separate answer of J. I. Kuhn, filed herein, and the answer of S. V. Crum, guardian ad litem for the unknown heirs of Henry Meyers, deceased, and it appearing to the court that the process herein was returned duly executed on the resident defendant at the March rules, 1891, and that an order of publication was duly published and posted as required by law as to the nonresident defendants herein, and that the bill herein was filed at February rules, 1891, and the same having been regularly taken for confessed and set for hearing as to the resident defendant, and the same is now set for hearing as to the nonresident defendants failing to appear, plead, or answer, and, the cause having been fully argued by counsel, the court is of opinion that the plaintiff is entitled to the relief prayed for in his bill." It was then decreed that the commissioners thereby appointed should "lay off and partition said lands as follows: That one-eighth thereof be laid off adjoining the lands now owned by S. S. Vinson, and be assigned to the said S. S. Vinson, one-eighth thereof be laid off to John N. Hauser, and one-fourth thereof be laid off and assigned to Charles R. Henderson, and one-half thereof laid off in one continuous body to J. I. Kuhn, or the heirs of Henry Meyers, deceased; and that said commissioners partition said land as above ordered, and make report of said partition to this court at the present term thereof."

On June 2, 1891, the report of the commissioners was filed and confirmed, which report laid off certain tracts or parcels of land to Vinson as his one-eighth, to Hauser as his one-eighth, to Henderson as his one-fourth, and certain tracts or parcels "as the one-half interest belonging to the heirs of Henry Meyers, deceased, or J. I. Kuhn." The order proceeded: "And this cause coming on to be further heard upon said report, and the bill and exhibits filed herein, and the answers of the guardian ad litem and J. I. Kuhn, and it appearing to the court that J. I. Kuhn is the owner of that portion of said land assigned to J. I. Kuhn, or the heirs of Henry Meyers, deceased, being one-half of all the lands in the plaintiffs' bill mentioned, it is therefore adjudged, ordered, and decreed, that said partition be and the same is hereby confirmed." A commissioner was then appointed to make deeds, and costs decreed to be paid, one-eighth by Vinson, one-eighth by Hauser, one-fourth by Henderson, and one-half by Kuhn. Certain proceedings and orders in reference to costs of January 28, June 3, and October 1, 1892, also appear. Upon the bill of Elizabeth Meyer and others in this case, subpoena was duly issued and served on defendants Vinson and Kuhn. Thereupon Vinson filed his answer to said bill, and prayed as affirmative relief for an order restraining Kuhn from prosecuting a suit he had commenced against Vinson on a note given by Vinson for part of the purchase price of land bought by Vinson of him, and now in controversy, upon which a restraining order was made and entered December 14, 1892; and defendant Vinson was given leave to file a cross bill asking affirmative relief within sixty days from date, defendant Kuhn excepting. December 6, 1893, defendant Kuhn tendered his demurrer to the bill, which was set down for argument, and on December 7th the demurrer was sustained, and a decree entered dismissing the bill, with costs to the defendants, and dissolving the injunction against Kuhn, from which decree plaintiffs were allowed an appeal.



F. B. Enslow, for appellants.

J. F. Brown, for appellees.

Before FULLER, Chief Justice, SIMONTON, Circuit Judge, and ORRIS, District Judge.

FULLER, Chief Justice, after stating the facts as above, delivered the opinion of the court.

The demurrer rested, substantially, on two grounds: First, that the decree in the partition suit determined the title to the land, and must be given effect as a bar; second, if not, that the tax deed to Kuhn was valid, and vested title in the lands in him, of which he was not divested by the alleged redemption. The circuit court sustained the demurrer upon the first of these grounds, and was of opinion that complainants should have proceeded to obtain the vacation of the decree in the suit in which it was rendered, as provided by statute, and that, so long as they did not so proceed, that decree was in full force, and must be respected. By the Code of West Virginia it is provided that "in any suit in equity where the bill states that the names of the persons interested in the subject to be divided or disposed of, are unknown, and makes such persons defendant by the general description of parties unknown, on affidavit of the fact that the said names are unknown, an order of publication may be entered against said unknown parties. \* \* \*". And "on affidavit that a defendant is not a resident of this state \* \* \* an order of publication may be entered against such defendant"; that "every order of publication shall state briefly the object of the suit, and require the defendants against whom it is entered, or the unknown parties, to appear within one month after the date of the first publication thereof, and do what is necessary to protect their interests." Provision is made for the publication of such order "once a week for four successive weeks in some newspaper published in the county in which the order is made or directed," etc.; and for posting the same "at the front door of the courthouse of the county where the court is held at least twenty days before judgment or decree is rendered"; and that "when such order shall have been so posted and published, if the defendants against whom it is entered, or the unknown parties, shall not appear at the next term of the court, after such publication is completed, the case may be tried or heard as to them." And it is further provided that "any unknown party or other defendant, who was not served with process in this state and did not appear in the case before the date of such judgment, decree or order, or the representative of such," may "have the proceedings reheard in the manner and form required \* \* \* and not otherwise," namely, as provided in relation to attachments, "he may within one year after a copy of such judgment or decree has been or shall be served upon him at the instance of the plaintiff, or within five years from the date of such judgment or decree, if he be not so served, petition to have the proceedings reheard, on giving security for the costs which have accrued and shall thereafter accrue, and such defendant shall

be admitted to make defense against any such judgment or decree as if he had appeared in the case before the same was rendered, except that the title of any bona fide purchaser of any property real or personal, sold under such attachment shall not be brought in question or impeached." Code W. Va. c. 124, §§ 11-14; Id. c. 106, § 25. If the complainants were not proceeded against as parties to the partition suit, or if they were, yet, as there was no service of process on, nor appearance by, the defendants in that suit other than Kuhn, if they were not so proceeded against that the court obtained jurisdiction over them, the decree therein could not be relied on as a defense to this suit. Judgments and decrees are open to collateral attack when jurisdiction over the subject-matter or over the person is wanting, and whatever contrariety of view may have been expressed as to the conclusiveness, under particular circumstances, of the action of courts of general jurisdiction, there is no dispute that, when the record affirmatively shows the absence of the steps necessary to obtain jurisdiction, the judgment or decree may be collaterally overthrown. Under section 1 of chapter 79 of the Code of West Virginia, tenants in common, joint tenants, and coparceners were compellable to make partition, and the circuit court of the county wherein the estate, or any part thereof, might be, in exercising the jurisdiction in partition, might "take cognizance of all questions of law, affecting the legal title, that may arise in the proceedings." By sections 35 and 57 of chapter 125 of the Code it was provided that "the defendant in a suit in equity may in his answer allege any new matter constituting a claim for affirmative relief in such suit against the plaintiff or a defendant therein, in the same manner and with like effect as if the same had been alleged in a cross bill filed by him therein"; and that, when this is done, "the case shall be decided upon the same principles, and the same relief shall be decreed in the case as if a cross bill had been filed to obtain such relief."

Assuming that the defendant Kuhn could, under these sections, have had the question of title, as between himself and his codefendants, adjudicated upon an answer, nevertheless his proceeding in that regard would be subjected to the same tests as if he had sought affirmative relief by a cross bill. And it may be said, generally, that the appearance of a defendant to a cross bill, as between codefendants, should be enforced in the same manner as the appearance of a defendant to an original bill. *Railroad Co. v. Bradleys*, 10 Wall. 299; *Smith v. Woolfolk*, 115 U. S. 143, 5 Sup. Ct. 1177; *Beach, Eq. Prac.* § 445; and see *Conrad v. Buck*, 21 W. Va. 396, 404. This answer of Kuhn was filed on May 26, 1891, the bill having been previously taken as confessed against him, and no process was issued or order of publication taken thereon, nor any notice thereof given to his codefendants, nor any rule entered on them to plead thereto. The decree for partition was entered on the same 26th of May. On the 2d of June thereafter, the report of the commissioners was confirmed, and a further decree made, which recited that Kuhn was the owner of that portion of the lands "assigned to J. I. Kuhn or the heirs of Henry Meyers, deceased," and then di-

rected deeds to be made of the shares as partitioned by the commissioners. Under these circumstances, it might well be held that the decree, so far as the title to the Meyer half was concerned, was of no binding force, and might be disregarded when drawn in question in another case. *Reynolds v. Stockton*, 140 U. S. 254, 11 Sup. Ct. 773. But this result may be reached on other grounds, which appear to us decisive. Proceedings in partition or to quiet title are not strictly proceedings in rem, for they are not taken directly against property, but they are regarded, so far as they affect property, as proceedings in rem sub modo, in respect of which, while there must be reasonable notice to the parties, personal service is not essential to jurisdiction, and constructive service may be substituted. *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557. When, however, constructive service by publication is substituted by statute in place of personal citation, a strict compliance with statutory provisions is exacted. *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 147, 11 Sup. Ct. 512; *McCoy's Ex'r v. McCoy's Devisees*, 9 W. Va. 443; *Hoffman v. Shields*, 4 W. Va. 490. It is essential that the publication shall correctly state the parties to the suit and their names. *Detroit v. Detroit City Ry. Co.*, 54 Fed. 1, 9; 16 Am. & Eng. Enc. Law, 815, and cases cited. In *Colton v. Rupert*, 60 Mich. 318, 27 N. W. 520, the suit was by Garrett B. Hunt and Henry S. Cunningham against a nonresident defendant. In the publications the name of one of the complainants was printed "Grant" instead of "Garrett," and the supreme court of Michigan held the decree not binding collaterally. The supreme court of Kansas in *Entrekin v. Chambers*, 11 Kan. 368, held that a judgment against "Robert Brimford" quieting title to a certain piece of land, rendered upon a default and upon service by publication only, was not valid as against the owner of the land, whose name was "Robert Binford." So in *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. 44, a sale of the land of M. B. Millen for taxes in a tax proceeding where the publication of notice of the suit was to "M. B. Miller" was treated as void; and it was held that it made no difference, as against a grantee of "Millen," that the name of "Miller" appeared on the tract books of the county as owner of the land. The court of appeals of Maryland decided that the omission of the middle initial was not fatal to a notice of sale (*White v. McClellan*, 62 Md. 347); and in *Lane v. Innes*, 43 Minn. 137, 45 N. W. 4, the supreme court of Minnesota was of opinion that the name "Beulah M. Plimpfon" was so slightly variant from "Berlah M. Plimpton" that a mistake in that regard was not material. In Iowa and Ohio it has been held that, although the name is incorrectly spelled, yet if accompanied by other description, making the identification clear, the notice may be sustained. *Fanning v. Krapf*, 61 Iowa, 417, 14 N. W. 727, and 16 N. W. 293; *Id.*, 68 Iowa, 244, 26 N. W. 133; *Buchanan v. Roy's Lessee*, 2 Ohio St. 251. The supreme court of Iowa observed that "a published notice is not necessarily sufficient if it is such that the defendant upon actually seeing it would probably conclude that it was intended for him. The office of the notice is in part to give the pendency of the action

notoriety. It should be such that others than the defendant, seeing it, and knowing the defendant, or knowing of him, would not probably be misled by it as to the person for whom it was intended." 61 Iowa, 420, 14 N. W. 727, and 16 N. W. 293; 68 Iowa, 246, 26 N. W. 133. In *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. 508, it was ruled that notice under the statutes of Oregon that the property of "Ida J. Hawthorn" was to be sold for taxes was not only not notice that the property of "Ida J. Hanthorn" was to be sold, but was actually misleading, and that such want of notice, or misleading notice, vitiated the sale.

In the partition suit under consideration the order of publication, as entered and published, ran against "Sarah E. Meyers, and the unknown heirs of Henry Meyers, deceased," as "nonresident of the state of West Virginia." Whatever question there might be as to the identity of "Meyer" and "Meyers," which has been differently determined, as a strict construction was or was not supposed to be applicable (*Gonzalia v. Bartelsman*, 143 Ill. 634, 32 N. E. 532; *Smurr v. State*, 88 Ind. 504), there can be no doubt that "Elizabeth Meyer" is a distinct name from "Sarah E. Meyers," and there is nothing to help out the description, if it could be properly aided in the instance of such a variance. Sarah E. Meyers was not described as the widow or devisee of Henry Meyers, deceased, nor as a citizen of New York. It would be going much too far to hold that the coupling of "the unknown heirs of Henry Meyers, deceased," with "Sarah E. Meyers" would operate to supply the defect, upon the ground that Elizabeth Meyer, or other persons reading the notice, ought to conclude that "the unknown heirs of Henry Meyers, deceased," were the daughters and devisees of Henry Meyer, and that, therefore, Sarah E. Meyers must be Elizabeth Meyer, the widow and devisee of Henry Meyer, deceased.

We are not unmindful of the fact that in the bill complainants say that the pleading in partition made "the said Kuhn and these plaintiffs parties to the said suit," but taking all the allegations of the bill together, and the record of the partition suit as a part thereof, we regard that as merely averring an unsuccessful attempt to make plaintiffs parties, and not a concession on their part that they were legally made or brought in as such. It is also urged that as, from the record of the proceedings in redemption, it appears that Elizabeth Meyer petitioned for redemption, but that the order ran in the name of Sarah E. Meyers, it should be concluded that the latter was the name of the widow and devisee of Henry Meyer, especially as the bill does not specifically aver that her name was Elizabeth Meyer, and not Sarah E. Meyers. But upon a demurrer to the bill, in which this complainant is stated to be Elizabeth Meyer, widow of Henry Meyer, deceased, and executrix of his last will and testament, and which has annexed thereto, as a part thereof, the will of the said Henry Meyer, naming his wife throughout as Elizabeth, we are bound to assume that that was her name, and must decline to treat that fact as doubtful because of the description in the order referred to which did not in that respect conform to the petition. In our judgment, Mrs. Meyer was

not bound by the decree in the partition suit, and, being a stranger to that decree, was not obliged to come into the state court, and have it vacated under the statute in that behalf. Inasmuch as the decree was invalid as to her, it must be held so as to the daughters of Meyer, his devisees in remainder. This is so, apart from the independent reasons for holding that the publication was ineffectual as to them. Kuhn claimed under the tax deed which purported to convey title to five-eighths of the land. The alleged taxes were not levied on the life estate nor the estate in remainder, but on the entire interest. The sale on which the deed rested was a sale of the entire interest in five-eighths, and not of the life estate and estate in remainder as distinct interests therein. If the sale and deed were invalid, they were invalid as to the entirety. The decree assumed to adjudge the title in Kuhn as an entirety, and if not binding as to the whole estate was certainly not binding as to the estate in remainder.

2. The second ground of demurrer asserted the validity of the tax deed as apparent on the face of the record. We do not think it best to enter upon any extended discussion of this branch of the case, as, in view of the situation of the pleadings, the cause cannot properly be finally disposed of at this time. In *Poling v. Parsons*, 38 W. Va. 80, 18 S. E. 379, it was ruled that redemption statutes ought to be construed liberally in favor of persons entitled to redeem, and *Danser v. Johnson*, 25 W. Va. 385, and *Dubois v. Hepburn*, 10 Pet. 1, were cited to the same effect. In *Jackson v. Kittle*, 34 W. Va. 207, 12 S. E. 484, it was held that, as the law required the sheriff to append to his return of sales of delinquent lands a prescribed affidavit, if he omitted to do so, or omitted from such affidavit a material or substantial portion of it, as so prescribed, the clerk should not make the purchaser a deed, and that, if objection were interposed before the deed were made, the sale should be set aside. So in *Hays v. Heatherly*, 36 W. Va. 613, 15 S. E. 223, it was adjudged that when the sheriff appended, to his list of lands sold for taxes, an affidavit not fulfilling the requisitions of the statute as to an interest, past or present, direct or indirect, in the purchase, such sale would be absolutely void; and if, after the expiration of the year to redeem and before the purchaser had obtained his deed, the owner of the land offered to redeem, and the purchaser refused, and afterwards obtained a deed from the clerk, a bill brought to set aside the deed, alleging the facts and accompanied by the proper tender, would be good on demurrer. See, also, *Baxter v. Wade* (W. Va.) 19 S. E. 404. Judge Jackson, holding the United States circuit court for the district of West Virginia, decided in *Wakeman v. Jackson*, 32 W. Va. Append., that the failure of the sheriff to return his list of lands sold as delinquent for taxes within the time prescribed by law, as well as the failure of the recorder to note the time of the return, was fatal to the acquisition of title. The bill here charged that the entry of the land for taxation for the year 1885 on the land books of Wayne county, and the return of the land as delinquent for nonpayment, were

illegal and erroneous; that the return of the sheriff of the list of delinquent sales was not filed and not recorded within the time prescribed by law; that the sheriff did not make the affidavit provided by law, the return and affidavit being annexed, and the affidavit closely resembling that considered in *Hays v. Heatherly*; that the complainants have redeemed according to law, and paid all taxes, including those of 1885; and that Kuhn had actual personal knowledge of such redemption and payment of taxes before the deed was made to him. In the light of the authorities, these averments seem to us sufficient to require an answer. It may be remarked in this connection that the one-eighth claimed by Vinson was derived from the heirs of John Phillips, as appears from his statement of the ownership of the other seven-eighths, and as is charged in the bill in this case, admitted by the demurrer, and not denied by Vinson's answer. The deed to Vinson is referred to as an exhibit to his bill, and made part thereof, but the clerk certified that it was not on file, and it is therefore not set forth in the record. This eighth was one of the five-eighths covered by the tax deed to Kuhn, and in respect of which the alleged redemption was made. No explanation is suggested why the tax deed was allowed effect as to the four-eighths, and not as to the one-eighth, nor does the record indicate the ground for this apparent discrimination. As we do not consider the issues between defendants Vinson and Kuhn to be properly before us on this appeal, we express no opinion upon the controversy between them. The circuit court may deal with that subject after the mandate has gone down. The decree is reversed, and the cause remanded, with a direction to the circuit court to overrule the demurrer, with leave to answer, and for further proceedings in conformity to law.

---

## GILLETTE et al. v. DOHENY et al.

(Circuit Court, S. D. California. January 23, 1895.)

## EQUITY—DEMURRER—PLACING ON LAW CALENDAR.

Under equity rule 33, giving plaintiff the right to set down for argument defendant's demurrer, and rule 38, providing that if he does not set it down on the rule day when it is filed, or on the next succeeding rule day, he shall be deemed to admit its sufficiency, and his bill shall be dismissed, unless he is given further time, where plaintiff does not have the demurrer set down for argument on the rule day when it is filed (January 7th), and the next rule day is the first Monday of February, it cannot in the meantime be "ready for argument," so as to be put on the law calendar, within rule 39, requiring the clerk, five days before the commencement of the term, to put on the law calendar all cases ready for argument on demurrer, and to enter causes thereon at any time during the term when ready for argument.

Suit by Frederick J. Gillette and others against Edward A. Doheny and others.

James Burdett, for complainants.

Wellborn & Hutton, Harris & Vickery, and W. T. Cheney, for defendants.

ROSS, District Judge. This is a motion on behalf of the defendants to strike from the law calendar the demurrer filed by the defendants. The suit is one in equity. Rule 33 of the equity rules gives to the plaintiff the right to set down the demurrer to be argued, and rule 38 of the equity rules prescribes the penalty for a failure to do so. So far as applicable to this question, it is as follows:

"If the plaintiff shall not \* \* \* set down any plea or demurrer for argument on the rule day when the same is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and sufficiency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose."

The demurrer in question was filed on the 7th day of January, which was the January rule day of the court, but it was not set down for that day to be argued. The next succeeding rule day will be the first Monday in February. The January term of the court commences the second Monday in January, which, in this instance, was the 14th. Rule 39 of the court, respecting the preparation of the calendar, provides, among other things, as follows:

"Five days before the commencement of every term the clerk shall prepare two calendars, one of which, to be designated the 'law calendar,' shall contain all causes pending before the court and ready for argument on demurrer or exceptions to pleadings, whether causes at law or in equity. \* \* \* Causes will be entered upon the 'law calendar' at any time during the term when at issue or ready for argument."

Rule 42 is as follows:

"On the second day of each term, unless otherwise ordered by the court, and on each subsequent rule day of the term upon which the court is in session, the law calendar will be called and disposed of, and such days shall be known in these rules as 'law days.' Upon the regular call of the law calendar, when no counsel appears to support a demurrer or exception, it will be overruled without any examination of the record, and a motion for new trial, under like circumstances, will in like manner be denied."

The second day of the January term was, in this instance, Tuesday, January 15th, and upon the law calendar for that day the clerk placed the demurrer filed by the defendants on the 7th of January. It is contended by the defendants, and I think rightly, that the demurrer was improperly so placed. As has been seen, the provision of rule 39 is, in effect, that no demurrer shall be placed upon the calendar until the same is ready for argument. Such demurrers as are ready for argument five days before the commencement of the term, the clerk is, by rule 39, required to place upon the law calendar to be prepared by him before the beginning of the term; and such demurrers as become ready for argument during the term are, by the concluding clause of rule 39, to be thereafter entered upon the law calendar by the clerk. When a demurrer in equity becomes ready for argument is to be determined by rules 33 and 38, prescribed by the supreme court of the United States for the government of the United States courts of equity, by the first of which, as has been seen, the plaintiff is given the right to set down the demurrer to be argued, and by the second of which it is declared that if the plaintiff does not do so on the rule day when the demurrer is filed, or on the next succeeding rule day, he shall be deemed to admit the truth and suffi-

ciency thereof, and his bill shall be dismissed as of course, unless a judge of the court shall allow him further time for the purpose. What constitutes the setting down of a demurrer for argument is not expressly defined by the equity rules. According to the equity practice in England, a demurrer is set down for argument by an ex parte order, issued on petition of the plaintiff, and served upon the defendant's solicitor two days before the hearing. 1 Daniell, Ch. Pl. & Prac. (5th Ed.) pp. 595, 596. Under the provisions of rule 5 of the equity rules, a motion to set down a demurrer for argument is grantable of course by the clerk. Its provisions are:

"All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees, for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions, and for other proceedings in the clerk's office which do not, by the rules hereinafter prescribed, require any allowance or order of the court, or of any judge thereof, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended, or altered, or rescinded by any judge of the court, upon special cause shown."

And by the preceding rule (4) the entry in the order book of any motion grantable of course by the clerk is made sufficient notice to the parties and their solicitors. An observance of these rules of procedure will secure to the plaintiff the option conferred upon the plaintiff by rule 38 of the equity rules, and to the defendant the right of dismissal under the circumstances prescribed by the same rule. An order will be entered striking the demurrer from the law calendar.

---

FARMERS' LOAN & TRUST CO. v. GRAPE CREEK COAL CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 26, 1895.)

No. 204.

MORTGAGES—FORECLOSURE FOR DEFAULT AS TO INTEREST—DEFICIENCY JUDGMENT BEFORE MATURITY OF PRINCIPAL.

On foreclosure of a mortgage for nonpayment of interest, although the proceeds of sale of the property as an entirety are insufficient to pay the whole debt, no judgment for the deficiency can be rendered if the principal is not due and there is no provision in the mortgage, or the bonds secured thereby, that the principal shall become due on default in payment of interest.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This was a suit by the Farmers' Loan & Trust Company against the Grape Creek Coal Company, Grape Creek Coal & Coke Company, Mason M. Wright, and John B. Brown, to foreclose a mortgage. A decree was rendered for complainant under which the mortgaged property was sold as an entirety, but afterwards, upon defendants' appeal, the decree was reversed in certain particulars, and the cause was remanded to the circuit court. 63 Fed. 891. The circuit court entered a decree, September 12, 1894, in conformity with the opinion of the circuit court of appeals, adjudging \$379.648.56 to be due. From this decree complainant appealed.



J. S. Runnells, William Burry and H. B. Turner, for appellant.

C. A. Remy and J. B. Mann, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge. In conformity with our decision when this cause was previously before us (18 U. S. App. —, 63 Fed. 891), the court below, on September 12, 1894, vacated so much of the original decree as adjudged that the principal of the bonds was due, and so much of its decree of March 2, 1893, confirming the sale of the mortgaged premises, as adjudged the balance of the debt, after application of the proceeds of sale, to be due, and rendered judgment to the complainant therefor, and thereupon in all other respects confirmed the original decree, and ratified and confirmed the sale of the mortgaged premises under the original decree before its reversal by this court. The appellant, complainant below, assigns for error that the court erred in not according to it a money judgment for the debt secured by the mortgage remaining unpaid after application of the proceeds of the sale. The refusal to award such a judgment was clearly right. If under the provisions of the trust deed the trustee could, under any circumstances, be entitled to a judgment for the amount of the bonds secured by the trust deed, and if its functions did not cease upon distribution of the proceeds of the sale of the mortgaged premises among the various bondholders,—questions which we do not decide,—it still remains true that the principal of the bonds does not mature until the year 1916, that there is no provision in the bonds or the trust deed securing them that the principal should become due upon default in the payment of interest, and that a sale of the property mortgaged to secure the payment of the bonds could not have the effect of maturing the principal. A judgment for deficiency, before maturity of the principal, would be wholly unwarranted. *Danforth v. Coleman*, 23 Wis. 528.

Affirmed.

---

DANIELS et al. v. LAZARUS et al.

(Circuit Court, S. D. New York. December 31, 1894.)

1. PROCESS—FEDERAL AND STATE COURTS—PROPERTY IN CUSTODIA LEGIS.

L. brought an action against the W. Co. in a state court, and caused an attachment to be levied upon certain personal property, alleged to belong to the W. Co. The cause was removed to the federal court, and the sheriff, under an order of that court, turned over the attached property to the United States marshal. D., the assignee of the W. Co. for the benefit of creditors, interposed a claim to the attached property, and, upon failure of the sureties upon an indemnity bond, given by L., to justify, the federal court made an order, in accordance with the practice under the state Code, directing the marshal to turn over the attached property to D. This order was entered at 1:15 p. m., and was immediately served upon the marshal. On the same day, after the entry and service of such order, but before actual delivery of the property by the marshal to D., a coroner, under process of the state court, in an action by one I. against L., D., the marshal, and the sheriff, replevied the property. Held that,

after the making and entry of the order requiring the marshal to deliver the property to D., such property was discharged from the custody of the federal court, and open to new process of the state court, although the marshal had not actually turned it over to D.

**3. INJUNCTION—AGAINST COLLUSIVE PROCEEDINGS AT LAW.**

D. filed his bill in the federal court against L., I., the marshal, the sheriff, and the coroner, alleging that the replevin suit was instituted, without foundation, by collusion between I. and L., for the purpose of defeating D.'s right to the property. It appearing that this allegation was probably well founded, *held*, that L. and I. should be enjoined, until final hearing, from receiving or disposing of the property in controversy.

Prior to October 30, 1893, defendant Herbert Lefavour conducted business on his own account at 96 Duane street, New York City. On that day he made a contract with the plaintiff Whitman Shoe Company, of Boston, Mass., under which he thereafter conducted business, at the same place, as its agent, but under his own name, all goods, assets, etc., of the business becoming the property of the Whitman Shoe Company. In August, 1894, the Whitman Shoe Company assigned all its property, including that at 96 Duane street, New York, to the plaintiff William H. Daniels, for the benefit of its creditors. October 31, 1894, Lefavour commenced an action against the Whitman Shoe Company in the supreme court of New York, and caused an attachment to be issued and levied upon the property at 96 Duane street. November 10, 1894, the cause was removed to the United States circuit court, and on November 16th, pursuant to an order of that court, the attached property was delivered by the sheriff to the United States marshal.

On November 2, 1894, Daniels, as assignee, filed a claim of ownership of the attached property, and a demand therefor; and thereupon, in accordance with the state practice, the sheriff demanded and received from the plaintiff in the action, Lefavour, an indemnity bond of \$5,000. The sureties upon this bond were duly excepted to by Daniels, and, having failed to justify, an order was made by the circuit court, after the removal, on notice to Lefavour and on his default, directing the marshal to deliver the attached property to Daniels. This order was entered at 1:15 p. m. on November 20, 1894, and was immediately served upon the marshal. The marshal and Daniels thereupon went to the sheriff to settle with him certain claims for fees, for which he claimed a lien on the property. While so engaged, and before the marshal had delivered the property to Daniels, it was taken possession of by the coroner under a writ of replevin issued from the state court in a suit brought against Lefavour, Daniels, the sheriff, and the marshal by one Isidor Lazarus, who claimed title to the property under an alleged sale of the same to him by Lefavour prior to October 31, 1894. Daniels subsequently made a motion in the replevin suit in the state court to vacate the levy, which was denied; the opinion, written by Patterson, J., holding that the property replevied was not, at the time, in the custody of the federal court. *Lazarus v. McCarthy*, 82 N. Y. Supp. 833. Daniels and the Whitman Shoe Company then filed this bill against Lazarus, Lefavour, the marshal, the sheriff, and the coroner, alleging that the replevin suit was without foundation, and was brought by collusion between Lazarus and Lefavour to defeat plaintiffs' rights, and asking that all the defendants be enjoined from delivering or disposing of the property otherwise than to Daniels.

George H. Adams, for complainants.

Abram Kling, for defendants.

LACOMBE, Circuit Judge. I concur in the opinion expressed by Judge Patterson, namely, that after the order of November 20, 1894,

had been made and entered in this court, the property therein described was discharged from its custody, and open to new process from the state court, although the marshal had not yet actually turned it over to Daniels, the claimant. No order, therefore, should be made interfering with the custody of the property while in the hands of state officers under process of the state court. Examination of the papers, however, has impressed me with the conviction that the replevin suit is a collusive one, gotten up in aid of a fraudulent attempt by Lefavour and Lazarus to obtain possession of property belonging to one or other of the complainants. Diversity of citizenship gives to this court jurisdiction of the controversy, and until the case is tried, and the facts finally determined, upon proofs, after opportunity for cross-examination, these defendants should not be allowed to take possession of the property. Complainants may therefore take an order for an injunction pendente lite against Lefavour and Lazarus, forbidding them from taking, receiving, or disposing of the property in controversy.

---

WHEELER v. WALTON & WHANN CO. (PENN MUT. LIFE INS. CO., Intervener).

(Circuit Court, D. Delaware. February 12, 1895.)

No. 165.

1. JURISDICTION—HOW OBTAINED.

The mere filing of a bill in equity, and giving notice thereof, and of a motion for the appointment of a receiver, to the defendant, does not give jurisdiction of the parties or the subject-matter, but service of process is essential. Therefore, *held*, that a judgment entered in a state court after the filing of a bill in a federal court, but before the service of process and appointment of receivers, was a valid and existing lien prior to such appointment, and that the receiver's possession of the insolvent's property is subject thereto.

2. EXECUTION—WHEN LEVIED ON PROPERTY IN RECEIVERS' HANDS.

On June 5th a bill praying for the appointment of receivers of the W. Co. was filed in a federal court, and a copy thereof and notice of a motion for the appointment of receivers were served on the W. Co. On the same day, and after these proceedings, a judgment against the W. Co. was entered in a state court, upon confession, in favor of the P. Co., upon a bond of the W. Co., secured by mortgage upon part of its property. On June 6th receivers of the W. Co. were appointed, and the subpoena in the suit was served upon it. Subsequently, by leave of the federal court, the P. Co. brought suit, in a state court, to foreclose the mortgage on the W. Co.'s property, which was duly sold, and the proceeds of sale applied on the mortgage judgment, leaving a balance unsatisfied. The P. Co. then petitioned the federal court for leave to levy an execution on the property of the W. Co. in the hands of the receivers. *Held*, that though, at the time of the entry of the judgment, the federal court had not acquired jurisdiction, and the receivers took the property subject to the lien of the judgment, permission would not be given to levy execution without proof of some urgent necessity for selling the property at once, instead of permitting the receivers to administer the estate, and distribute the proceeds, with due regard to priority of claims, among all the creditors.

3. RECEIVERS—PRIORITY OF CLAIMS—TAXES.

*Held*, further, that the receivers would not be directed to refund to the Co. taxes on the mortgaged property, paid out of the proceeds of its

sale, since the taxes were a lien on the property superior to the mortgage, and the receivers, if they had sold the property, must have applied the proceeds to the payment of taxes before paying the P. Co.

W. C. Spruance and A. W. Spruance, for petitioner.  
Bradford & Vandegrift, for receivers.

WALES, District Judge. This is a petition for authority to issue execution on a judgment which was obtained by the intervener against the defendant, by confession, in the superior court of Delaware, for New Castle county, prior to the appointment of the receivers. The facts in support of the application are these:

(1) On the 17th of June, 1893, the Walton & Whann Company executed their bond and mortgage to the petitioner to secure the payment of \$40,000. By the terms of each of these instruments, the interest on the debt was payable semiannually, and the principal was made payable in annual installments, of \$5,000 each, until the whole debt and interest should be paid. It was further provided that if, at any time, default should be made in the payment of any installment of principal or interest, or any part thereof, for the period of 30 days after the same should fall due, the whole of the principal debt and interest remaining unpaid should become due and payable, at the option of the petitioner.

(2) On the 5th of June, 1894, the bill of complainant, a stockholder of the Walton & Whann Company, on behalf of himself and all other stockholders and creditors of the defendant company, was filed, stating the insolvency of the company before and at the time of the filing of the bill, and praying for the appointment of one or more receivers to take charge of and administer the estate of the insolvent corporation. The bill was founded on a statute of the state of Delaware, which provides that:

"When a corporation shall be insolvent, the chancellor, on the application and for the benefit of any creditor or stockholder thereof, may, at any time, in his discretion, appoint one or more persons to be receivers of and for such corporation, to take charge of the estate, effects, business and affairs thereof, and to collect the outstanding debts, claims, and property due and belonging to the company, with power to prosecute and defend." Rev. St. Del. 1893, p. 584.

(3) On the 6th of June, 1894, the court made an order, in limine, for the appointment of the receivers, who were duly qualified on the 8th of June, 1894, by each giving a bond, with surety, in the sum of \$100,000.

(4) After the appointment of the receivers, the defendant company having defaulted in the payment of the semiannual interest and of the first annual installment of the principal, due on the 17th of June, 1894, the petitioner, with leave of this court, brought suit on the mortgage in the superior court of the state of Delaware for New Castle county, and recovered a judgment, on which the mortgaged premises were sold by the sheriff of New Castle county, on December 4, 1894, for \$40,000, and the proceeds of the sale were applied as follows: To costs, \$929.98; to county taxes on the property sold, for the year 1894, \$393.60; and the balance, \$38,676.42, to the debt and interest on the mortgage judgment,—leaving a balance of

v.65f.no.7—46

\$3,636.90 still due and unpaid, with interest thereon from December 4, 1894.

(5) On the 5th day of June, 1894, the attorney of the petitioner, with actual knowledge of the filing of complainant's bill, and after the service on the defendant of a certified copy of the same, together with notice that a motion would be made on the next following day for the appointment of receivers, obtained a judgment, by confession, in the superior court of Delaware, for the debt secured by the bond.

(6) The subpoena was served on the defendant at 2 p. m. on the 6th of June, and subsequent to the appointment of the receivers.

The petitioner also asks that an order be made on the receivers to pay the county taxes which were due and payable by them prior to the proceedings instituted on the mortgage.

The granting of authority to issue execution is opposed by the receivers, on the ground that this court had acquired jurisdiction of the parties and of the subject-matter of the controversy by the filing of the complainant's bill and service of notice on the defendant of the motion for the appointment of receivers, before the entry of the judgment of June 5th, and that to permit the sale of the property, now in the custody of this court, would be an interference with its jurisdiction. It is undoubtedly the law that, where two courts have concurrent jurisdiction, the one which first obtains jurisdiction will retain it to the end, and will allow no interference by the other. This rule is reciprocal between the federal and state courts, and its observance has hitherto operated to prevent any serious conflict of jurisdiction between them.

The first inquiry, then, is, how and when did the jurisdiction of this court commence? The mere filing of a bill in equity does not give jurisdiction. Service of process is always requisite, and, until the subpoena has been served on the defendant, jurisdiction is not complete, either of the parties or of the property. The authorities cited by the receivers' counsel, when carefully examined, will show that in every case, except in those arising under special provisions of the bankrupt law of 1867, the filing of the bill and service of the subpoena were held to be essential prerequisites to jurisdiction. *Union Trust Co. v. Rockford, etc., R. Co.*, 6 Biss. 197, Fed. Cas. No. 14,401; *Platt v. Archer*, 9 Blatchf. 559, Fed. Cas. No. 11,213; *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. 8. See, also, *Wilmer v. Railroad Co.*, 2 Woods, 420, Fed. Cas. No. 17,775. Per Justice Bradley (2 Woods, 427):

"Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property; and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction."

Here the seizure or custody of the receivers could not begin before the order was made for their appointment. High, Rec. 108. The filing of a bill, in the absence of statutory provisions, does not make a *lis pendens*. A suit in equity or at law does not become *lis pendens* until service of process. *Benn. Lis Pendens*, 95; *Murray v. Ballou*, 1 Johns. Ch. 566; *County of Warren v. Marcy*, 97 U. S. 106; 2 Pom. Eq.

Jur. tit. "Lis Pendens." In the present case, actual knowledge by the petitioner's attorney of the filing of the bill and notice to the defendant were not equivalent to the service of the subpoena, which might have been retained indefinitely, or the service finally countermanded, by the complainant. The judgment was entered in the interval between the filing of the bill and the service of the subpoena. The bond on which the judgment was obtained was executed nearly a year before the bill was filed, and at a time when the defendant was, or was supposed to be, solvent, and there is no intimation of fraud or collusion in the transaction. The knowledge that proceedings had been or would be taken for the appointment of receivers could not prevent the petitioner's attorney from protecting his client's interests in all lawful ways. The obligee in a bond with a warrant of attorney to confess judgment has the right to enter judgment at the latest moment. The bond was given for the purpose of affording the creditor the right of using the warrant at his option, and it often happens that he defers using the right until he learns that other parties are about to proceed against his debtor. There is nothing unusual in this. It is the common practice, and no exception can be taken to it where the bond has been given for a bona fide consideration. If this view of the law be correct, it follows that the judgment of June 5th was obtained before the jurisdiction of this court was complete, and that the receivers' possession of the insolvent estate is subject to the lien which was created at the precise time when the judgment was entered on the docket of the superior court, which was on the day before the appointment of the receivers, prior to the service of the subpoena, and before this court had acquired jurisdiction.

But it does not follow that a prior judgment creditor should be allowed under all circumstances to enforce the payment of his claim by the sale of the debtors' property when in the hands of a receiver. The court must look to the rights of all the creditors. If the property is sold by the receivers, it will be sold subject to the lien, or the judgment will be paid out of the fund in the receivers' hands. The petition does not show that there is any urgent necessity for a speedy sale by reason of a prospective depreciation in the value of the property, or that, for any other reason, the petitioner will be prejudiced by allowing the receivers to administer the estate, collect the assets, and distribute the fund, with due regard to priority of claims, among all the creditors, under the orders of the court; and until some satisfactory evidence to this effect shall be produced, either on reference to a master, or by an amendment to the petition, the authority to issue an execution will be withheld. The petitioner was permitted to sue on the mortgage for two reasons: First, it was a special lien on the property described in it; and, second, the property derived almost its entire value from the manufacturing plant, which had been closed with no prospect of being reopened, and consequently was daily diminishing in value for want of use.

The taxes for the year 1894 became a lien on the mortgaged property from the 1st day of March of the same year, and took precedence of all other liens, prior as well as subsequent to the date of the mort-

gage, and it was the official duty of the sheriff to pay the taxes out of the proceeds of the sale before applying any part thereof to the mortgage judgment. Rev. St. Del. 1893, p. 125. If the receivers had sold the property, they would have sold it subject to the mortgage and tax liens, or appropriated the purchase money in the same order as was done by the sheriff; so that, practically, the same result would have been reached in either case. The property was taken out of the possession of the receivers and of the custody of the circuit court by the proceedings in the state court, and the receivers were thus relieved from the burden of paying the tax lien. The order for the payment of the taxes to the petitioner is therefore refused.

PHENIX INS. CO. OF BROOKLYN v. WILCOX & GIBBS GUANO CO.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 99.

1. CONTRACTS—INTERPRETATION—PARTY DRAWING CONTRACT.

The P. Insurance Co. issued to the W. Co. a policy of insurance against loss by windstorms or cyclones. In addition to the printed parts of the policy, there was written upon its face, "Subject to coinsurance clause," and "Subject to freshet clause." Over the latter inscription was pasted a printed slip, excepting from the policy any damage by freshet. There was no slip, over the inscription relative to coinsurance, upon the policy when produced in court. In the body of the policy was a clause providing that, if there were other insurance on the property, the P. Co. should only be liable for such proportion of the loss as its policy bore to the whole whole amount of insurance. There having been a total loss, the P. Co. claimed that it was liable only for such proportion of the face of the policy as that bore to the sound value of the property, alleging that a slip had been or should have been attached to the policy limiting its liability in that way. The W. Co. denied any knowledge of such slip or such agreement. The agent of the insurance company who effected the insurance testified that he had intended to attach to the policy a particular printed slip, headed "Average or Coinsurance Clause," limiting the liability of the insurance company, in case of "fire," to the proportion of the policy which its face bore to the sound value of the property, and to change the word "fire" to "loss," and that he had explained this provision to the son of the manager of the W. Co. when the first policy, of which the one in suit was a renewal, was taken out, and that it had been assented to by the son, after consulting his father. The manager of the W. Co. and his son denied that there had been any such explanation. It appeared that the first policy bore the printed slip, with the word "fire" unchanged. It also appeared that various clauses, called "coinsurance clauses," varying in terms, were in use by different insurance companies. No evidence was given of any usage as to the meaning of the words. *Held*, that the jury were rightly instructed that, if there was a doubt as to the meaning of the contract, it should be construed most strongly against the insurer.

2. SAME—"COINSURANCE CLAUSE."

*Held*, further, that the words "subject to coinsurance clause" had no definite meaning in themselves, and that the defendant could not complain of an instruction that, if the jury found the contract incomplete, they were to ascertain what was left out which, if inserted, would have explained or varied the terms of the policy.

3. SAME—EVIDENCE OF ORAL UNDERSTANDING TO VARY WRITING.

*Held*, further, that the evidence as to the intention of the agent and the previous verbal understanding was incompetent, since in an action at law the court could only consider the actual terms of the contract; but,

it having been received, the insurance company could not complain of an instruction that such an understanding must have been between persons authorized to bind the respective parties, and that if the slip containing the word "fire" had been attached it would have been meaningless in case of a loss by cyclone.

In Error to the Circuit Court of the United States for the District of South Carolina.

This was an action by the Wilcox & Gibbs Guano Company against the Phenix Insurance Company of Brooklyn, N. Y., on a policy of insurance. The action was commenced in a court of the state of South Carolina, and was removed by the defendant to the federal court. A motion by plaintiff to remand was denied (60 Fed. 929), and another motion by plaintiff to strike out part of defendant's answer was granted (61 Fed. 199). Upon the trial judgment was rendered for the plaintiff. Defendant brings error.

This was an action at law brought by the Wilcox & Gibbs Guano Company against the Phenix Insurance Company to recover on a policy against loss by windstorms, cyclones, or tornadoes on property damaged by the cyclone which prevailed at Charleston, S. C., on the 27th and 28th of August, 1893. The material portions of the policy are as follows: "By this policy of insurance the Phenix Insurance Company, of Brooklyn, N. Y., in consideration of thirty-eight dollars, do insure the Wilcox & Gibbs Guano Co. against loss or damage by windstorm, cyclone, or tornado to the amount of sixty-five hundred dollars, as follows: \$2,000 on their wharf and tramway thereon, subject to coinsurance clause; \$1,500 on 3-story tin-roof mill building and shed on north side, adjoining and communicating; \$1,500 on 1-story frame tin-roof warehouse, adjoining and communicating on south side of their premises; \$1,500 on 1-story frame tin-roof warehouse on north side of their premises,—all of the above situated east side of Concord street, foot of Hasel street, Charleston, So. Ca. Subject to freshet clause." The words "subject to coinsurance clause" and the words "subject to freshet clause" were written and not printed upon the policy. Immediately over the words "subject to freshet clause" there was a printed slip pasted to the margin of the policy, reading as follows:

"It is hereby distinctly understood and agreed that this company is not liable for any loss or damage to the property herein insured which may occur by reason of freshets, floods, or high water; said insurance being limited to loss or damage by cyclone, windstorm, or tornado. Attached to and forming part of tornado policy No. 953 of Phenix Insurance Co.

"[Signed]

S. Y. Tupper & Sons, Agents."

In the policy produced and put in evidence by the plaintiff there was no slip attached over the words "subject to coinsurance clause." The particular subject-matter of insurance drawn in question is the item, "\$2,000 on their wharf and tramway thereon, subject to coinsurance." It was conceded that the damage was caused by the cyclone, and that the damage to the wharf and tramway had been rightly ascertained by arbitration to be \$2,510.68, and the sound value of the wharf and tramway before the damage to be \$3,529.50. The question litigated was whether under the policy the insurance company was liable for the full amount insured, viz. \$2,000, or only for such proportion of the loss as the amount of the insurance bore to the sound value of the property. In the one case the plaintiff would be entitled to recover the full amount insured, viz. \$2,000; in the other, only about \$1,420.

The general manager of the plaintiff company testified that he first effected cyclone insurance for one year with this defendant company to cover the same risks two years before the date of this policy; that each was an annual policy, and upon each renewal he received a new policy; that he had never had his attention called to the coinsurance clause by any one before the loss; that the business was in the first instance solicited by Mr. Tupper, the agent of the insurance company, and that nothing was said about the conditions; and that about the time of the expiration of each policy the agent asked if



the insurance was to be continued, and upon getting an affirmative reply sent a new policy. Upon cross-examination he was asked if he had ever seen a printed slip like this: "Average or Coinsurance Clause. Charleston, So. Ca., —, 188—. It is understood and agreed that, in case of loss under this policy, the company shall be liable only for such proportion of the whole loss as the amount of this insurance bears to the cash value of the whole property hereby insured at the time of the fire. Attached to and forming part of policy No. — of the — Insurance Company. —, Agent." He said he had examined the first policy since this suit was instituted, and it had on it such a slip, with the word "fire" in it; that he had lost the other expired policies, and did not know whether they had such a slip; and that the policy in suit never had such a slip on it.

On behalf of the defendant, Mr Tupper, the agent of the insurance company, testified that the insurance was originally, in 1890, applied for by the son of the manager of the plaintiff company; that witness told him the whole insurance would have to be subject to the freshet clause, and the wharf and tramway subject to the coinsurance clause, and showed the printed slip, and explained to him how in case of loss the calculation would be made, and the son said he would consult his father, and afterwards he came back and said he would accept the insurance; that witness was confident the printed slip had been attached to the other policies; if it was not attached to this one, it was an oversight of his clerk; that the slip intended to be attached was a printed slip similar to the slip above set out. The son of the agent of the plaintiff company, on cross-examination, denied that he ever had the meaning of the coinsurance clause explained to him, or ever had any conversation or knowledge about the intention to put that clause in the policy, or any condition as to coinsurance. It was shown that there were other printed slips in use by underwriters to be attached to policies which were called "coinsurance clauses," some requiring not less than 75 per cent., and some not less than 50 per cent., of the sound value to be insured, and by failing to do so the assured becomes a coinsurer to the extent of the deficiency. The testimony with regard to the particular coinsurance clause which the agent of the insurance company claimed to have explained to the son of the plaintiff company's manager, and intended to be attached to the policy, was objected to by the plaintiff, and his objection overruled. There was in the body of the printed policy a clause as follows: "In case there shall be any other tornado insurance on the property hereby assured, whether valid or not, the assured shall recover of this company only such proportion of the loss as the sum hereby insured thereon shall bear to the whole amount of insurance."

The court, inter alia (Simonton Circuit Judge), instructed the jury as follows: "(1) The policy is a contract between the parties, and in construing this contract, if there be any doubt of its construction, the doubt should be solved in favor of the insured. Policies are prepared by the companies themselves, and are generally of a stereotype form and character, and as a general rule are never examined by the insured until the loss occurs, and are delivered frequently after the premium has been paid." To this instruction the defendant excepted, contending that the tendency of such instruction was to impress the jury that unless the plaintiff examined the policy before the loss it would not be strictly bound by its provisions, terms, and conditions, whereas the acceptance of said policy by the defendant, without examination, operated as an assent on its part to all the conditions and provisions therein contained.

The court further instructed the jury as follows: "(2) Is this policy, as proved in this case, the contract between the parties? Was it prepared by the insurance company, and delivered by its agent to the insured, and by the latter received and accepted as a complete contract, or was there something left out, which both parties agreed and understood should be put in, which would explain and vary the terms of the policy?" To this instruction the defendant excepted, contending that the court thereby held, and so impressed the jury, that the printed slip upon which the coinsurance clause was written was introduced to vary the terms of the policy, whereas it was offered only to explain the terms "subject to the coinsurance clause," written into and forming part of the contract of insurance.

The court further instructed the jury as follows: "(3) I call your attention to the fact that there does not appear in the evidence any clause claimed to be omitted from the policy but that one Mr. Bryan has read. I understand that it is claimed that a clause like that had been in the previous policies, and was omitted from this one. This clause is as follows: 'Average or Coinsurance Clause. Charleston, So. Ca., —, 188—. It is understood and agreed that, in case of loss under this policy, this company shall be liable only for such proportion of the whole loss as the amount of this insurance bears to the cash value of the whole property hereby insured at the time of the fire. Attached to and forming part of policy No. — of the — Insurance Company. —, Agents.'" To this instruction the defendant excepted, contending that the court thereby withheld from the consideration of the jury the expert testimony of Mr. Tupper as to the meaning of the term "coinsurance clause," and his further testimony that said clause as explained by him was intended to have been attached thereto, in which slip the word "fire" was stricken out, and "loss" inserted in lieu thereof.

The court further instructed the jury as follows: "(4) If this slip: 'Average or Coinsurance Clause. Charleston, So. Ca., —, 1888. It is understood and agreed that, in case of loss under this policy, this company shall be liable only for such proportion of the whole loss as the amount of this insurance bears to the cash value of the whole property hereby insured at the time of the fire. Attached to and forming part of policy No. — of the — Insurance Company. —, Agents,'—was on the policy now, as it is claimed that it ought to have been, it would not affect this case at all. It relates to an entirely different risk; this is a cyclone risk, and this slip relates to a risk by fire." To this instruction the defendant excepted, contending that the court thereby gave the jury to understand defendant's claim to be that a clause like that read by the court had been attached to previous policies, whereas the clause claimed by defendant to have been attached to previous policies contained the word "loss" instead of "fire"; and, further, that the court thereby gave the jury to understand defendant's claim to be that the slip, as read by the court, should have been attached to the policy, and whereas defendant's claim was that the clause, as explained by Mr. Tupper, should have been attached to the policy under which clause the assured became a coinsurer with the defendant in the event of loss by a cyclone. And in so charging the court further erred, in this: that if the slip, as read by him, had been attached to the policy, it should not have been held to relate to a fire risk, but should have been construed by the court in *pari materia* with the terms of the policy, so as to give its true effect to the clause, which was a provision for coinsurance between the assured and insurer in case of loss under the policy.

The court further instructed the jury as follows: "(5) What do the words 'subject to the coinsurance clause' mean? Do they refer to the coinsurance clause used in the latter part of this policy in regard to insurance in other insurance companies? If it does not, there is no evidence before you except this printed slip: 'Average or Coinsurance Clause. Charleston, So. Ca. —, 1888. It is understood and agreed that, in case of loss under this policy, this company shall be liable only for such proportion of the whole loss as the amount of this insurance bears to the cash value of the whole property hereby insured at the time of the fire. Attached to and forming part of policy No. — of the — Insurance Company. —, Agents,'—of any other coinsurance clause to which they referred. Suppose, for a moment, it did refer to a coinsurance clause, which one of the coinsurance clauses does it refer to? You have seen a number of them produced before you. Which one of them can you say was the coinsurance clause? No one can tell, and you, being in that position, I think you may dismiss that point from your minds." To this instruction the defendant excepted, contending that under said instruction the jury was prevented from considering the testimony of Mr. Tupper, who, in the capacity of an expert witness, had explained the words "coinsurance clause" as used in the policy to refer to coinsurance to the full value of the property, as contradistinguished from a limited coinsurance, or a coinsurance to the extent only of a specified percentage of the property's value.

The court further instructed the jury as follows: "(6) Upon the point of

Mr. Tupper's explanation to you of what he thought the coinsurance clause was,—what he understood by the coinsurance clause,—if he referred to this paper: 'Average or Coinsurance Clause. Charleston, So. Ca., —, 1888. It is understood and agreed that, in case of loss under this policy, this company shall be liable only for such proportion of the whole loss as the amount of this insurance bears to the cash value of the whole property hereby insured at the time of the fire. Attached to and forming part of policy No. — of the — Insurance Company. —, Agents,'—and was construing this paper, it does not affect this policy at all. If, however, he explained the coinsurance as explained by insurers, then you must see some evidence that that was given to the Wilcox & Gibbs Co., and that that company concurred with those instructions,—that construction of the risk,—and that the evidence of assent on the part of the Wilcox & Gibbs Co. must appear to have been given by such a one who occupied a position in the company that would entitle him to make and alter contracts for them." To this instruction the defendant excepted, contending that by such instruction the defendant was required to prove actual communication to the Wilcox & Gibbs Guano Company of the meaning attached to said clause, and a positive assent thereto by some one authorized to make and alter contracts for said company, whereas the court should have charged that if the jury believe the words of the policy "subject to coinsurance clause" to have the fixed technical meaning in the business of insurance as explained by Mr. Tupper, and that the policy was duly delivered to and received by the plaintiff company without objection or inquiry as to the meaning of the words in question, the said company was bound by the coinsurance clause as explained by the defendant as fully as though said clause had been personally explained by the insurer, and assented to by the insured, at the inception of the risk.

The jury found for plaintiff the full amount of its claim as fixed by the arbitrators, with interest, including the entire loss upon the wharf and tramway.

George M. Trenholm, for plaintiff in error.

J. P. K. Bryan, for defendant in error.

Before GOFF, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

MORRIS, District Judge (after stating the facts). The question of law raised by the defendant's exceptions in this case is, what is the effect of the words "subject to coinsurance clause" in the policy of insurance in the item of \$2,000 on their wharf and tramway thereon "subject to coinsurance clause," and what was the legal effect of the testimony of the agent of the insurance company with regard to it? The condition which the defendant contended was imposed upon the policy by these words was a restrictive condition, depriving the assured of something to which it was entitled under the general terms of the policy. Such restrictions are to be taken most strongly against the party for whose benefit they are intended. *Palmer v. Insurance Co.*, 1 Story, 360, Fed. Cas. No. 10,698; *First Nat. Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, 678; *Thompson v. Insurance Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1019. It devolves upon such party to express the restriction in language which conveys the meaning intended. The party who accepts the policy should be informed by it what is the contract for which he has paid the premium and upon which he relies for indemnity. Ang. Ins. §§ 20-22.

We can see no ground for the defendant's first exception, which is to the court's instruction that, if there was doubt as to the construction of the policy, it should be solved in favor of the assured, and we can see nothing in the instruction to mislead the jury.

The meaning of words which have a special trade or technical significance, or clauses in a policy which are ambiguous or indeterminate, may be explained by usages which are so general, uniform, or notorious that the party to be bound may be presumed to have known them. But no evidence of any usage was offered which would tend to explain the meaning of "subject to coinsurance" or "subject to coinsurance clause." The only witness for the defendant was its local agent at Charleston. He did not testify to any usage, but simply to his understanding of these words in this policy. He further testified that the policy, if delivered without the coinsurance clause, which he had intended to attach to it and which he had attached to prior policies on the same risk, was incomplete, showing that the policy was not relied upon as expressing the contract he had intended the company should make, but that contract would have been expressed in the clause which he alleged had been attached to earlier policies, and which would have been attached to this but for the oversight of his clerk. It appeared, further, from the evidence, that there were various coinsurance clauses which are attached to policies by different underwriters, some requiring the assured to become coinsurers for the deficiency if the insurance did not amount to 75 per cent. of the whole value of the property, and others stating a different percentage. It further appeared that the clause which the insurance agent would have affixed to the policy, if he had completed it as he had intended, was a printed clause applicable to a loss by fire, and not a loss by cyclone. It would appear, therefore, as the words "subject to coinsurance clause" had no definite meaning in themselves (unless they applied to the coinsurance clause contained in the body of the policies with reference to other insurance), and had no definite meaning by usage, but referred to some particular clause which the company's agent intended to affix, that the court committed no error of which the defendant can complain in saying to the jury that if they found the policy not a complete contract they were to ascertain what it was that was left out, and which, if inserted, would have explained or varied the terms of the policy as delivered. The court then called the attention of the jury to the fact that, if the very clause had been attached which the insurance agent testified had been omitted, it was one which was applicable only to a loss by fire, and instructed them that it would not have affected this loss, which was by cyclone.

It does not appear that there was any error in this instruction of which the insurance company can complain. Unless there was some restriction by which the assured was prevented, it was entitled under the general terms of the policy to the whole sum insured. The insurer claimed that the restriction was contained in the words "subject to coinsurance clause" of themselves. We think the court right in holding this not to be so, and that the words had no definite meaning. The insurer was then (against the objection of the plaintiff) allowed to explain what was the clause it would have attached but for an oversight. Surely the defendant could not ask to be placed in a better plight than if the policy had been completed as was intended. Attention had been called to the fact that the

printed slip had reference to fire, but the agent's testimony was clear that it was the slip he had attached to fire policies which he intended to attach to this. Treating the policy as if the slip was there, the defendant asked the court to say that it was not to have its literal meaning, but was to be construed contrary to its obvious meaning, in order to make it consistent with a verbal agreement alleged to have been had with the assured two years before this particular policy was issued. This certainly is not the rule in an action at law. If the slip had been attached to the policy when delivered, and by mistake failed to express the actual agreement, a court of equity was the only jurisdiction in which the policy could be reformed and corrected. *Insurance Co. v. Mowry*, 96 U. S. 547; *Graves v. Insurance Co.*, 2 Cranch, 419; *Andrews v. Insurance Co.*, 3 Mason, 6, Fed. Cas. No. 374. The policy as delivered and accepted is conclusively presumed, in an action at law, to express the entire contract of the parties. *Insurance Co. v. Mowry*, 96 U. S. 547. If the slip intended had been attached to the policy, there would have been no room for construction; the insurer would have used the word "fire," and would have been presumed to have meant "fire." The court, then, in substance, told the jury if they should find that this particular slip with the word "fire" on it was not the one intended to be attached, but some other, then the evidence left it doubtful which other slip was intended, as the various slips produced showed there were several of different import in use. This instruction was entirely justified by the testimony.

The sixth exception was to that part of the charge which instructed the jury that, in order to bind the defendant by the special meaning which the agent of the insurance company contended he had explained in the original negotiation to be the import of insuring the wharf and tramway "subject to coinsurance," the jury must find that this explanation was made to some person whose connection with the plaintiff corporation was such that he had authority to make and alter contracts on its behalf. In this policy the words "subject to coinsurance clause" would seem to import that there was some clause, either in the policy or to be attached thereto, by which coinsurance was to be regulated and the contract controlled either as to the extent of the risk or the basis of the settlement of the loss. This idea is favored by the provision "subject to freshet clause," and the attaching of a clause with regard to freshets to form a part of the policy. There was no evidence sufficient to submit to the jury to find that the words "subject to coinsurance" had any fixed technical meaning in the business of insurance. By the special explanation claimed to have been made to Mr. Murphy, Jr., before the first policy was issued, it was attempted to interpret the contract in such a manner as to add to it a clause which it did not contain, or else to show that the policy did not express the previous verbal understanding. If this could in any case be permissible, it would seem that the understanding which was to control the written contract should be between persons authorized to bind the parties to the contract. But, in our opinion, these verbal explanations, no matter to whom made, were incompetent testimony

for this purpose. The testimony might have been admissible in an equity suit to correct the policy, if there was a mutual mistake or omission, but was not proper to be considered by the jury in this suit. It was an attempt to prove a parol understanding prior to issuing the policy, thus giving meaning to words in it which of themselves expressed nothing; not to explain a latent ambiguity, but to insert a clause by giving the oral understanding of the parties as to something which should be in the policy for the benefit of the insurer, but was not there. It is obvious, therefore, that the instruction to which the sixth exception applies could not be prejudicial to the defendant. We find the whole charge was sufficiently favorable to the defendant, and that there is no error of which it can complain. The judgment is affirmed.

---

TINDALL et al. v. WESLEY.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 96.

1. CONSTITUTIONAL LAW—SUIT AGAINST STATE.

The state of South Carolina was the owner of certain real estate, which, under a statute of the state, was in the care and custody of the secretary of state, and was held by him, subject to the directions of the commissioners of the sinking fund. Pursuant to directions of such commissioners, the real estate was sold at auction to one A., acting for the plaintiff, who complied with the terms of sale, and received a deed from the commissioners of the sinking fund. A. afterwards conveyed the property to plaintiff, who made a demand for possession upon the secretary of state and a keeper, who had actual charge of the property, under direction of the secretary of state, the property being at the time partly in the occupation of certain state officers; and, being refused possession, brought an action of ejectment against the secretary of state and the keeper. *Held*, that such action was not a suit against the state. U. S. v. Lee, 1 Sup. Ct. 240, 106 U. S. 193, and Stanley v. Schwalby, 13 Sup. Ct. 418, 147 U. S. 508, followed.

2. EVIDENCE—RELEVANCY—EJECTMENT.

The terms of sale of the property provided that one-third of the purchase price should be paid in cash and the balance secured by bond and mortgage, which should be payable at any time, at the option of the purchaser. A. had paid the one-third in cash, given his bond and mortgage, and received a deed of the property. Upon cross-examination of a witness on the trial of the action of ejectment, defendants attempted to show that the purchase was made for the purpose of raising an issue as to the validity of a tender of certain depreciated state scrip, and that such scrip had been tendered in payment of the bond and mortgage. *Held*, that such evidence was irrelevant, and was properly excluded.

In Error to the Circuit Court of the United States for the District of South Carolina.

This was an action of ejectment by Edward B. Wesley against J. E. Tindall and J. R. Boyles to recover possession of certain real estate in the city of Columbia, S. C. Upon the trial in the circuit court, plaintiff recovered judgment. Defendants bring error.

On the 16th of February, 1892, the plaintiff below, Edward B. Wesley, through a trustee, purchased from the commissioners of the sinking fund of

the state of South Carolina the lot of ground in the city of Columbia on which stands the building known as "Agricultural Hall." The property was sold at public auction, and the purchase price was \$16,165. The state of South Carolina had been the owner, and this sale was made in pursuance of an act of her general assembly. The purchase was made for the plaintiff below by one J. W. Alexander, as his trustee. Alexander fully complied with the terms of sale by paying to the state treasurer, W. T. C. Bates, one-third of the purchase money, and executing to him his bond and a mortgage of the premises for the residue of the stipulated price, and received a deed for the property in due form, executed by the commissioners of the sinking fund of the state, and delivered by Bates, the state treasurer. In the advertisement of sale, in the bond taken for the deferred installments of the purchase money, and in the mortgage securing them, leave was given the purchaser to anticipate the deferred payments at his pleasure. The deed of conveyance recites that it was made by the commissioners of the sinking fund, by direction and appointment of the plaintiff below, to J. W. Alexander, to hold the same in trust for the use of the plaintiff below, his heirs and assigns forever, and to permit the cestui qui trust to have and possess the same, and to enjoy the profits, and in trust to convey the same to him, his heirs and assigns, on request, or to such person as he might direct and appoint. Afterwards, namely, on the 11th day of February, 1893, Alexander did, upon request, convey the lot and premises in fee simple to him, Edward B. Wesley, who was a citizen of the state of New York. On the 13th day of February, 1893, this suit was brought. The suit is by complaint, and is, in South Carolina, a statutory action, equivalent to and a substitute for the common-law action of ejectment. One of the provisions of the statute law of South Carolina is as follows: "The secretary of state shall take charge of all the property of the state, the care and custody of which is not otherwise provided for by law. He shall hold the same subject to the directions and instructions of the commissioners of the sinking fund." There was no provision of law for other custody of the subject of this suit than that of the secretary of state, J. E. Tindall. The immediate custody of the building was in a watchman,—J. R. Boyles,—appointed by Tindall, whose duty it was to "watch, guard, and take care of the premises." He is one of the defendants below. The complaint avers that the plaintiff below was a citizen of New York, sets up his title to the premises in dispute by describing his purchase from the commissioners of the sinking fund, and the deeds conveying title to him, which gave him the right of possession; and complains that the defendants below, Tindall and Boyles, wrongfully entered into the premises and ousted him, and have been in possession since his purchase on the 20th of February, 1892, and still are withholding the same from him.

The defendant below Tindall, for his first answer, denies each and every allegation of the complainant. For his second answer he says that on the 20th of February, 1892, he was, and has since continued to be and is, secretary of the state of South Carolina; that the premises described in the complaint were and are the property of and in the possession of the said state, in actual public use. For his third answer he says that he has no right, title, interest, or estate in the said premises of any kind whatever, but that the same are in his custody as secretary of state. The answer of Boyles is similar to that of Tindall, averring that he is in the employment of Tindall as secretary of state, has no title in the premises, and is engaged only in watching, guarding, and taking care of the premises. The state of South Carolina is not a party to the suit in any form. She did not come into court to make suggestion of her title to the premises in dispute, and for that purpose only, as was done in *Kaufman v. Lee*, 1 Sup. Ct. 240. She left her relations to the property to be gathered exclusively from the pleadings and the evidence.

Among other testimony taken at the trial was the following, given by W. H. Lyles, one of the counsel for the plaintiff below, which refers to occurrences on the morning of the 13th day of February, 1893, the day on which this suit was brought, and before the complaint was filed: "Question by the Court: The transaction of the sale had been completed? A. Yes, we had taken the formal delivery of the deed, and had delivered the bond and mortgage, and taken the receipt, put it in our pocket, and went out of the room; then came back, and told Dr. Bates [treasurer of the state] that we had the

privilege of anticipating the payment. By counsel for the plaintiff below: Q. State again the conversation you had with Mr. Tindall? A. On the day this action was commenced, before we put the papers in the hands of the deputy marshal for service, I went down to the building itself. I found Mr. Boyles, the defendant, in possession of the building, and I told him I had come down to demand possession of the building. He told me he was there in the custody of the building, under the instructions of the secretary of state, and that he was instructed not to give up the possession of the building to me, and I would have to see the secretary of state. I went immediately to his office, having had some trouble in the first case about the matter, and I told him of my conversation and Mr. Boyles' statement to me that he was holding the property under the instructions of the secretary of state. He said I had stated the matter correctly; that he was instructed by the commissioners of the sinking fund to hold that property as the property of the state of South Carolina, and he couldn't give the possession of the property to me; that he held it as agent of the board of the sinking fund commissioners of the state of South Carolina." During the cross-examination of W. H. Lyles, one of the witnesses and one of the counsel for the plaintiff below, the following proceedings took place: "Q. You say you took the deed and went out of the office? A. Yes. Q. You came back almost immediately? A. Came back within the space of 3 or 4 minutes. Q. What then took place? I want to know what occurred between you and Mr. Muller [Lyles' partner] on the one hand, and Dr. Bates [state treasurer] on the other, when you went out of the room and immediately returned? (The court directs the jury to withdraw.) Q. You and Mr. Muller went out of the state treasurer's office, and almost immediately returned. Now, what occurred between the state treasurer on the one hand and Mr. Muller and yourself on the other? A. We returned within five minutes,—I think within two minutes. We called the state treasurer's attention to the fact that the bond which had been delivered by us for Alexander contained a clause which authorized him to anticipate it at any time; and we told him, on behalf of Mr. Alexander, we desired to pay that bond and mortgage immediately. We then drew out the revenue bond scrip, known as the 'Blue Ridge Railroad Bond Scrip,' which we counted out to the amount of a few cents or dollars in excess of the amount due on the bond and mortgage, allowing interest on the bond and mortgage from its date up to the date of this transaction, and we told Dr. Bates we tendered that in payment of the bond and mortgage. We demanded no receipt. We demanded nothing. Q. And it was refused? A. Yes, the advertisement was not referred to. Q. Was it not the purpose of the transaction to create an issue in the United States circuit court, in order to test the validity of the revenue bond scrip? Was not that the object of the purchase? A. The object of the purchase from the beginning was to create an issue as to the validity of the revenue bond scrip; but as to the United States circuit court, we were not— Q. Then, when you bought it, you did not intend to pay for it in good money? A. We did, and considered the scrip as good as money. Q. When you made the purchase, you made it with a view of compelling the state to take the deferred payment of it in revenue bond scrip? A. Yes. Q. Did you happen to know whether the revenue bond scrip had any value in the market? A. I don't know. Q. It has not? A. I don't know that it has. Q. Very little, if any? A. Yes. Q. Had Alexander and Wesley had no use for this property, that you know of, except to create the issue to which you have referred? A. That was the sole object for which it was purchased. Mr. Wesley regarded the property as worth the money, and, even if he had to pay, he would not lose the money. Q. Mr. Wesley holds a large block of revenue bond scrip? A. Yes." The court ruled out the foregoing testimony of Lyles relating to the bond scrip taken in the absence of the jury, and the jury were called into court.

At the close of the testimony taken on behalf of the plaintiff below, counsel for defendants entered a motion for a nonsuit. The court ruled as follows: "The object and purpose of this suit is the obtaining possession of a certain tract of land in the city of Columbia. The plaintiff, not being actually in possession of the land, is obliged to show that he has in himself such title as warrants a possession. For that purpose he has introduced testimony that



he holds title under the state, and in the same testimony he offers evidence that he has made demand under that title, was refused upon the ground that the parties were holding by virtue of the state, both parties referring their claim to the same source, and the motion for nonsuit is overruled."

Tindall, one of the defendants, testified, among other things, as follows, speaking of Agricultural Hall: "Q. Was there any one—at the time of the alleged deed to Alexander—was there anybody in that building at that time? A. Yes. Q. Who was there? A. The railroad commissioners had their rooms there, and I had engaged two rooms to Mr. Boyden, editor of a paper, for which he paid \$2 a month each, and the weather bureau had their office in the building. I found them there when the building came into my possession, and I did not remove them. They are there yet. Q. Since that time, how is that building used? A. Those same parties I have mentioned are there, and a little later on the dispensary was established in that building. I think that was some time in the spring of last year. Mr. Traxler, who is the state dispenser, has his office there, and liquors belonging to the state."

At the close of the testimony the defendants below entered a motion to dismiss the complaint on the plea to the jurisdiction of the court, founded on their allegation that the premises were the property of and in the possession of the state of South Carolina, in actual public use, at the time of the commencement of the suit; contending that they, Tindall and Boyles, were mere custodians and care takers of the premises, not in possession or having any interest in them, and were not proper parties to the suit, it being in effect a suit against the state of South Carolina. The court below overruled this motion to dismiss, holding that the cause was not, in effect, a suit against the state of South Carolina, that the defendants were proper parties, and that the court had jurisdiction. The case was tried on the 7th of April, 1893, ending in the following verdict of the jury: "We find for the plaintiff the possession of the land in dispute as described in the complaint."

The plaintiffs in error assign as errors:

(1) That the court below erred in excluding the testimony of W. H. Lyles, given on cross-examination, relating to the intention to pay the deferred installments in railroad bond scrip.

(2) That it erred in overruling motion for nonsuit, on the ground that no evidence was given by the plaintiff below to show title in himself by grant from the state, and a source of title common to both plaintiff and defendants.

"And for a second defense:"

(3) That the court erred in overruling motion to dismiss on the ground that the defendants below were mere custodians and care takers of the premises, not in possession nor having any title or interest in them, and that they were the property of the state.

Samuel W. Melton and Osmund W. Buchanan, for plaintiffs in error.

William H. Lyles, of Lyles & Muller, for defendant in error.

Before GOFF, Circuit Judge, and HUGHES and MORRIS, District Judges.

HUGHES, District Judge (after stating the case as above). The first assignment of error in this case relates to the testimony of W. H. Lyles on cross-examination, tending to show that the plaintiff below, Edward B. Wesley, had made the purchase of the premises with the secret intention of paying the deferred installments of the purchase money in a valueless kind of paper issued by the state called "Blue Ridge Railroad Bond Scrip." The court below refused to allow this evidence to go to the jury, and this ruling is assigned as error. The payment of the first installment of the purchase money, the execution of the deed of conveyance to the purchaser, and his counter execution of bond and mortgage for the deferred install-

ments, made the transaction a perfect and complete one to confer title upon the purchaser, and to entitle him to possession of the premises. The suit which he brought for this possession involved no other inquiry than whether his first payment had been made, whether a valid deed of conveyance had been executed, and whether he had further complied with the terms of sale relating to the bond and mortgage for the future installments. What might have been his secret intentions with respect to the deferred payments was a question foreign to his suit for possession of the premises to which he had become entitled, and all evidence in regard to such intentions was properly ruled out.

The second assignment of error, based upon a denial that any evidence had been introduced showing a grant of the premises from the state to the plaintiff below, is waived by the defense, and a consideration of it by us rendered unnecessary.

The third and principal ground assigned as error is a denial of the jurisdiction of the court below to try the cause, because of the allegations in the pleadings that the premises in dispute were, on the date of plaintiff's demand for possession, and have been ever since, the property of the state of South Carolina, in actual public use; that the defendants below were officers of the state, and in custody of the premises only as such, and that they have no right, title, interest, or estate of any kind to or in the said premises. It is well-settled law that a sovereignty cannot be sued except by its own consent. The doctrine applies alike to the government of the United States and to the states themselves, composing the Union. But it is equally well settled that suits may be brought, under special circumstances, for property claimed by a state, and in the possession of individual persons holding for and in the name of the sovereign. There is some confusion in the decisions on this question when they come to define what the special circumstances and conditions are under which the property of a sovereign in possession of agents or officers may be the subject of suits against such persons. In the present case we are saved the task of entering upon a general survey of the decisions on this vexed question that have been rendered in the courts of this and the mother country. The case at bar is practically and in principle all fours with that of *U. S. v. Lee*, or *Kaufman v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240, and is ruled by the decision in that case and in *Stanley v. Schwalby*, 147 U. S. 508, 13 Sup. Ct. 418. The complaint in the case at bar specifically charges that, "the plaintiff being lawfully possessed of the premises, the defendants, on the 20th of February, 1892, wrongfully entered into said premises and ousted plaintiff, and that the defendants are, and ever since have been, and still are, withholding the same from the plaintiff," against his demand. Issue was joined on this allegation, and the verdict was for the plaintiff below, on evidence proving an ouster and tort. The action was, in substance, for trespass and tort, and it is in this respect that the case at bar is all fours with that of *Kaufman v. Lee*, and ruled by the decision of the supreme court therein. In the case of *Stanley v. Schwalby*, at page 518, 147 U. S., and page 418, 13 Sup. Ct., the supreme court say:

"It may be accepted as unquestioned that neither the United States nor a state can be sued as defendant in any court in this country without their consent, except, etc. Accordingly, whenever it can be clearly seen that a state is an indispensable party to enable a court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction. But, in the desire to do that justice which in many cases the courts can see will be defeated by an extreme extension of this principle, they have in some instances gone a long way in holding the state not to be a necessary party, though its interests may be more or less affected by the decision. Among these cases are those where an individual is sued in tort for some act injurious to another in regard to person or property in which his defense is that he has acted under the orders of the government. In those cases he is not sued as an officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts the authority of such officer. To make out that defense he must show that his authority was sufficient in law to protect him. In this class of cases is included *U. S. v. Lee*, where the action of ejectment was held to be in its essential character an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment; and the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense."

A case rarely arises in the courts more fully within the terms of a ruling decision than is the case at bar within the meaning and tenor of the language of the supreme court in the case of *Stanley v. Schwalby*, confirming and explaining the decision in *Kaufman v. Lee*.

We think there was no error in the action of the court below in entertaining this suit as not a suit against the state of South Carolina, and in giving judgment for the plaintiff below. The judgment of the court below is affirmed.

---

#### JONES v. NEWPORT NEWS & M. V. CO.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 173.

1. RAILROADS—SWITCH TO PRIVATE WAREHOUSE—DISCONTINUANCE.

A railroad company, as a carrier, is not bound, at common law, by the establishment and maintenance for any length of time of a switch connection of its main line with a private warehouse, forever to maintain it.

2. SAME—ABUSE OF DISCRETION.

Even if a railroad company may be liable for damages for an abuse of discretion in discontinuing such a switch, the person complaining must negative the dangerous character of the switch which the facts stated in regard to it in his petition suggest as a good ground for its discontinuance.

3. SAME—CONTRACT.

An agreement by a railroad company, with one owning land adjacent to its track, that, if he would build a coal tipple and a trestle therefrom to its track, it would construct a switch thereon, and thereafter deliver coal to him there, does not contain an implication that the switch shall be perpetual.

In Error to the Circuit Court of the United States for the District of Kentucky.

Action by H. M. Jones against the Newport News & Mississippi Valley Company for injury to and discontinuance of a railroad

switch to plaintiff's warehouse. A demurrer was sustained to that part of the petition which claimed damages for discontinuance of the switch, and plaintiff brings error. Affirmed.

H. M. Jones, the plaintiff in error and the plaintiff below, filed two petitions in ordinary in the Caldwell circuit court of Kentucky against the Newport News & Mississippi Valley Company, a corporation organized under the laws of Connecticut, and a citizen of that state, engaged in operating under a lease the railroad of the Chesapeake & Ohio Southwestern Railroad Company. The plaintiff is the owner of land in the town of Princeton, lying near the junction of two streams, and within a few feet of the defendant's railroad bridge over one of them. The lot adjoins the right of way of defendant's railroad. The railroad at this point runs on a high embankment or fill. Some years before the filing of the petition, the plaintiff had built himself a coal tipple and storage bins for coal on his lot, and near the defendant's right of way, and a trestle, 15 feet high, above the ground, connecting the coal tipple with the defendant's roadbed on the high embankment. A railroad track was laid over the trestle, so that the cars could be run from the main track by a switch to the tipple. Plaintiff's first petition averred that, by the negligence of the agents of the railroad company, the switch from the main track of the railroad to the coal tipple was left open, and a regular freight train, running at a high rate of speed, left the main track, and running out upon the trestle, was precipitated over the tipple, doing much damage to the plaintiff's plant, for which he asked damages. The second petition, which, by the order of the court, was consolidated with the first, described the circumstances under which the trestle and connection track were built as follows: "That several years ago the plaintiff, desiring to go into the coal business at Princeton, Kentucky, and desiring to build for that purpose a coal tipple on said lot, and connect the same with the main line of said railroad, owned and then operated by the Chesapeake & Ohio Southwestern Railroad Company, by trestle and a railroad track, or switch, as it is sometimes called, had plans and specifications drawn for such coal tipple and trestle; and thereupon the said Chesapeake & Ohio Southwestern Railroad Company made and entered into a contract with him, this plaintiff, that, if this plaintiff would build the proposed coal tipple and trestle, it would make the necessary embankment, connect the trestle with its main line of road, and lay down the track over said embankment, trestle, and coal tipple, and connect the same with the main line of road by a switch, and thereafter deliver coal to him at said tipple, over said switch and road, on said trestle and coal tipple, and this contract was made in the early part of 1884. That, in compliance with this contract, this said plaintiff, in the summer of 1884, built said coal tipple and trestle in accordance with said plans and specifications, and the said Chesapeake & Ohio Southwestern Railroad Company built said embankment and laid said track thereon, and on said trestle and coal tipple, and connected the same with the main line of said railroad with a switch, and then it became a part of said main line of road, and so remained until the doing of the wrongs hereinafter complained of; and said last-named railroad company and the defendant delivered coal in car-load lots over said switch to said coal tipple, as was their duty, from that time until the time of the doing of the wrongs hereinafter complained of, as the business of the plaintiff required said coal to be delivered. That said coal tipple and trestle were built of heavy timber, and were about fifteen feet high, and were very expensive, and cost this plaintiff not less than \$——; and, in addition thereto, he built a room under one of the bents of said coal tipple, and fitted it up for an office, bought and put up a pair of wagon scales, built a bridge across the Dallam Spring, which was necessary to get the wagons to the scales, put a roof over the coal tipple, bought a wagon and a pair of mules, and in every way fitted himself up to run a coal business, and did run a coal business, at that place and on said coal tipple, for a number of years, and until the doing of the wrongful acts hereinafter complained of. Said trestle and coal tipple is the same mentioned in the first paragraph of this petition. That afterwards the Chesapeake & Ohio Southwestern Railroad Company leased said railroad from Louisville to Paducah, Ky., through Princeton, Ky., to the defendant,

which took possession under said lease, and for several years last past has operated and controlled said road under said lease, and assumed the duties and contracts of said lessor company, including its duty to and contract with this plaintiff, and for several years fulfilled and performed said duty and contract, and then, ratifying the old contract, made a new one with this plaintiff, by which he was to repair and rebuild a part of said trestle, which he did at great expense, not less than \$——, to himself, and it was its duty at all times to keep said switch to said coal tipple in good order, and to deliver coal to him over said switch to said coal tipple; but, notwithstanding said contract and said duty, the defendant has violated its contract and its duty, and soon after the accident referred to in the first paragraph of this petition, and in the month of —, 1892, the defendant wrongfully and without right tore up and removed said switch and all the iron forming the railroad from the main line of road to said coal tipple over said trestle, and has since wrongfully and without right refused to relay said track, or to deliver coal to this plaintiff at said coal tipple, thus rendering worthless to this plaintiff, and utterly destroying, the value of said coal tipple and trestle, and utterly breaking up and ruining the plaintiff's said coal business, to the damage of this plaintiff five thousand dollars, which damage said defendant refuses to pay, although demanded. Wherefore the plaintiff prays for damages against the defendant for five thousand dollars, and for interest thereon from date of judgment until paid, and for his costs and all proper relief." The two petitions were carried by removal from the state circuit court into the court below, where they were consolidated as already stated, and thereafter the defendant demurred to both causes of action. The demurrer to the first cause of action was overruled. The demurrer to the second cause of action was sustained, and upon that judgment was entered for the defendant. The first cause of action was submitted to the jury, and resulted in a verdict and judgment for the plaintiff. The plaintiff sued out a writ of error to the ruling of the court in sustaining the demurrer to the second cause of action, and in rendering judgment for the defendant thereon. The correctness of the ruling of the circuit court in sustaining the demurrer to the second cause of action is therefore the sole question for consideration in this court.

Wm. Marble and Husbands & Husbands, for plaintiff in error.

Quigley & Quigley and P. H. Darby, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts). Plaintiff bases his claim for damages—First, on the violation of an alleged common-law duty; and, second, on the breach of a contract.

1. The proposition put forward on plaintiff's behalf is that when a railroad company permits a switch connection to be made between its line and the private warehouse of any person, and delivers merchandise over it for years, it becomes part of the main line of the railroad, and cannot be discontinued or removed, and this on common-law principles and without the aid of a statute. It may be safely assumed that the common law imposes no greater obligation upon a common carrier with respect to a private individual than with respect to the public. If a railroad company may exercise its discretion to discontinue a public station for passengers or a public warehouse for freight without incurring any liability or rendering itself subject to judicial control, it would seem necessarily to follow that it may exercise its discretion to establish or discontinue a private warehouse for one customer.

In *Northern Pac. Ry. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283, it was held that a mandamus would not lie to

compel a railroad company to establish a station and stop its trains at a town at which for a time it did stop its trains and deliver its freight.

In *Com. v. Fitchburg R. Co.*, 12 Gray, 180, it was attempted to compel a railroad company to run regular passenger trains over certain branch lines upon which they had been run for a long time, but had been discontinued because they were unremunerative. The court held that mandamus would not lie because the maintenance of such facilities was left to the discretion of the directors. Referring to this and other cases, Mr. Justice Gray, delivering the opinion of the supreme court in *Northern Pac. Ry. Co. v. Washington Territory*, supra, said:

"The difficulties in the way of issuing a mandamus to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself are much increased when it is sought to compel the corporation to establish or to maintain a station, or to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of the population and business at, near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or in case of abuse of their discretion by the legislature, or by administrative boards intrusted by the legislature with that duty, than by ordinary judicial tribunals. \* \* \* To hold that the directors of this corporation, in determining the number, place, and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases."

Among the cases which Mr. Justice Gray cites in support of the foregoing is that of *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 9 N. E. 856. In that case it was sought to compel a railroad company by mandamus to enlarge a passenger and freight station which was admittedly inadequate, but the writ was denied. The ground for the conclusion of the court, as stated by Mr. Justice Gray, was that "the defendant, as a carrier, was under no obligation, at common law, to provide warehouses for freight offered, or station houses for passengers waiting transportation," and no such duty was imposed by statute.

See, also, *Florida, C. & P. R. Co. v. State*, 31 Fla. 482, 13 South. 103.

It is true that the foregoing were cases of mandamus, and that the court exercises a discretion in the issuance of that writ which cannot enter into its judgment in an action for damages for a breach of duty. But the cases show that the reason why the writ cannot go is because there is no legal right of the public at common law to have a station established at any particular place along the line, or to object to a discontinuance of a station after its establishment. They make it clear that the directors have a discretion in the interest of the public and the company to decide where stations shall be, and where they shall remain, and that this discretion cannot be controlled in the absence of statutory provision. Such uncontrollable discretion is utterly inconsistent with the existence of a legal duty to maintain a station at a particular place, a breach of which can give

an action for damages. If the directors have a discretion to establish and discontinue public stations, a fortiori have they the right to discontinue switch connections to private warehouses. The switch connection and transportation over it may seriously interfere with the convenience and safety of the public in its use of the road. It may much embarrass the general business of the company. It is peculiarly within the discretion of the directors to determine whether it does so or not. At one time in the life of the company, it may be useful and consistent with all the legitimate purposes of the company. A change of conditions, an increase in business, a necessity for travel at higher speed, may make such a connection either inconvenient or dangerous, or both. We must therefore dissent altogether from the proposition that the establishment and maintenance of a switch connection of the main line to a private warehouse for any length of time can create a duty of the railroad company at common law forever to maintain it. There is little or no authority to sustain it.

The latest of the Illinois cases which are relied upon is based upon a constitutional provision which requires all railroad companies to permit connections to be made with their track, so that the consignee of grain and any public warehouse, coal bank, or coal yard may be reached by the cars of said railroad. The supreme court of that state has held that the railroad company has a discretion to say in what particular manner the connection shall be made with its main track, but that this discretion is exhausted after the completion of the switch and its use without objection for a number of years. *Railroad Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824. But this is very far from holding that there is any common-law liability to maintain a side track forever after it has once been established. The other Illinois cases (*Vincent v. Railroad Co.* 49 Ill. 33; *Chicago & N. W. Ry. Co. v. People*, 56 Ill. 365) may be distinguished in the same way. They depended on statutory obligations, and were not based upon the common law, though there are some remarks in the nature of obiter dicta which gives color to plaintiff's contention. But it will be seen by reference to Mr. Justice Gray's opinion, already quoted from, that the Illinois cases have exercised greater power than most courts in controlling the discretion of railroads in the conduct of their business.

In *Barre R. Co. v. Montpelier & W. R. Co.*, 61 Vt. 1, 17 Atl. 923, the question was one of condemnation. The law forbade one railroad company to condemn the line of another road, and the question was whether the side tracks of the railroad company which, with the consent of the owners of the granite quarry, ran into a quarry in which a great business was done, were the line of the railroad within the meaning of the statute. It was held that they were so far as to impose obligations on and create exemptions in favor of the railroad company operating the side tracks. We may concede, for the purpose of this case, without deciding, that, as long as a railroad company permits a side track to be connected with its main line for the purpose of delivering merchandise in car-load lots to the owner of the side track, the obligation of the railroad com-

pany is the same as if it were delivering these cars at its own warehouse, on its own side track. But this we do not conceive to be inconsistent with the right of the directors of the railroad company, exercising their discretion in the conduct of the business of the company for the benefit of the public and the shareholders, to remove a side-track connection.

The recital of the facts in the petition in this case is enough to show that the switch connection of the plaintiff was one of probable or possible danger to the public using the railroad, and to justify its termination for that reason. It was made on a high fill, on the approach to a bridge across a stream, and the switch track ran on to a trestle 15 feet above the ground, and terminating in the air. Even if the discretion reposed in the directors to determine where switch connections shall be made or removed were one for the abuse of which an action for damages would lie, the petition would be defective, because it does not attempt in any way to negative the dangerous character of the switch which the facts stated certainly suggest as a good ground for the action of the company complained of.

2. The petition makes no better case for the plaintiff on the theory of a contract than on a common-law liability. It is not alleged that either the defendant or its predecessor agreed to keep the switch in the main line for any definite time, or that either expressly agreed to keep it there forever. The plaintiff contends that, nothing having been said as to the time, the implication is that the switch was to be maintained at all times, i. e. forever. Such a construction is quite at variance with the views of the supreme court, as expressed in *Texas & P. Ry. Co. v. City of Marshall*, 136 U. S. 393, 10 Sup. Ct. 846. In that case the city of Marshall filed a bill in equity to enforce an agreement with the railroad company under which it had given the railroad company \$300,000 in county bonds and 66 acres of land in the city limits, and the company, in consideration of the donation, agreed "to permanently establish its eastern terminus and Texas office at the city of Marshall, and to establish and construct at said city the main machine shops and car works of said railroad company." It was held that the contract on the part of the railroad company was satisfied and performed when the company had established and kept a depot and offices at Marshall, and set in operation said car works and machine shops there, and kept them going for eight years, and until the interests of the railway company and the public demanded a removal of all or part of these subjects of the contract to some other place; that the word "permanent," in the contract, was to be construed with reference to the subject-matter of the contract, and, under the circumstances of the case, it was complied with by the establishment of the shops, with no intention at the time of removing or abandoning them; that if the contract were to be interpreted as one to maintain forever the eastern terminus and the shops and Texas office at Marshall, without regard to the convenience of the public, it would become a contract that could not be enforced in equity. In this case, Mr. Justice Miller, speaking for the court, and referring to the contract, said:



"But it did not amount to a covenant that the company would never cease to make its eastern terminus at Marshall; that it would forever keep up the depot at that place; that it would for all time continue to have its machine shops and car shops there; and that, whatever might be the changes of time and circumstances of railroad rivalry and assistance, these things alone should remain forever unchangeable. Such a contract, while we do not say that it would be void on the ground of public policy, is undoubtedly so far objectionable as obstructing improvements and changes which might be for the public interest, and is so far a hindrance in the way of what might be necessary for the advantage of the railroad itself, and of the community which enjoyed its benefits, that we must look the whole contract over critically before we decide that it bears such an imperative and such a remarkable meaning."

In the light of this construction of an express agreement to locate and maintain a depot permanently at a town on the line of a railroad, it would seem clear that we should not imply in a contract for a private switch connection a term that it shall be perpetual, and thus forever limit the discretion of the directors to deal with a subject which may seriously affect the convenience or safety of the public in its use of the road.

The judgment of the circuit court is affirmed, with costs.

---

BERRY et al. v. SEAWALL et al. SHEPHERD v. SAME. BAUGHMAN et al. v. SAME. HAYS v. SAME. ARBOGAST v. SAME.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1895.)

Nos. 154-158.

1. PARTITION BY PAROL—EFFECT ON LEGAL TITLE—ESTOPPEL.

In Ohio, parol partition, consummated by possession and acquiescence under it for any less period than that which creates the bar of the statute of limitations, does not vest the legal title in severalty to the allotted shares; but such a partition, acquiesced in for any considerable length of time, will estop any person joining in it and accepting exclusive possession under it from asserting title or right to possession in violation of its terms.

2. EJECTMENT—ESTOPPEL AS DEFENSE.

In ejectment, any conduct which estops one in pais to assert title or right of possession to the land is a good defense.

3. MARRIED WOMEN—PARTITION—ESTOPPEL.

At common law, and in Ohio, where, until recent statutes, the rights and disabilities of married women were determined by the common law, a partition of land held in cotenancy by a married woman, made by her husband, and consented to by her, would bind her inheritance, if equal and fair, since she might by law be compelled to make such partition; and, accordingly, a married woman would be estopped to dispute a partition, fairly and equally made by her husband by parol, with her consent, and followed by long possession and acquiescence.

4. PRACTICE—SETTING ASIDE FINDING OF JURY.

A motion to set aside a special finding of a jury is a motion for a new trial on the issue thereby decided, is addressed solely to the discretion of the trial court, and is not reviewable by writ of error.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

These were five actions for the recovery of real estate, consolidated and heard together. A jury in the circuit court found a verdict for

the defendants, but the court, on motion, gave judgment for the plaintiffs non obstante veredicto. 55 Fed. 731. Defendants bring error.

These are five writs of error to review the same number of judgments in actions for the recovery of real estate, in which, the plaintiffs below being the same, and the questions of fact and law being identical, the court below ordered a consolidation under section 921, Rev. St. U. S. All the cases turned on the existence, validity, and effect in Ohio of a parol partition of lands by a married woman and her husband, followed by long possession and acquiescence in accordance therewith, as a defense to an action for recovery of real estate in a circuit court of the United States. The real estate in controversy in the different actions was the undivided one-third interest in lands all of which are embraced in a survey of 1,500 acres lying in Fayette and Union counties, Ohio, and in the Virginia military district, and which were conveyed by patent of the United States government, dated August 21, 1821, to the heirs and legal representatives of Col. William Greene Munford, in consideration of said Munford's services in the war of the Revolution. This patent was one of several issued in satisfaction of a United States land warrant for 6,666 $\frac{2}{3}$  acres in favor of the same beneficiaries, directed to the surveyor of the Virginia military land district in Ohio. Patents for 1,500 acres in the aggregate were issued to Duncan McArthur for his services in locating and surveying the land. The other patents in satisfaction of the warrant were for 1,500 acres (the one in controversy), for 1,300 acres, for 1,299 $\frac{3}{4}$  acres, for 437 acres, for 100 acres, for 410 acres, and for 120 acres. These, except the first, were dated August 22, 1822.

The original plaintiffs in the actions below, which were begun in 1877, were all of them descendants and heirs at law of Margaret Ann Sinclair, a granddaughter of William Greene Munford, and one of his heirs, when the patents above mentioned were issued. Subsequently a majority of the original plaintiffs conveyed all their interests to J. Hairston Seawall, and by consent of all parties the causes proceeded entitled as above. At the date of the issuance of the patents the heirs of William Greene Munford were in three branches, as follows: (1) Margaret Ann Sinclair, the daughter of a deceased son of William Greene Munford. She was born January 1, 1800, was married to John Sinclair, July 4, 1819, and died September 13, 1837. Her husband survived her, and did not die until August, 1875, shortly after which these suits were brought. (2) Robert H. Munford, Stanhope R. Munford, and Ann Munford, children of John Munford, a deceased son of William Greene Munford. (3) The children of Mary Stubblefield, daughter of William Greene Munford, and wife of Edward Stubblefield. It was conceded at the trial that Margaret Ann Sinclair, by the patent for 1,500 acres, became the owner in fee of an undivided one-third of the lands in controversy; that the plaintiffs were her lawful heirs or grantees; and that, unless the defendants could establish some fact by which she and her successors in title were barred from claiming the possession, the plaintiffs must have a verdict. The answer of the defendants, in addition to denying the title of the plaintiffs, pleaded the statute of limitations. On the trial the defendants sought to establish a parol partition, under which Margaret Sinclair and her husband parted with all interest in the 1,500-acre tract to her cotenants, and acquired the exclusive right in severalty to the 1,300-acre patent, which she and her husband subsequently, in 1824, sold by deed, with covenants of general warranty, for \$1,300. There was no direct evidence of the partition, but the proof of its existence rested on circumstances, the chief of which were the warranty deed of Margaret Ann Sinclair for the 1,300-acre tract above referred to, and the quiet possession of the 1,500-acre tract by the plaintiffs and their grantors, the other cotenants of Margaret Ann Sinclair, for more than 50 years. The court below submitted to the jury several questions, the answers to which show the facts to be as already stated. The jury found that there had been a parol partition as claimed by defendants, and also found a general verdict for the defendants. The circuit court was of the opinion that the evidence was not sufficient to sustain the special finding that there had been a parol partition, and set it aside. The court was further of the opinion that a parol partition, though followed by possession in accordance with it, was not a valid partition in Ohio against a married woman, and constituted no defense to the plaintiffs'

case. Therefore, disregarding the finding of a parol partition as immaterial, the court, on motion, gave judgment in each case for the plaintiffs on the other special findings non obstante veredicto.

Mills Gardner and Humphrey Jones, for plaintiffs in error.

Matthews & Cleveland, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Counsel for the plaintiffs in error have devoted some time in argument and some space in their brief to a discussion of the action of the court in setting aside the finding of the jury that there had been a parol partition between Margaret Sinclair and her cotenants. This action of the court is not before us for review. A motion to set aside a special finding is a motion for a new trial on the issue thereby decided, and is addressed solely to the discretion of the trial court. It is not reviewable by writ of error. *Railway Co. v. Struble*, 109 U. S. 381, 3 Sup. Ct. 270. The only question for our consideration here is whether the action of the court below was right in giving judgment for the plaintiffs on the facts found by the jury, including the fact of a parol partition. If a parol partition, followed by a correspondent possession in severalty, was a good defense by the law of Ohio, then the fact that the evidence was insufficient to sustain a finding of such parol partition would not justify the court in ignoring the finding and giving judgment for plaintiffs; and, having submitted the question of fact as to parol partition to the jury, the court could only set aside the finding, and grant a new trial. The judgment under review therefore rests on the proposition that a parol partition between a married woman and her husband and her cotenants, followed by long correspondent possession, is not, in Ohio, a valid defense in an action by her or her heirs for the recovery of her original undivided interest in the part assigned under the partition to her cotenants. If this proposition cannot be supported, the judgment must be reversed; otherwise it must stand.

The statute of limitations was pleaded in these cases, but cannot avail the defendants. The statute in force at the time the possession of defendants and their grantors was begun is still in force and is as follows:

"An action for the recovery of the title or possession of lands, tenements or hereditaments can only be brought within twenty-one years after the cause of such action accrues." Rev. St. Ohio, § 4977.

The saving clause of this statute, in force until after the bringing of these suits, was as follows:

"If a person entitled to commence such action is, at the time his right or title first descends or accrues, within the age of twenty-one years, a married woman, insane or imprisoned, such person may, after the expiration of twenty-one years from the time his right or title first descended or accrued, bring such action within ten years after such disability is removed, and at no time thereafter." Section 4978.

By virtue of the foregoing section, the statute did not run against Margaret Ann Sinclair during her life, because she was under

coverture from the time possession was taken in accordance with the partition until her death in 1837. When she died, the right of entry was in her husband as tenant by the curtesy, and the statute could not begin to run against her heirs until his death, in 1875, and the termination of his right of entry. Till then no right of entry or action accrued in favor of the heirs. *Lessee of Ford v. Langel*, 4 Ohio St. 465; *Koltlenbrock v. Cracraft*, 36 Ohio St. 584; *Carpenter v. Denoon*, 29 Ohio St. 398; *Holt v. Lamb*, 17 Ohio St. 374.

The consideration of the question of the parol partition, which, for the purposes of our decision, must be assumed to have taken place between 1821 and 1824, as claimed by the defendants below, has been divided by counsel in argument into four heads: First. Does a parol partition of land in Ohio between all the cotenants, consummated by long possession and acquiescence short of the period for ripening of title by adverse possession under the statute of limitations, pass a legal title in severalty to the allottees in their respective shares? Second. Does it pass the legal title of a married woman who, as one of the cotenants, consented to and took part in the division and possession? Third. Even if it does not pass the legal title, will it estop in pais a cotenant who was *sui juris* to bring an action at law in courts of the United States to recover an undivided interest in the parts assigned in the partition to his other cotenants? Fourth. Will such an estoppel in pais prevail in Ohio against a cotenant who was a married woman, and joined with her husband in making such a partition?

It will be convenient for us to take the same course as counsel in our consideration of this case.

1. The effect of a parol partition consummated by possession and acquiescence upon the legal title to the land has never been directly decided in Ohio. The cotenants in this case are properly described as tenants in common, though the derivation of their title has in some aspects an analogy to that of coparceners at common law, and in others to joint tenants. As the right of survivorship, which was incident to joint tenancy, never existed in Ohio (*Sergeant v. Steinberger*, 2 Ohio, 305), there is now no substantial difference in that state between tenants in common, coparceners, and joint tenants. There never was much practical difference between the first two after the statutes of 31 & 32 Hen. VIII. gave the right of compulsory partition to a tenant in common as it had always existed at common law in favor of coparceners. It is true, coparceners were said to have unity of person, title, and possession, and tenants in common only unity of possession, but these nice and technical distinctions between the cotenancies which it required "the cunning learning" of the old common-law lawyer fully to understand and appreciate have long disappeared in Ohio. *Tabler v. Wiseman*, 2 Ohio St., 208; 4 Kent, Comm. 367. The claim of counsel for defendants below is founded on the mode of voluntary partition between tenants in common at common law by which legal title in severalty was vested in the former cotenants. "If two tenants in common be, and they make partition by parol, and execute the same in severalty by livery, this is good and sufficient in law." Co. Litt. 169a, § 250. The

argument is that, as possession is the modern equivalent of seisin, a parol partition, followed by correspondent possession, must be now good in law. The chief objection to this contention is found in that clause of the statute of frauds which is now to be found in section 4198, Smith & B. Rev. St. Ohio, as follows:

"No lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in or out of lands, tenements, or hereditaments, shall be assigned, or granted, except by deed or note, in writing, signed by the party so assigning or granting the same, or his agent thereunto lawfully authorized by writing, or by act and operation of law."

It is contended by counsel for the defendants below that the change which takes place by a partition between tenants in common does not involve either the assignment or grant of any interest, or any uncertain interest of, in, and out of lands, as it is a mere fixing of boundaries between persons who, by different titles, have had possession of a tract of land in common because they did not know their limits. Judge Ranney, speaking for the supreme court of Ohio in *Tabler v. Wiseman*, 2 Ohio St. 207, 211, says of partition between tenants in common:

"It operates upon the possession, dissolves the unity before existing, and enables each of the owners to know, possess, and enjoy his own share of the common estate in severalty. This construction preserves all the analogies of the law, and is fully sustained by the adjudged cases. It is well settled that such a proceeding does not decide title or create any new title. It barely dissolves the tenancy in common, and leaves the title as it was, except to locate such rights as the parties may have, respectively, in distinct parts of the premises, and to extinguish it in all others."

Previous to partition, certainly each tenant in common has an interest in every foot of the undivided tract. This interest is enjoyed by possession until partition. The right to use and enjoy every part of the land is commensurate with the permanency of the estate, and endures as long, provided it is not terminated by partition. When voluntary partition takes place, each party, by his act, transfers or releases the interest which he had in all the land for an exclusive and fixed possession in a part. He does not derive title or estate from his cotenant by this transfer, so that either can be said to hold under the other, or to strengthen or weaken his title to his half by the strength or weakness of his cotenant's title, but we think it clear that there is a mutual transfer by each tenant to the other of his previous right of possession in the part assigned to the other. This is an interest in land, and is within the letter of the statute of frauds. It is, moreover, within the spirit of that statute. The danger that fraud and perjury would unsettle the ownership of lands in disputes over the terms of a partition was not materially less than in those over the terms of a sale or exchange of lands in severalty. Especially in this country and state, where there was no law of primogeniture, and the land descended equally to the children, there was very little land which must not be subjected to partition at some time; and the probability that such partitions, if their terms depended on verbal agreements, would involve the greatest uncertainty in the ownership of land, must have been ap-

parent to the legislature, and within the mischief which the statute was enacted to avoid. For similar reasons, we are of opinion that the change of ownership involved in partition is within the statute of deeds. The act of 1820 concerning deeds, which was in force when the partition in this case is said to have been agreed to and executed, began in this wise:

"That when any man or unmarried woman above the age of twenty-one years shall within this state execute a deed, mortgage or other instrument of writing, by which any lands, tenements or hereditaments lying and being within the same shall be conveyed in whole or in part, or otherwise affected or incumbered in law, such deed, mortgage or other instrument of writing shall be signed, sealed," etc.

The implication of this statute is that lands shall not be conveyed, in whole or in part, or otherwise affected or incumbered in law, except as therein prescribed. *Clark v. Graham*, 6 Wheat. 577, 579. The present statute (Smith & B. Rev. St. § 4106; 84 Ohio Laws, 132, 133), begins, "A deed, mortgage, lease of any estate or interest in real property shall be signed," etc. The two statutes are in *pari materia*, and cover the same subject-matter. A voluntary act of the owner of land, by which he creates or enlarges an irrevocable right to enjoy that land in another, affects the land, and transfers an interest in it within the meaning of this statute. It is true that the right or interest was only one of possession, but it was incident to a title which could only be described by reference to the entire land, and was as enduring as that title until partition. The purpose of the statute of deeds was to require permanent, solemn, and certain evidence of the change in ownership of real estate by voluntary act; and we think that, as partition is one of the most frequent methods of change in ownership by voluntary act, it was necessarily within the purpose of the statute. The recording acts were passed to give to the public exact evidence of the ownership of each piece of land in the community. Is it possible that the legislature did not intend that the public should know from that record whether land is owned by one person or a dozen? But it is said that the public may know of the partition by the visible possession. So they may know the ownership of all land. If the change of ownership caused by a partition is not within the deed statute, there would seem to be no authority for recording partition deeds at all. The recording act (section 4134, Smith & B. Rev. St.) provides for the recording of "deeds and instruments for the conveyance or incumbrance of any lands, tenements or hereditaments." It nowhere gives the county recorder specific authority to record partition deeds. Unless, therefore, a partition deed is a deed for the conveyance of land, or some interest in it, it would seem not to be within the description of those deeds whose record is provided for by law. If no provision is made for such record, then the innumerable records of partition deeds that have been made since the admission of Ohio as a state are nullities, and certified copies of them are not evidence in any court of justice. *Ramsey v. Riley*, 13 Ohio, 157; *Johnston v. Haines*, 2 Ohio, 55. This is the absurd conclusion we must reach if we once yield to the claim that a partition does not involve a transfer of interest in land within

the statute of frauds, the statute of deeds, and the recording act of Ohio.

It is not too much to say that the view that a parol partition in Ohio and possession for less than the period of the statute of limitations in accordance with its terms can vest legal title in severalty in the allotments is entirely contrary to the public policy of the state, as shown by its legislation and the decisions of its courts. In the case of *Lessee of Lindsley v. Coats*, 1 Ohio, 243, the action was ejectment. The defense was that the plaintiff and defendant had entered into a parol agreement for the exchange of lands in the same county, and had executed it, whereby defendant had come into possession of the land in controversy, and had remained in possession 16 years. The exchange had taken place in 1807. There was no statute of frauds in Ohio until 1810. The territorial law of Ohio adopted the common law of England and the statutes in aid thereof to 4 Jac. I. The defendant therefore relied on the principle of the common law, by which a parol exchange of lands situate in the same county was good if followed by possession under it. *Shep. Touch.* 294; *Co. Litt.* §§ 51, 52, 62. The supreme court, meeting this argument of defendant, said:

"It has been repeatedly determined by the courts of this state that they will adopt the principles of the common law as the rules of decision, so far only as those principles are adapted to our circumstances, state of society, and form of government. In no instance have the common-law modes of conveyance, as such, been adopted in this state; and long anterior to the settlement of this country they had given way to the comparatively modern mode of assurance by deeds of lease and release, bargain and sale, etc. There is nothing in our circumstances or state of society that would seem to require the adoption of a principle so pregnant with mischief as that the title to real estate might rest in and be evidenced by parol only. The policy of all our laws respecting lands is opposed to such a principle. Without attempting to enumerate the different acts of the legislature applicable to this subject, it may be said that from the first organization of the government to the present time it has been the policy of our laws that the title to real estate should be matter of record, subject to the inspection of every individual interested. The uniform custom of giving and receiving deeds upon all sales and transfers of real estate has been in accordance with this policy, and this is believed to be the first instance in which an attempt has been made to sustain a legal title to lands resting only on a parol contract. The policy of law, the custom of our country, the danger of perjury, and the many inconveniences that must necessarily result from the establishment of the principle contended for by the defendant, would, in the absence of all legislative provision upon the subject, require us to declare that the exchange claimed by the defendant did not transfer to him the legal title to the land in controversy; and that no contract evidenced only by parol, though accompanied with possession or livery of seisin, would vest in the purchaser a legal estate in or legal title to lands."

While this decision related to an exchange of lands, it declares with so much emphasis the policy of the state in respect of the necessity for written and recorded evidence of the ownership of land that we cannot think it doubtful what the same court would say, were it called upon to answer the question before us, of the effect of a parol partition, however completely consummated, on the legal title to the aparted land. While the supreme court of this state has never directly passed on the question, the cases in which the effect

of an executed parol partition has been considered leave little doubt that it is not regarded by that court as apportioning the legal title. In *Piatt v. Hubbell*, 5 Ohio, 243, the court held that a parol partition, followed by possession and improvements in accordance with it, could not be disturbed in chancery. If the legal title had passed, certainly the partition needed the aid of no equitable principle to support it. The same implication arises from the case of *Cummings v. Nutt, Wright* (Ohio) 713, in which a court of chancery decreed the execution of releases in accordance with a parol partition executed by nine years' possession under it. If the allottees had acquired legal title in severalty, what was the necessity for, or right to have execution of deeds? In *Bank v. Wallace*, 45 Ohio St. 152, 168, 12 N. E. 439, Judge Dickman uses this language:

"There was no parol partition consummated by possession taken and held in accordance therewith, and so long acquiesced in as to call for the protection of a court of equity."

If a legal title passes by such a partition, it would hardly need the protection of a court of equity. There is nothing in the decision of Judge Saylor in *Docktermann v. Elder* (Com. Pl. Hamilton Co.) 27 Wkly. Law Bul. 195, upon which to base the inference that the legal title passes by parol partition and possession.

In *Johnson v. Wilson, Willes*, 248, 253, several tenants in common, wishing to make partition of their lands, covenanted by deed to pay the expenses of, and to abide by the award of, arbitrators. The arbitrators allotted the whole in severalty, but did not direct conveyances to vest the allotments in the respective owners. A suit was brought on the covenants against the allottees for not performing them, and the defense was that the arbitrators had not completed partition. It became important, therefore to determine whether by allotment without conveyance there had been a legal partition. Lord Chief Justice Willes discusses what was necessary to make a good partition at common law between tenants in common, and points out that livery of seisin was necessary, and continues:

"This was before the statute 29 Car. II., where a feoffment might be by parol; and the livery which is mentioned supposes that a feoffment is intended, which would then have been a proper conveyance. And therefore, as since the statute of Car. II. no conveyance can be but by deed, a proper conveyance is now become necessary, and for this reason the award is incomplete and not good."

This is the only litigated case in England which has been cited to the court where the question of the effect of the statute of frauds on such a partition has arisen. It is obvious that this construction of the statute was deemed so manifest that it was never again called in question. There are cases in equity in which parol partitions were recognized because there were equitable grounds for not disturbing them. As already explained, the exercise of equitable jurisdiction in such cases implies that legal title is not affected by such a partition. *Ireland v. Rittle*, 1 Atk. 541; *Whaley v. Dawson*, 2 Schoales & L. 367. The English law writers are of one accord upon the question. Bl. Comm. bk. 2, p. 324; 2 Cruise, Dig. 538; Alln. Partit. pp. 129, 130; Rob. Frauds, 285.



The Ohio statute of frauds was copied verbatim from the third section of the English statute of 29 Car. II. When it was adopted into the legislation of this state in 1810 (29 Ohio Laws, 218), it then had a fixed construction in England in respect of its bearing on parol partitions. It is hardly likely that courts of Ohio would give the statute a narrower scope than those of the mother country, from whose legislation it was borrowed.

The weight of authority in America, though there is a conflict, sustains the view that a parol partition is within the statute of frauds and the statute of deeds. In *Porter v. Perkins*, 5 Mass. 233, Chief Justice Parsons, speaking for the supreme judicial court of Massachusetts, in a case where the validity of a parol partition followed by long possession was in question, said: "Since the statute of frauds, partition by parol is void." See, also, *Porter v. Hill*, 9 Mass. 34, 35. The same view has been taken by the supreme court of Maine (*Manufacturing Co. v. Heald*, 5 Me. 384; *Duncan v. Sylvester*, 16 Me. 388; *Chenery v. Dole*, 39 Me. 162), and by the supreme court of New Hampshire (*Dow v. Jewell*, 18 N. H. 340, 353; *Wood v. Griffin*, 46 N. H. 231, 237; *Ballou v. Hale*, 47 N. H. 347), and the opinion of Chief Justice Parsons is cited in all these cases. In Vermont it is held that by a parol partition, followed by possession sufficiently long to raise the bar of the statute, the interest of the allottees in their respective shares ripens into a legal title in severalty, but that partition with possession short of the period of limitation is not binding in law on the cotenants. *Booth v. Adams*, 11 Vt. 156; *Pope v. Henry*, 24 Vt. 560; *Johnson v. Goodwin*, 27 Vt. 288. The necessary result of the Vermont cases is the same as in the Massachusetts, Maine, and New Hampshire cases, that parol partition and possession short of the period of limitation do not vest the legal title. The supreme court of New Jersey has held that a parol partition between tenants in common is within the statute of frauds. *Den ex dem. Woodhull v. Longstreet*, 18 N. J. Law, 405; *Lloyd v. Conover*, 25 N. J. Law, 47. The opinion of Chief Justice Hornblower in *Woodhull v. Longstreet* is the most satisfactory discussion of the subject contained in all the books, and, after a review of all the authorities, points out with telling force the objections to a modern recognition of so loose, dangerous, and archaic a method of creating a legal muniment of title as that by a parol partition and possession. In Delaware, North Carolina, Kentucky, and California, parol partitions are held to be within the statute of frauds. *McCall v. Reybold*, 1 Har. (Del.) 150; *Medlin v. Steele*, 75 N. C. 154; *Anders v. Anders*, 2 Dev. 529; *McPherson v. Seguire*, 3 Dev. 153; *Duncan v. Duncan*, 93 Ky. 37, 18 S. W. 1022; *White v. O'Bannon*, 86 Ky. 93, 5 S. W. 346; *Gates v. Salmon*, 46 Cal. 362. The supreme court of South Carolina holds that a parol partition is within the statute of frauds, but that long possession thereunder will be such a part performance as to take the case out of the statute in equity, and will constitute a good defense to a bill for a new partition. *Rountree v. Lane*, 32 S. C. 160, 10 S. E. 941; *Kennemore v. Kennemore*, 26 S. C. 251, 1 S. E. 881; *Goodhue v. Barnwell*, Rice, Eq. 198; *Jones v. Reeves*, 6 Rich. Law, 132. The cases of *Haughabaugh v. Donald*, 3 Brev. 97,

and *Slice v. Derrick*, 2 Rich. Law, 627, did not require the expression of such an opinion, but the judges seem to have considered that a parol partition might be good at law on the authority of the New York cases hereafter to be considered. However this may be, the later authorities above cited are, of course, controlling.

In Alabama, it is held that a parol partition followed by possession short of the period of the statute of limitation was not a good defense to an action of ejectment, but that in equity, such a partition, attended by possession, would be enforced and confirmed. *Yarbrough v. Avant*, 66 Ala. 526. In Georgia and Mississippi it is permissible under a code to plead equitable defenses to actions at law, and, though it is a matter of some doubt, it is probable that in these states a parol partition is regarded as within the statute of frauds. In *Welchel v. Thompson*, 39 Ga. 559, the action was for a partition. The defense was that there had been a previous parol partition. The trial court charged that it was no defense unless possession had continued for seven years, which was the period of limitation for the ripening of title by adverse possession fixed by statute. The ruling was reversed on the ground that possession for less than the statutory period was a part performance of the contract, and constituted an equitable title, and a defense to the action. In *Hamilton v. Phillips*, 83 Ga. 293, 9 S. E. 606, the action was ejectment. A parol partition, with possession under it continued for 25 years, was held a good defense. Of course, in such a case, the possession for so long a time would have ripened into a legal title. In *Natchez v. Vandervelde*, 31 Miss. 707, which was a bill for the specific performance of a parol partition accompanied by possession, a decree was entered confirming the partition. As already pointed out, this would have been entirely unnecessary, had the partition and possession vested a legal title. See, also, *Pipes v. Buckner*, 51 Miss. 848; *Wilkey v. Bonney's Lessee*, 31 Miss. 644. What has been said of Georgia and Mississippi is true also of West Virginia. *Frederick v. Frederick*, 31 W. Va. 566, 8 S. E. 295; *Patterson v. Martin*, 33 W. Va. 494, 10 S. E. 817. In Missouri, Illinois, Wisconsin, Indiana, and Texas, it is held that a parol partition, followed by possession, gives to the allottees an equitable title in their respective shares, but that the legal title is held by all in common. *Le Bourgeoise v. Blank*, 8 Mo. App. 434; *Bompart v. Roderman*, 24 Mo. 398; *Hazen v. Barnett*, 50 Mo. 506; *Nave v. Smith*, 95 Mo. 596, 8 S. W. 796; *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. 674; *Gage v. Bissell*, 119 Ill. 298, 10 N. E. 238; *Shepard v. Rinks*, 78 Ill. 188; *Grimes v. Butts*, 65 Ill. 347; *Tomlin v. Hilyard*, 43 Ill. 300; *Manly v. Pettee*, 38 Ill. 131; *Buzzell v. Gallagher*, 28 Wis. 680; *Eaton v. Tallmadge*, 24 Wis. 217; *Bruce v. Osgood*, 113 Ind. 360, 14 N. E. 563; *Savage v. Lee*, 101 Ind. 514; *Hauk v. McComas*, 98 Ind. 460; *Bumgardner v. Edwards*, 85 Ind. 117; *Moore v. Kerr*, 46 Ind. 468; *Aycock v. Kimbrough*, 71 Tex. 330, 12 S. W. 71; *Wardlow v. Miller*, 69 Tex. 395, 6 S. W. 292; *Stuart v. Baker*, 17 Tex. 419; *Houston v. Sneed*, 15 Tex. 307. In Indiana and Texas it is expressly held that the statute of frauds does not apply to parol partitions, but that nothing but an equitable title passes by partition and possession. In Texas the conclusion that a parol parti-

tion is not within the statute of frauds is based on the difference between the language of the English and Texas statutes of frauds. In Connecticut, Maryland, and Iowa are to be found cases in which parties to a parol partition, followed by possession and improvements in accordance with its terms, have been held estopped in equity to repudiate it, and have been required by decree to perfect it (*Brown v. Wheeler*, 17 Conn. 345; *Hardy v. Summers*, 10 Gill & J. 319; *Mahon v. Cooley*, 36 Iowa, 479), but no one of these cases affirms that by such a partition and possession short of the limitation period the legal title in severalty vests in the allottees. The fact is that there are only three states where such a doctrine does prevail. Those are New York, Pennsylvania, and Virginia. It will be seen that the question is probably an open one in Virginia. The doctrine had its beginning in a decision of Chancellor, then Chief Justice, Kent, in the case of *Duncan v. Harder*, 4 Johns. 202. In that case—which was an action of ejectment—he said:

“A parol partition, carried into effect by possession taken according to it, will be sufficient to sever the possession, as between tenants in common, whose titles are distinct, and where the only object of the division is to ascertain the separate possession of each.”

The decision has been followed in New York in *Jackson v. Vosburgh*, 9 Johns. 270; *Jackson v. Long*, 7 Wend. 170; *Ryerss v. Wheeler*, 25 Wend. 434; *Baker v. Lorillard*, 4 N. Y. 257; *Wood v. Fleet*, 36 N. Y. 499; and *Taylor v. Millard*, 118 N. Y. 245, 23 N. E. 376. It will be observed that in the passage quoted above Chief Justice Kent makes no reference whatever to the statute of frauds, which in New York is even more comprehensive than the English statute, and gives no reason why it did not render invalid parol partitions. Not until the decision of *Wood v. Fleet* (decided in 1867) was any attempt made by the court of appeals of New York to reconcile the validity at law of a parol partition with the statute of frauds, and then recourse was had to the doctrine of part performance in equity. By that time, however, the doctrine laid down by Chief Justice Kent in the early years of the state, and followed without question by subsequent judges, had become a rule of property, and the principle of *stare decisis* prevented a departure from it. *Freem. Coten*. § 298. In Pennsylvania, where there is no administration of equity jurisprudence except through courts of law, parol partitions, followed by possession, were upheld at law on the equitable ground of part performance and estoppel. *Ebert v. Wood*, 1 Bin. 216; *Bavington v. Clarke*, 2 Pen. & W. 115. In *Gratz v. Gratz*, 4 Rawle, 410, it was held that a parol partition was within the statute of frauds, and void; but in subsequent cases this was not followed. *Calhoun v. Hays*, 8 Watts & S. 127; *McMahan v. McMahan*, 13 Pa. St. 380; *Darlington's Appropriation*, Id. 430; *McConnell v. Carey*, 48 Pa. St. 348; *Williard v. Williard*, 56 Pa. St. 127; *Mellon v. Reed*, 114 Pa. St. 647, 8 Atl. 227; and *McKnight v. Bell*, 135 Pa. St. 358, 19 Atl. 1036. In the last case *Gratz v. Gratz* is expressly overruled, and it is distinctly declared that a parol partition of lands in Pennsylvania, followed by possession in accordance with it, vests the title in severalty, and gives not a mere equitable right, but one recognized

and enforced at law. In Virginia, the special court of appeals, in *Coles v. Wooding*, 2 Pat. & H. 189, held that by parol partition, followed by long possession, the allottees became seised in severalty. See, also, *Bryan v. Stump*, 8 Grat. 241. In *Bolling v. Teel*, 76 Va. 487, referring to the mode of partition at common law by parol agreement and livery of seisin, the judge says:

"Whether this rule of the common law is now changed, and mutual conveyances are necessary under the statute of frauds and perjuries, is a controverted question. Judge Lomax and Professor Minor concur in the opinion that coparceners may still make partition by parol without deed. 2 Minor, Inst. 438. The special court of appeals, in *Coles v. Wooding*, 2 Pat. & H. 189, laid down the same doctrine. My brethren take the same view. It must be admitted, however, that there are many respectable opposing authorities. This case does not call for an express decision of that question."

From this it would seem that the question is not definitely settled in Virginia, though the probability is that the New York theory will be adopted, should occasion arise.

The result of a careful examination of all the foregoing cases is that by the great weight of authority in this country a parol partition, consummated by possession and acquiescence under it for any less period than that which creates the bar of the statute of limitations, does not vest the legal title in severalty to the allotted shares, but that such a partition, acquiesced in for any considerable length of time, will estop any person joining in it and accepting exclusive possession under it from asserting title or right to possession in violation of its terms.

2. In view of this conclusion, it becomes unnecessary to discuss whether, even if a parol partition could vest legal title as between partitioners who were *sui juris*, it would nevertheless be void as against a married woman under the statute of Ohio prescribing the mode by which she must convey the legal title to her lands.

3. The action below was an action for the recovery of real estate under the Code of Ohio. In the state courts, of course, it would be permissible to make equitable defenses, but in the United States court the same rules must prevail as in the action of ejectment at common law. The supreme court of the United States has decided in two cases that, while equitable estoppel or estoppel in pais will not constitute a good title upon which to found ejectment, it will constitute a good defense to the action, because, even at law, such a ground is recognized as a valid reason for denying the right of possession to one against whom it may justly be urged. In *Kirk v. Hamilton*, 102 U. S. 68, it was held a good defense to an action of ejectment that the plaintiff, without objection, permitted the defendant, who thought he had a good title by judicial sale, to improve the property, and occupy it for some years, even though the sale was void against the plaintiff, the former owner, and the then holder of the legal title. In *Dickerson v. Colgrove*, 100 U. S. 578, land in Michigan descended to a brother living in California and a sister in Michigan. The sister and her husband sold the whole of the land with covenants of general warranty. The purchaser, afterwards learning of the brother's interest, wrote him concerning it. The brother wrote the sister to tell the purchaser to fear nothing from him, that he

never intended to claim the land. The purchaser thereupon sold with general warranty. Subsequently the brother sued in ejectment. He was held estopped by his conduct to assert his right to possession.

The right of the defendants in ejectment to defeat recovery by showing an estoppel in pais is not denied by counsel for plaintiffs below, but it is claimed that there was nothing before the circuit court tending to establish such a defense, and this for two reasons: First, it is said that the facts disclosed would not work an estoppel against a person *sui juris*; and, second, that Margaret Sinclair, being a feme covert at the time of the alleged parol partition, and from that time to her death, could not, by any conduct, however fraudulent, create against herself an estoppel which would divest her of her real estate.

The evidence which was admitted by the court below tended to show that after the alleged partition Margaret Sinclair and her husband sold for \$1,300, by deed with covenants of general warranty, the 1,300 acres in which they had, before the partition, but an undivided one-third interest. The evidence also tended to show that one branch of her former cotenants had sold in fee simple, nearly, if not quite, all of the 1,500-acre tract in controversy with covenants of general warranty, and that from the time of the partition down to Margaret Sinclair's death, the grantees under this latter conveyance had undisturbed occupancy. If Margaret Sinclair had been a feme sole, it would be difficult to state a clearer case of estoppel in pais. By entering into a parol partition she said, as strongly and emphatically as conduct could say anything, that she did not intend thereafter to claim any interest in the shares of land assigned in the partition to her cotenants, and she made this representation irrevocable by taking to her exclusive benefit the part assigned to her, and selling it in its entirety to another. Relying on her consent to the partition, and her active participation in appropriating its fruits, her cotenants made themselves liable under covenants of general warranty to their grantees, and for the 13 years remaining to her of life there was nothing said or done to disturb the confidence which her cotenants had justly reposed in the permanency of the partition. If this conduct in a person *sui juris* would not create estoppel in pais, it is difficult to conceive conduct which would. Said Mr. Justice Swayne in *Dickerson v. Colgrove*:

"The law upon the subject is well settled. The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked."

The case at bar, on its facts, cannot be distinguished from that of *Dickerson v. Colgrove*, except in that Margaret Sinclair was under disability of coverture. Parol partition, followed by long possession, furnishes frequent occasion for the proper application of the prin-

ciples of estoppel in pais. The consent to a partition is necessarily the plainest invitation to all concerned to treat the share assigned as the several property of the respective allottees; and sales of the same by the respective allottees under general warranty, and the investment of labor and money in substantial improvements, are the usual result, and create all the necessary elements, of the estoppel. In *Dickerson v. Colgrove*, supra, Mr. Justice Swayne, as authority for the proposition that estoppel in pais is a proper defense in ejectment, cites *Brown v. Wheeler*, 17 Conn. 345, 353. That case was one of parol partition of inherited lands between a widow and two sons of a decedent. Possession was taken in accordance with the division, and continued for many years. Then one of the sons conveyed his own share to a stranger, and also an undivided interest in his mother's share. In ejectment by the stranger against the widow he was held estopped by the conduct of his grantor to dispute the partition. In answer to the objection, that the defense of estoppel in pais could not be made at law, the supreme court of Connecticut uses language which Mr. Justice Swayne quotes as follows (*Dickerson v. Colgrove*, 100 U. S. 582):

"This is certainly not the common law. Littleton says: And so a man can see one thing in this case: that a man shall be estopped by matter of fact, though there be no writing, by deed or otherwise. Lord Coke, commenting hereon, gives an instance of estoppel by matter in fact,—this very case of partition. Co. Litt. 352, § 667. And such an award has been held sufficient to estop a party against whom ejectment was brought. *Doe d. Morris v. Rosser*, 3 East, 15."

Reference has already been made, in the discussion of the effect of parol partition upon the legal title, to the very great number of other cases in which it is held that such a partition, consummated and acquiesced in for any considerable time, estops those holding it from asserting title or right of possession to the contrary. We think, therefore, that as against a person *sui juris* there would be, on the facts disclosed in this case, no difficulty in upholding the partition on principles of estoppel.

4. We come now to a most difficult question, and that is whether Margaret Sinclair's coverture renders the doctrine of estoppel in pais wholly inapplicable to this case. In 1824, when the partition is said to have taken place, the disabilities of married women in Ohio were exactly as they were at common law, except that there was no mode of conveying her estate or barring dower by levying fines. Instead of fines, early in the history of the state a statute was enacted enabling a wife to convey her real estate or to bar her dower by joining with her husband in a deed executed as hereafter shown. The act of 1820, which was the third act on the subject, was in force at the time of the partition. It provided as follows:

"Sec. 2. That when a husband and wife (she being eighteen years old or upwards), shall within this state execute any deed, mortgage or other instrument of writing, for the conveyance or incumbrance of the estate of the wife, or her right of dower to any lands, tenements or hereditaments whatsoever, such deed, mortgage or other instrument of writing shall be signed and sealed by the husband and wife,"

—And acknowledged before two witnesses, and a judge of the common pleas or justice of the peace, who should examine the wife

separate and apart from her husband, and make known and explain the contents of the instrument to her, and, if she declared that she had acknowledged and still acknowledged the signing and sealing as of her own free will and accord, and without fear or coercion of her husband, should certify the same, then the deed would be valid in law. Chase's St. 1139. The third section made all deeds executed out of the state valid in law if executed either according to the law of the state where executed or according to the law of Ohio. Another section provided for the execution by a married woman of a power of attorney to convey her estate by deed. It is important to bear in mind, that this was an enabling act, and gave to married women a power they did not have at the common law. In *Glenn v. Bank*, 8 Ohio, 80, Judge Grimke, speaking for the supreme court of the state with reference to the change from the levying of a fine at common law to this mode of barring dower, said that they would not "voluntarily apply any very nice or technical rules in the construction of a statute which is made in furtherance of, rather than in derogation of, the rights of married women." It was an act that related to the transfer of the legal title of the interest of married women in real estate. It impliedly prohibited the transfer of such title in any other way; but it was not, in any other sense, a restriction on her power to deal with her property. If she had power to make a binding executory contract to sell her property at the common law, there was nothing in the statute to prevent her doing so. The reason why she could not make such a contract in Ohio in 1824 was because she was under the same disabilities in that respect as she was at common law. To determine, therefore, the legal effect or binding character of the act or conduct of a feme covert in 1824, in Ohio, other than the conveyance of the legal title to her land, reference must be had to the principles of the common law, and to those special modes of relief which had their rise in courts of equity to soften the rigor of the fiction by which at common law the legal identity or existence of the feme covert was lost in that of her husband. In *Phillips v. Graves*, 20 Ohio St. 371, the question was whether a woman had charged her real estate in equity, and it was objected that the statute of deeds prevented her affecting or charging her real estate except in the mode prescribed therein. To this Judge McIlvaine answered:

"But we may observe that the only office of the statute referred to is to prescribe the mode, and the only mode, in which the legal title to lands and tenements in this state may be transferred or otherwise affected by act or deed of the owner. It treats only of legal evidences of title or interests in land. The same mode, substantially, is prescribed for men and unmarried women and wives. But in neither case does the statute affect the power of a court of chancery to charge equities upon lands and tenements, or attempt to define what may or may not be an equity chargeable upon real estate." Page 390.

When, therefore, we find reiterated in Ohio decisions the statement that a married woman cannot divest herself of title to her real estate, and cannot bind herself in respect thereto, or in any way affect her real estate except in the mode prescribed in the statute of deeds, we must understand that this is not because of the statute,

but that it is a general statement of the disabilities of a married woman with respect to her property at common law, and that the statute of deeds created an exception to the rigorous common-law rule; and, while it must be strictly complied with, to secure the effect provided, it was nevertheless rather an enabling than a disabling provision. Such is the only weight to be given to the cases, which, in such great number, have been cited to the court. *Murdock v. Lantz*, 34 Ohio St. 589, 597; *Todd v. Railroad Co.*, 19 Ohio St. 526; *Needles' Ex'r v. Needles*, 7 Ohio St. 432, 437; *Purcell v. Goshorn*, 17 Ohio, 107; *Silliman v. Cummins*, 13 Ohio, 116; *Meddock v. William*, 12 Ohio, 377; *Lessee of Good v. Zercher*, Id. 364; *McFarland v. Febiger*, 7 Ohio, 194; *Connell v. Connell*, 6 Ohio, 358. At common law and in Ohio, down to the married woman acts of 1846 and 1861, a man had a freehold estate in all the property of his wife jure uxoris, which he could convey or sell, and which was subject to execution for his debts. *Lessee of Thompson's Heirs v. Green*, 4 Ohio St. 216. She had no power to make contracts which would bind or affect her property, and, as she could not contract with reference to it, she could not, by her conduct, create a liability with respect to it, or estop herself from asserting a title to it on her husband's death, unaffected by anything done by her during coverture. *Drury v. Foster*, 2 Wall. 24; *Sims v. Everhardt*, 102 U. S. 300; *Bank v. Lee*, 13 Pet. 107, 119; *Weatherhead's Lessee v. Baskerville*, 11 How. 329, 359; *Meegan v. Boyle*, 19 How. 130, 150; *Todd v. Railroad Co.*, 19 Ohio St. 514; *Rice v. Railroad Co.*, 32 Ohio St. 380; *Murdock v. Lantz*, 34 Ohio St. 589; *Dukes v. Spangler*, 35 Ohio St. 119, 127; *Lowell v. Daniels*, 2 Gray, 161; *Hastings v. Merriam*, 117 Mass. 245. This was a general rule at common law, but it had exceptions, and it is with one of the exceptions that we are called upon to deal.

It is a principle which seemed to have general application at common law with respect to persons under disabilities that whatever they could be compelled by law to do they might effectually do without compulsion. Thus in *Zouch ex dem. Abbot v. Parsons*, 3 Burrows, 1801, Lord Mansfield, presiding in the court of queen's bench in banc, in a case involving the validity of a conveyance by an infant mortgagee, used this language:

"If an infant does a right act, which he ought to do, which he was compellable to do, it shall bind him; as if he makes equal partition, if he pays rent, if he admits a copyholder upon a surrender. But there is no occasion to enumerate instances. The authorities are express, the reason decisive. Generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit at law. Co. Litt. 172a. The second resolution in Conny's Case, 9 Coke, 85b, is: 'That although the infant in the case at bar was not compellable to attorn, because the manor was not conveyed by him, yet, because by a mean he was compellable to attorn, scilicet, if a fine had been levied, the attornment was good.' Fortescue lays it down larger (18 Hen. VI. p. 6, fol. 2a). He did but that 'which he ought to do; therefore the attornment is good.' The attornment of an infant to a grant by deed is good because it is a lawful act, albeit he be not upon that grant by deed compellable to attorn. Co. Litt. 315a. The reason is manifest. A right and lawful act is not within the reason of the privilege, which is given to protect infants from wrong. His being compellable by any mean, or in any way to do it, proves the act to be substantially what he ought to do. In



the case of *Holt v. Ward*, 2 Strange, 937, the infant's being compellable by the ecclesiastical court would have answered the objection made there as much as her being compellable by the common law; therefore civilians were heard. To what end should the law permit a minor to avoid an act which in any way, through any mean, by any jurisdiction, he might be compelled to do over again after it was undone? It would be assisting him to vex and injure others without the least benefit to himself."

See, also, 2 Kent, Comm. 242; *People v. Moores*, 4 Denio, 518; *Baker v. Lovett*, 6 Mass. 80.

It may be suggested that there is a difference between the act of a married woman concerning her property and that of an infant, namely, that the one is void while the other is only voidable; but it will be seen by reference to common-law authorities that this difference does not prevent the application of the principle under discussion to married women, and especially to the very subject-matter of partition by them. Thus Viner, in his Abridgment (title "Partition," D, 13), says that "partition between husband and wife of lands, if it be equal, shall bind the makers, because they are compellable to make partition; but otherwise of a use because they are not compellable." In section 256, Littleton says that if two parceners take husbands, and then, with their husbands, make unequal partition, it shall remain in force during the lives of the husbands; but at her husband's death the woman with the lesser portion may avoid it. In section 257 he says that if the two parts were of equal yearly value, such a partition could not afterwards be defeated. Commenting on this, Lord Coke says (Co. Litt. 171a):

"Hereby it appeareth that if the parts at the time of the partition be of equal yearly value, neither the wives nor their heyres shall ever avoid the same; and the reason hereof is for that the husbands and wives were compellable by law to make partition, and that which they are compellable to do in this case by law, they may do by agreement without process of law."

In *Oldham v. Hughes*, 1 Atk. 541, n, a case where an unequal partition of wives' estates had been made by the husbands, with owelty to make up for the inequality, Lord Hardwicke is reported to have said that such a partition did not bind the wives, however long acquiesced in. As the partition was not equal, the case would not seem to be in conflict with Coke's and Littleton's view as cited. But the learned editor of Coke on Littleton (Mr. Hargrave) seems to think otherwise, and, after referring to the case, says:

"But, notwithstanding this high authority, I take the doctrine of Littleton and Coke that such a partition will bind the wives, unless it be unequal, to be clear law, and for the cogent reason here given by the latter;" citing *Fitzh. Nat. Brev.* 62 F.

The passage in Coke on Littleton, quoted above, has been referred to as stating the law by the supreme court of Ohio in the case of *Foster's Lessee v. Dugan*, 8 Ohio, 87. In that case Samuel Foster and his wife petitioned the court to make partition of land in which his wife, as tenant in common, held the fee in an undivided one-eighth. After the filing of the petition, and before the partition, the wife died. The commissioners reported that the land could not be aparted without injury. An appraisalment was made, and a sale was ordered. Foster and another agreed to take the land at the

appraisement, and a sheriff's deed for an undivided half was made to Foster. The deed recited that Samuel Foster was seised of one-eighth, and had elected to take three other eighths, and then it conveyed to him an undivided one-half. The court held that by the proceeding the only estate passing to Foster was the fee in the three-eighths; that he had a freehold as tenant by the curtesy in the remaining eighth; and that the plaintiffs, as heirs of his wife, could recover, on his death, the remainder in the one-eighth. In discussing the husband's rights, and the effect of his partition, Judge Lane, speaking for the court, said: "A voluntary partition may be made by tenants for life, holding estates in joint tenancy or coparcenary. When made by husbands, of wives' lands, if equal, it binds the inheritance;" referring, among other authorities, to Co. Litt. 171a, where is found the passage above quoted. Judge Lane is not quite accurate in his statement of the law, because he leaves the impression that the partition by the husbands alone would bind the inheritance. This may have arisen from the fact that, in the text of Littleton, two words were omitted, which show the necessity of the wife's joining in the partition to bind her estate. Coke very particularly refers to this omission, and comments on it in his note to the section, saying that the consent of the wives was necessary to bind the inheritance. In the passage above quoted from Coke, he was dealing with coparceners who were by the common law "compellable" to partition by writ, and could make voluntary partition by parol. Co. Litt. § 250, note 169a. By the act of 31 Hen. VIII., tenants in common, having estates of inheritance, were compelled to suffer partition in the same way; and by later statutes partition was made compulsory in all estates in common, whether freehold or for years. The effect of these statutes was not to enable tenants in common who were sui juris to make voluntary partition in any other way than they had before done,—i. e., by parol and livery of seisin (Co. Litt. § 250, note 169a),—because that continued as at common law, but the necessary result of the statute which made married women "compellable" to partition their estates held in common was to give them such power by consenting to or uniting in a partition by their husbands which bound their husbands. No reason appears why a wife might not as well consent to or unite in a partition by parol and livery of seisin as in one simply by parol, and thereby bind herself to that which she was otherwise "compellable" to do. This was the logical result of the reason for the rule in coparcenary, and there is no authority to the contrary in the books. In Ohio, estates in coparcenary exist because the statute uses the term, but they now have the same incidents as tenants in common. *Tabler v. Wiseman*, 2 Ohio St. 207-210; 4 Kent, Comm. 367. The reason given for the greater facility with which partition could be had between coparceners at common law was that the law favored the partition. The same reason prevails to-day in Ohio with respect to all cotenancies. The language of Judge Lane in *Foster's Lessee v. Dugan*, 8 Ohio, 87, quoted above, used, as it is, in a case of tenancy in common, justifies the inference that, in the opinion of the court, the rule there stated might properly have weight with respect

to such a tenancy in Ohio. On the whole, it seems to us that in the matter of binding herself by consent and acquiescence in a partition of her estate held in cotenancy at common law a married woman's disability was not so great as in other respects; that if the husband, in a binding way, aparted his life estate, she could by consent bind her inheritance to the same partition if it was fair and equally made. To this modified extent she was *sui juris*. Nor did the statute of frauds and the statute of deeds affect her power in this respect any more than they did that of a man or an unmarried woman. If, either by common law or in equity, those statutes do not prevent a man or an unmarried woman from being bound by an equal parol partition fairly made, on principles of estoppel, we think a married woman who consents may be equally bound.

This conclusion need not rest only on the technical and historical accuracy of our application of the common-law rule concerning a married coparcener's power of partition to the case of a married tenant in common after the passage of the partition statutes. The reason which Coke gives for the power of a married coparcener to bind her inheritance by consenting to an equal partition, namely, that what she was compellable at law to do, having done, she could not repudiate it, taken in connection with the real nature of an equal partition, furnishes quite ground enough, even without direct authority, for recognizing this class of cases as an exception to the somewhat stringent rule enforced by the supreme courts of the United States, Ohio, and Massachusetts, by which a married woman may commit frauds, however gross, in respect of her property, and not estop herself in pais because of her common-law disabilities. To bind a woman to an equal partition to which she gave her consent, and which has for years been acquiesced in, is not at all inconsistent with her general disabilities and helplessness at common law. The partition was not an alienation of her property, so that on her husband's death she would find herself stripped of her estate. In the theory of the law and in fact a partition was generally a benefit to her estate. The essential condition that the partition must be equal to make it binding on the inheritance gave her or her heirs full opportunity to prevent injustice to her or her estate when the rights of her husband ceased. While, for the reasons given, we think a partition to be such a change in ownership of land as to bring it within the purpose of the statute of frauds, the statute of deeds, and the recording act to preserve permanent and public records of such changes, we do not think, so far as the married cotenant is concerned, that an equal partition involves any real change in her estate, because, as held by her in common, it is always subject to partition at the merest whim of her cotenant. In this case, if the cotenants of Margaret Ann Sinclair had not been induced, by her consent and active participation in appropriating the fruits of the parol partition, to rely on it, they might have gone into court, and compelled her to make the same equal partition, which would necessarily have been binding. It has always been the law of Ohio that married women and all others could be compelled to partition their estates. By act of 1820, which was in force when the parol parti-

tion in this case is said to have taken place, "joint tenants, tenants in common, and coparceners of any estate in lands might be compelled to make or suffer partition of such estate" in the manner prescribed in the act. Chase's St. 1162.

There is no case in Ohio which conflicts with the views here expressed. In *Williams v. Pope*, Wright (Ohio) 406, it was sought to compel a married woman and her husband, who had consented by parol to a division of her father's estate, and had gone into possession of a 10-acre lot under the division, to make a release of the rest of the land. The court refused to grant this relief against the wife, but it is evident from the case that there has been no attempt to make an equal partition of the land. The equality of division was produced by distribution of personalty, which would become the absolute property of the husband, and it would, of course, be impossible to bind the inheritance of the wife, even with her consent, where her purparty was eked out by that which was at once to become her husband's. In *Piatt v. Hubbell*, 5 Ohio, 243, there was a partition of land made by commissioners, on a petition filed in court, between the heirs of one W. Perry, some of whom were minors. Possession was taken in conformity with the partition, and improvements were made on the faith of it. But the partition was claimed to be wholly ineffectual as a judicial proceeding, because there had been no judgment of confirmation. After a lapse of some years, a suit was brought in equity to set aside these partition proceedings and for a second partition. The court dismissed the bill. Judge Lane disposed of the case as follows:

"We do not think it necessary to decide what is the precise effect of these proceedings. It is evident the partition was in fact made between the parties in 1814, which at that time was equal; and that all the adult parties took possession of their respective shares, and have ever since held them in severalty, built upon and improved them, on the faith of its validity. This court, in chancery, would not disturb a parol partition, originally fair, in which there had been so long acquiescence, and such acts of confirmation. No difficulty is found in disposing of all the rights except that remaining in the children of Mrs. Stratton, who were minors at the institution of this suit. We have been led to conclude that even to these the same principles are applicable. They were parties to the original partition, and we believe it was fair. Separate possession, the erection of houses, and sales of parts of the property, have been had upon the faith of its validity. If it be invalid, it becomes so from the common mistake of those who managed it that no confirmation by the court was necessary. If these minors ever possessed the right to set aside these proceedings, the subsequent transactions render it inequitable for them to exert it. We feel at least that, to produce this effect, they have not the right to invoke to their aid the extraordinary powers of chancery."

While the foregoing case is not directly in point, it shows with what favor the supreme court of Ohio regards equal parol partition carried out by possession and improvements on the faith of it, even against persons who are under disability when consenting to it. Though we have no direct authority in Ohio to sustain the view we have taken, it has the support of several adjudicated cases in other states and of the leading American text writer on the subject, Mr. Freeman. In his book on *Cotenancy and Partition*, this learned author says (section 412):

"In most, if not all, of the United States, a conveyance made by a married woman must be acknowledged before some officer who has first made her acquainted with its contents, on an examination without the hearing of her husband. The object of the law is, doubtless, to prevent coercion or undue influence on the part of the husband. But if a conveyance made by a married woman is intended to operate as a partition of lands held by herself and others as cotenants, and is followed by a holding of the property by the several cotenants in pursuance of such partition, the partition cannot be avoided on the ground that the deed was not acknowledged by the married woman on an examination without the hearing of her husband."

Again, in section 415, he says:

"We have seen that voluntary partitions made by or on behalf of infants and femes covert will be treated as binding and valid where they were equal at the time they were made, and were, in their inception and consummation, free from all taint of fraud. The theory upon which such partitions are enforced is that the interests of the cotenants are always best promoted by an occupation in severalty, and, therefore, that all honest and fair agreements, having a direct tendency to authorize such occupation, ought to be sustained. These parties, though under disability, may be compelled to make partition, and whatever the law will compel them to do it ought to allow to be done without compulsion."

In *Bumgardner v. Edwards*, 85 Ind. 117, a woman married a second time, and, holding by descent an undivided one-third of the lands of a former husband, made a fair partition with her children by the former marriage by deeds of herself and her husband. A statute of Indiana forbade a widow who married again to alienate lands received from her first husband. The wife in this suit sought to partition the rest of the land, in which she claimed an undivided third, and maintained that the first partition, under which possession had been had for five years, was not binding on her because of the statute. It was held that the partition could not be repudiated by her; that, as she could have been compelled to partition, the disability imposed by the statute did not cover such a case. In *Deweese v. Reagan*, 40 Ind. 513, where a wife sought by virtue of the same statute to annul her deed executed during a second marriage in pursuance of a contract to convey made during her widowhood, it was held that the deed was good, "because, notwithstanding the statute," said the court, "parties may voluntarily do without suit that which a court would require them to do with suit." In these cases the disability of the wife was declared by statute, but Coke's reason for binding married coparceners created an implied exception. In the case of *Hardy v. Summers*, 10 Gill & J. 316, Summers and wife filed their bill to enjoin Talburt from proceeding at law to partition land, part of which was in possession of the plaintiffs. It appeared that Summers' wife and Ann Hardy had inherited from their father the property sought to be partitioned, and had entered into a written agreement to divide it equally during Mrs. Summers' coverture, and that Summers did not sign the agreement. The parties entered into possession of their respective parts, and had quiet enjoyment for 15 years, when Ann Hardy made a deed of all her interest in her father's estate to Talburt, who at once brought suit to partition the entire estate, denying the validity of the former partition on the ground that it was void because made by a married woman, not in conformity with the statute of deeds, and without her husband's

joining in it, and so was not binding on the other party. The court declined to take this view, but held that the agreement, to which her husband had consented, having been consummated by actual division and possession for 14 years, was binding on all parties, and enjoined the suit for a second partition. The statute of deeds in Maryland makes a privy examination of the wife quite as essential as that of Ohio to the validity of her deed. *Hollingsworth v. McDonald*, 2 Har. & J. 230. In *Darlington's Appropriation*, 13 Pa. St. 431, a parol partition had been made between tenants in common, one of whom was a married woman and another a minor. The creditors of one of the cotenants sought to set it aside after years of exclusive possession under it. The court denied the relief asked, saying:

"As these parties did no more than they might have been coerced to at law, their acts in pais are binding, though one of them was under coverture and another a minor."

Mr. Justice Strong,—afterwards of the supreme court of the United States,—in *McConnell v. Carey*, 48 Pa. St. 348, used this language:

"It is true that family arrangements are regarded with favor, and a parol partition among heirs, if fairly made, is binding even upon femes covert, if they are parties to it, and assent to the arrangement."

Similar rulings have been made in *Calhoun v. Hays*, 8 Watts & S. 127; in *McMahan v. McMahan*, 13 Pa. St. 376; in *Williard v. Williard*, 56 Pa. St. 127. See, also, *Bavington v. Clarke*, 2 Pen. & W. 115, and *McLanahan v. McLanahan*, Id. 279. In *Bryan v. Stump*, 8 Grat. 241, a brother and sister, both of whom were married, made partition of land owned by them in common by a partition deed, with no certificate of privy examination of the wives as required by statute. Possession was taken by the parties under the partition, and maintained for many years. In a controversy between a vendor and purchaser as to whether this created a cloud upon the title, it was held that it did not. In *Wardlow v. Miller*, 69 Tex. 399, 6 S. W. 292; *Aycock v. Kimbrough*, 71 Tex. 330, 12 S. W. 71; and *Cravens v. White*, 73 Tex. 577, 11 S. W. 543,—married women were held bound by parol partitions carried into force by actual division and possession accordingly, when they were shown to have consented to the same. See, also, *Townsend v. Downer*, 32 Vt. 183.

The authority of the cases cited upon the point now under discussion is not at all affected by the circumstance that they are nearly all of them in states where parol partition is held not to be within the statute of frauds or the statute of deeds, differing in that respect from the law of Ohio as we have found it to be. The question we are now considering is whether a married woman at common law was disabled from binding herself by uniting with her husband in a parol partition, fairly and equally made, which was followed by long possession. The cases cited hold that she was not so disabled, because she might have been compelled to submit to such a partition by judicial proceeding. Whether parol partitions without possession are invalid by reason of the statute of frauds and perjuries, and whether the legal title to the allotted share passes to the allottees, are wholly different questions. One case cited to show that a mar

ried woman cannot be bound by a partition to which she consented is *Gates v. Salmon*, 46 Cal. 362. That case shows no possession under the agreed partition, and is not in point. In *Jones v. Reeves*, 6 Rich. Law, 132, under a practice which permitted no defense by equitable estoppel to an ejectment, it was held that a parol partition could not prevail as a defense, especially against a married woman, unless exclusive possession had been continued long enough to raise the bar of the statute. What would be the view in that state now, when equitable defenses may be made to an action at law, we cannot say. Much reliance is placed by counsel for the plaintiffs below on the case of *Weatherhead's Lessee v. Baskerville*, 11 How. 329. In that case the controversy was really over the construction of a will, and turned on the question whether the will gave five daughters an equal share in the testator's real estate with his five sons, or only gave to each daughter a small tract of land, and divided the residue among the sons. It was sought to estop a daughter from suing to partition the whole property, because she, while under coverture, had taken a small tract of land from the executors, and had united with her husband in selling it as their property. The partition of the land was not equal between her and the sons, or anything like it, and the attempt was really to estop a married woman with reference to a matter in respect of which her disability was complete, namely, an agreed construction of her father's will. It was not a case where she had done something voluntarily which she might by law have been compelled to do, because the supreme court found that under the will the daughters were entitled to share equally with the sons in the land.

On the whole case, therefore, we are of the opinion that, by the law of Ohio, parol executory agreements for partition made by cotenants are within the statute of frauds, and not enforceable; that, though they be followed by long possession in accordance with their terms, they will not vest the legal title in the allottees to their respective shares; that any conduct which estops one in pais to assert title or the right of possession to land is a good defense to an action at law for its recovery by such person in the courts of the United States; that a parol partition, consummated by long possession and acquiescence by all the former cotenants, estops each to assert title or the right to possession contrary to its terms; that at common law that which married women and infants and others under disability might be coerced by law to do, they might do with binding effect, by voluntary act; that, on this principle, partition of land held in cotenancy by married women, would bind their inheritance, if equally and fairly made by their husbands and consented to by them; that the statute of frauds and the statute of deeds in Ohio had no greater restrictive effect on the powers of married women than upon those of unmarried women, the one rendering unenforceable parol executory contracts, and the other limiting the mode in which legal title to interests in land could be passed by act of the owner; that neither of them had any effect to disable a married woman to create an estoppel in pais against herself cognizable in general by courts of equity and as a matter of defense in courts

of law; that such an estoppel was possible or not, as it was consistent or not with her general common-law disabilities; that, in general, her common-law disabilities made her contracts and acts wholly ineffectual to bind her land, and prevented the possibility of an estoppel in pais to defeat her assertion of title therein; but that, because of her power at common law, as a cotenant, to consent to an equal partition by her husband, and to bind her inheritance thereby, she could estop herself in pais by consenting to a parol partition by her husband, if equal and fairly made, and followed by long possession and acquiescence, because such partition bound her husband, and was one to which she could at law have been coerced. The questions whether there was a parol partition and whether it was equal, are for the jury. The burden is on the defendants below to establish the parol partition, and Mrs. Sinclair's consent to it, and long acquiescence in it by all concerned. After these facts have been shown, presumptions of the fairness and equality of the partition may be indulged, if nothing to the contrary appears. *Bumgardner v. Edwards*, 85 Ind. 126. The judgment of the court below is reversed, with instructions to order a new trial.

---

SMITH v. PROVIDENT SAV. LIFE ASSUR. SOC. OF NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 213.

1. LIFE INSURANCE—AUTHORITY OF AGENTS—DELIVERY OF POLICY BEFORE PAYMENT OF PREMIUM.

The provision in the contract of agency between a life insurance company and a general agent that "agents crediting \* \* \* premiums not actually received do so at their own risk, and must look to the policy holder for reimbursement. The society does not ask or desire you to take this risk,"—is evidence that the company was aware of the practice of its agents to give credit, and, in connection with evidence of the agent's practice of giving credit on the first premium, shows a greater actual authority than is implied from the provision of the policy that it shall not take effect unless the premium is actually paid, so that a delivery by the agent of a policy without receiving payment would constitute a waiver of any such provision.

2. SAME.

In view of the provision in a contract of agency with a life insurance company that agents crediting premiums not actually received do so at their own risk, a provision expressly withholding from the agent authority to give credit will be interpreted to mean credit for the company.

3. SAME—DELIVERY AND ACCEPTANCE OF POLICY.

On inquiry at the office of R., a general agent of a life insurance company, by S., a special agent, for a policy on his own life, which he had applied for, R. handed it to him, and, while he was examining it, R. calculated the amount due from him, after crediting him the amount of his commission, and told him the amount his check should be for, to which he assented. He then complained that he had not obtained the exact form of policy he wished, and on R. replying that it was the form mentioned in the application of S., that he had, however, tried to get the other form, but that he supposed the company was unwilling to issue it for so large a policy, S. said, "Well, I don't like it all the same."



Without anything further being said, S. went out, taking the policy, while R. was at the telephone. They never met again, S. dying within 10 days, having in the meantime been in the office once, while R. was out. R. did not send or write to S. for the policy or premium. The policy was found after the death of S. in his safe-deposit box, with another policy on his life. *Held*, that it was a question for the jury whether there was a delivery and acceptance of the policy.

4. SAME—PRACTICE OF AGENT—KNOWLEDGE OF COMPANY—EVIDENCE.

Monthly reports of an insurance agent to his company showing that policies applied for and sent to him early in the month were generally paid for the last of the month, but not showing when the policies were delivered, are not admissible as evidence that the company was informed of the agent's practice of delivering policies in advance of payment.

5. SAME—CUSTOM.

An offer to show a general custom by which general agents of life insurance companies exercised an authority to grant short credits on first premiums, without offering to show that the custom prevailed in the issuance of a policy which provided that it should not go into effect till the premium had actually been paid, and expressly stated that the agent could not waive the stipulation, is properly rejected in the case of such a policy.

6. SAME—ACTION ON POLICY—TENDER OF PREMIUM.

In an action on a life policy the premium on which had never been paid, tender thereof to the company is not necessary, where the agent had no authority to deliver the policy on the credit of the company, but only by assuming the risk, and thereafter looking to the policy holder for reimbursement.

7. WITNESS—IMPEACHMENT.

Plaintiff, after calling and using a witness to prove certain things, cannot impeach with respect to facts testified to by him when a witness for defendant.

Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

Action by Adelaide M. Smith against the Provident Savings Life Assurance Society of New York on a life policy. Judgment for defendant, and plaintiff brings error.

This is a writ of error to review a judgment for the defendant in an action on a policy of life insurance. The policy was for \$15,000, and purported to have been issued by the Provident Savings Life Assurance Society of New York in favor of Adelaide M. Smith on the life of her husband, Adolphus C. Smith. The sole defense of the insurance company was that the policy never took effect as a binding contract. The application was made and the policy was dated December 15, 1891. The insured died December 30th of the same year. The application was taken at Cleveland by R. E. Spink, general agent of the company for Northern Ohio, and was forwarded to the company's offices at New York, where it was approved, and a policy and premium receipt returned to Spink. Smith, who had been made a subagent of the company by Spink in August preceding, called at Spink's office for his policy. Spink delivered it and the premium receipt to him, and, after a conversation, Smith went out with the policy. Smith did not pay the premium, but kept the policy and died a week later. The sole issues in the case are: First, whether Spink's authority was such, in view of the terms of the policy, his instructions, and his practice under them, known to the company, as to enable him to make a binding delivery of the policy without actually receiving the premium; and, second, whether, conceding his authority, he actually made such a delivery.

Among other stipulations of the policy were these:

"This policy does not go into effect until the first premium has been actually paid during the lifetime and good health of the within named insured. All premiums are due at the office of the society in the city of New York. For

the convenience of policy holders they may be paid to an authorized agent of the society, but only in exchange for a receipt signed by the president and secretary and countersigned by such agent. Failure to pay any premium or semiannual or quarterly installment thereof when due will thereupon terminate this policy.

\* \* \* \* \*

"No agent is or will be authorized to make, alter, or discharge this contract, or to waive any forfeiture thereof, or to extend this insurance, or to grant permits, or to receive for premiums anything except cash."

The contract of agency between Spink and the company provided among other things as follows:

"That he will, and does hereby, become responsible for all moneys collected on behalf of the society by and passing through the hands of persons employed by him under this agreement, and for all policies and premium receipts intrusted by him to such persons.

\* \* \* \* \*

"That he will furnish to and maintain with the society a sufficient and satisfactory bond in the sum of ——— dollars for the faithful performance of all duties pertaining to ——— agency, and for the prompt payment of all moneys received by ——— or subordinate agents or brokers.

\* \* \* \* \*

"That the society shall at all times have a first lien upon the commission or compensation accruing under this agreement, as security for all debts or liabilities of said party of the second part to the society accruing at any time during the continuance of this agreement.

"It is further mutually understood and agreed by the parties hereto that said party of the second part is not authorized to make, alter, or discharge contracts for the society, waive forfeitures, allow credits, grant permits, guaranty dividends, write receipts for premiums, or make any indorsement whatsoever on the policies of the society."

It is further in evidence that Spink delivered to Smith a manual for agents, issued by the company to its general agents, in which occurred the following directions:

"All premiums are payable at the office of the society in New York, but may be paid to the agent on presentation of a policy signed by the president and secretary, or of a renewal receipt signed by the president or secretary.

\* \* \* \* \*

"You will receive no premium unless you have been furnished with a policy or receipt so signed, or with a binding receipt for advance payment of a first premium, as payment made to an agent without such evidence of his authority is not valid.

\* \* \* \* \*

"The agent must in all cases countersign receipts when money is received."

And then on the same page, under the same head, but in a different section (section 5), occurs the following:

"Agents crediting or remitting premiums not actually received do so at their own risk, and must look to the policy holder for reimbursement. The society does not ask or desire you to take this risk."

In the same manual it was provided that "policies not taken or paid for within sixty days from the date of issue, and renewal receipts not taken and paid for within thirty days from the day on which they fall due, must be promptly returned to the home office." Evidence was given of the practice of Spink to deliver the policies to the accepted applicants some time before the amounts due for the first premiums were received by him. After this evidence was admitted, it was excluded on the ground that plaintiff had failed to show that the company had any knowledge of the practice. To show that the company was familiar with this practice on Spink's part, monthly reports, made by him to the company, were introduced in evidence. The monthly reports were made on a form which contained a column for the names of the applicants, one for the amount of the policy, one for the date when the premium was due,—which was the date of the application and the policy,—and one for date of actual payment. The reports for several months previous to the application of Smith showed that policies applied for in the beginning

of the month or later were generally paid for a day or two before the time when the agent was required to forward his monthly report. Because these reports did not show when the policies were delivered, it was held by the court below that they had no tendency to prove that the company was informed of Spink's practice to deliver policies in advance of payment, and they were excluded.

The following question was asked of a witness for the plaintiff: "Q. What is the custom of all life insurance companies, including the defendant, or what was it in 1891 and prior thereto, of permitting their general agents to deliver a policy of insurance to the assured, and extend to him a short credit for the payment of the first premium?" To which question the defendant objected, which objection was sustained. To this ruling the plaintiff excepted, and offered to prove by the answer to the question that it was the custom of all companies, and that they did permit their general agents, to extend a short credit to the assured for the payment of the first premium.

There was very little dispute as to what occurred at the interview between Spink and Smith when the latter received the policy. Smith went to Spink's office, and inquired of him whether the policy had come. Spink's book-keeper, who had charge of the policies, got the policy, and handed it to Spink, and Spink handed it to Smith. Smith opened and examined it. While he was doing so, Spink turned to his desk, calculated the amount due from Smith after crediting him with his commission, and handed it to Smith with the remark, "That will be the amount of your check." To this Smith replied, "Yes, that is right." Smith then complained that Spink had not obtained the exact form of policy he wished. Spink replied that it was the form mentioned in Smith's application; that he had tried to get the other form, but that he supposed the company were not willing to issue it for so large a policy. "Well," said Smith, "I don't like it all the same." About that time Spink was called to the telephone, and remained away about 10 minutes. When he returned, Smith had gone with the policy, and they never met again. Spink did not send or write to Smith for the policy, nor did he send to him for the premium. His explanation of his not doing so was that he expected him every day, because he usually came in every morning. Smith died about a week or 10 days after this interview.

It further appeared in evidence by another witness that Smith was in the office every day between August and December 15th, and at least once between the time he received the policy and his death, but that he did not see Spink. The policy and receipt were found in Smith's safe-deposit box after his death, with another policy for \$5,000 in the same company, taken out by him in 1887.

Spink, the general agent, was called by the plaintiff in the opening of the case to prove the contract between himself as general agent and Smith as subagent, and to prove the delivery to Smith of the manual for agents above referred to, and the fact that the appointment of Smith as subagent had been communicated by him (Spink) to the company. Spink was called as a witness for the defendant to testify generally in the case, and especially with reference to the circumstances under which Smith obtained possession of the policy and the receipt. In rebuttal, after having laid the proper foundation with Spink, the defendant called two witnesses to prove that Spink had said to them, after Smith's death, when they called upon him in the interest of Mrs. Smith, the plaintiff: "I delivered the policy to Mr. Smith, and also the premium receipt." "I expected that he would pay for it or make settlement for it." "I expected him to send me a check." This evidence, which was given without the hearing of the jury, was not allowed to be submitted to them by the court on the ground that, having called Spink to prove part of her case, it was incompetent for the plaintiff to impeach him, even with reference to the subject-matter to which he had been called upon to testify on behalf of the defendant. This ruling of the court was objected to by the plaintiff, and an exception taken. At the conclusion of all the evidence, on motion of the defendant, the circuit court directed the jury to bring in a verdict for the defendant.

Boynton & Horr and J. B. Burrows, for plaintiff in error.

J. E. Ingersoll and W. B. Sanders, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The sole issue in the court below was whether the policy took effect as a contract, and it depended on two questions: First. Had Spink, as general agent of the defendant company, authority to bind it by delivering the policy and receipt to the applicant without receiving the premium in cash? Second. Did Spink and Smith intend a binding delivery and receipt of the policy? If, in every reasonable view of the evidence, either question must be answered in the negative, the action of the court below was right. But if, in any reasonable view of the evidence, both may be answered in the affirmative, then the judgment of the circuit court must be reversed.

1. Section 5 of Spink's instructions from his principal was:

"Agents crediting or remitting premiums not actually received do so at their own risk, and must look to the policy holder for reimbursement. The society does not ask or desire you to take this risk."

This rule assumes that an agent may have made one a policy holder by delivery of the policy without actually receiving the premium. The effect of it is that in such a case the agent becomes absolutely liable to the company for the premium, and must pay it exactly as if he had received it, his only recourse being against the policy holder. But such a condition is wholly inconsistent with the contention for defendant that, without actual payment of the premium by the applicant, the delivery by the agent is without authority, and void, giving no life to the policy as a contract. It is true that the contract of Spink with the company expressly withholds any authority to give credit, but, in view of section 5, this must be interpreted to mean credit for the company. His right to assume the payment of the premium himself and deliver the policy, taking the risk of collecting from the policy holder, is plainly recognized, though his exercise of it is not apparently encouraged. Spink had given bond to the company for the faithful performance of his duties and the prompt payment of all moneys received. He had also given the company a lien on all commissions due him, to secure all his liabilities to the company. The power of the company to enforce payment of any obligation assumed by him under section 5 was ample. It is said that section 5 can have no effect to give the agent any additional authority in his dealings with the applicants for policies, but is only intended as a penalty to be visited on the agent for exceeding his authority, and that the company may keep the money paid or credited by the agent on account of the policy, and at the same time refuse to ratify his act in delivering it. It seems to us that the mere statement of the proposition is its refutation. The words of section 5 are carefully selected not to forbid the practice of agents to deliver policies without actually receiving the premiums, while at the same time they shift all danger of loss from such a practice to the agent. The offering of credit on the first payment is a tempt-

ing inducement to many intending to take a policy, and in the strenuous competition between life insurance companies for business is a consideration which may often turn the scale in favor of the more accommodating company. The defendant company could be reasonably sure that, if the authority to give credit at their own risk was not absolutely denied to their agents, their desire to increase their commissions by a large business would be motive enough for them to assume the risk. Section 5 is strong evidence that the company was aware of the practice of their agents to give credit, and justified the introduction of testimony that it was Spink's practice to do so. It is argued that the evidence of Spink's practice of giving credit is confined to three cases. The statement of one witness is much more general than this, and justifies the inference that the specific instances testified to were not by any means isolated or exceptional cases.

In *Miller v. Insurance Co.*, 12 Wall. 285, 303, which was a case very like this in its facts, Mr. Justice Clifford, speaking for the supreme court, said:

"Evidence of the most convincing character is reported, showing that it was the custom of the agents to give credit in certain cases to persons with whom they were well acquainted, and knew to be responsible, and not to call for the money at the time the policy was delivered; and one of the instructions given to such agents affords a strong presumption, that the custom was known to the company, as the instruction states that agents must not deliver policies until the whole premiums are paid, as the same will stand charged to their account until the premiums are received or the policies are returned to the office."

If such an instruction afforded a presumption of knowledge by the company of the practice of agents to deliver policies without receiving premiums, the instruction we have in this case is even more significant. For this reason we are of the opinion that the court below erred in excluding evidence of Spink's practice of giving credit on first premiums. On the whole evidence, both that admitted and that erroneously excluded, it seems clear to us that the circuit court should have submitted to the jury the issue whether Spink had actual authority to deliver binding policies without actually receiving the premiums. The provision in the policy that it shall not take effect unless the premium is actually paid, if it stood alone, would, of course, limit the agent's authority to deliver a policy until he had received a cash premium; but the section 5, and the practice already referred to, show a greater actual authority than the words of the policy would imply, so that a delivery by the agent of a policy without receiving payment would constitute a waiver of any such provision. Smith, to whom the policy in this case was delivered, was a subagent of Spink, and had a set of the company's instructions, including section 5, in his possession, for his guidance, for nearly six months. More than this, he was in Spink's office every day, and may be presumed to have known Spink's practice in giving short credit for first premiums by virtue of section 5.

In *Miller v. Insurance Co.*, *supra*, which was a case involving the power of a general agent to deliver a policy without receiving the cash premium, the instructions to the agent were as follows:

"Agents must not deliver policies until the whole premiums are paid, as the same will stand charged to their accounts until the premiums are received, or the policies returned to the office. Agents are not authorized to make, alter, or discharge contracts, waive forfeitures, name an extra rate for special risks, or bind the company in any way; their duties being simply to obtain applications for insurance, to collect and transmit premiums, and generally to be the medium of communication between the policy holder and the company. Agents are not authorized to write the receipt of premium, or make any indorsement whatever on the policy. The president and secretary are alone authorized to sign receipts for premiums on the part of the company. When a receipt is delivered to a policy holder by an agent, such agent must counter-sign the same as an evidence of payment to him."

And the condition of the policy was as follows:

"It is agreed by the undersigned \* \* \* that the policy of assurance hereby applied for shall not be binding upon this company until the amount of premium as stated therein shall have been received by said company, or some authorized agent thereof, during the lifetime of the party therein assured."

Said Mr. Justice Clifford (page 303):

"Attempt is made in argument to show that general agents have no power to waive such a requirement, or to deliver the policy to the insured without first exacting the payment of the cash premium; but the court here, in view of the circumstances of this case, is entirely of a different opinion. Where the policy is delivered without requiring payment, the presumption is—especially if it is a stock company—that a credit was intended; and the rule is well settled, where a credit is intended, that the policy is valid though the premium was not paid at the time the policy was delivered, as, where credit is given by the general agent, and the amount is charged to him by the company, the transaction is equivalent to payment;" citing *Boehen v. Insurance Co.*, 35 N. Y. 131; *Sheldon v. Insurance Co.*, 26 N. Y. 460; *Wood v. Insurance Co.*, 32 N. Y. 619; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Bragdon v. Insurance Co.*, 42 Me. 259.

While there is some difference between the case at bar and *Miller v. Insurance Co.* in the facts, the ruling of the supreme court in that case is controlling in this. There is stronger ground in this case for holding that the general agent had actual authority to waive the payment of premium, and to substitute therefor his personal obligation to the company, than in the case cited, for the instruction in the *Miller Case* forbade agents to deliver policies until the whole premium was paid, while here the instruction is carefully framed not to forbid it, and impliedly permits it, but holds the agent responsible for risk of loss.

2. The evidence upon the point whether what transpired between Spink and Smith was intended to be a delivery of the policy would doubtless not justify a peremptory instruction to the jury that it was, in legal effect, a delivery; but it is quite clear that the evidence did not justify the instruction which was given. It is admitted that Spink handed the policy to Smith, and that Smith kept it. Unexplained, that would have been a delivery. The cases already cited show that, in the absence of evidence to the contrary, the intention of the agent to deliver will be presumed from a manual tradition of the policy. We certainly find nothing in the record in this case which so completely overcomes this presumption as to justify a withdrawal of the issue from the jury.

Spink says that he made a calculation to show Smith how much was due on the premium after crediting his commission, and that

Smith agreed that it was right. The whole claim for the defendant rests on Smith's expression of disappointment that Spink had not succeeded in getting him a form of policy which he liked. But it is to be observed that the policy which he got was the one called for by his application. This circumstance justifies the inference that he feared he could not get the other form of policy, and, if he could not, that he intended to take the one for which he had made formal application. The remark, "I do not like it all the same," a jury might fairly construe to be a merely grumbling remark, not intended to qualify his acceptance of the policy as a binding contract. The conduct of both Spink and Smith thereafter tends to show that they regarded the change of possession as a delivery. Smith put the policy in his safe-deposit box, with his other life insurance policy, while Spink made no effort to recover the policy. Spink admits that he was not afraid to give Smith credit for the premium. He certainly knew, and it may fairly be inferred, that Smith knew also that credit was often extended on first premiums. The failure to pay cash is not, therefore, of much significance to show that no binding delivery was intended.

On the whole case, the issues raised were for the jury, both as to the actual authority of Spink to make a binding delivery of a policy and as to his having done so, and the court erred in not submitting them to that tribunal.

Other questions are raised upon the record. It is contended that the court below erred in excluding evidence to contradict Spink as to statements made by him to friends of the plaintiff, after Smith's death, inconsistent with his evidence given when called for the defendant. Spink had been called by the plaintiff to prove certain material facts, namely, that Smith had had a manual of the company's instructions to agents furnished him, that he was a subagent of the company, and that the company knew it. It was not proper, after using him as a witness to this extent, to attempt to impeach him, even with respect to facts testified to by him when a witness for the defendant. *Ellicott v. Pearl*, 10 Pet. 412-440.

We think the court was right in excluding the reports which Spink made to the company. They did not show the dates when the policies were delivered by him, but only the dates of payment of the premiums. They contained nothing inconsistent with his having held the policies till the premiums were paid.

The plaintiff sought to establish a general custom by which general agents of life insurance companies exercised an authority to grant short credits on first premiums. We have held that evidence of general custom is permissible on questions of agency. *Insurance Co. v. Waterman*, 6 U. S. App. 549, 4 O. C. A. 600, 54 Fed. 839. But the offer here made did not cover the case. The policy here provided that it should not go into effect until the premium had actually been paid, and expressly stated that the agent could not waive the stipulation. The offer was not to show that the custom prevailed in the issuance of such a policy. Such express limitation of authority brought to the knowledge of the policy holder could not be enlarged by a general custom prevailing in the absence of such a limitation.

It can only be enlarged by showing a greater actual authority than that expressly given in the policy. The ruling of the court below was right.

It is objected by defendants in error that there is no proper bill of exceptions here, because the case was tried and verdict rendered at the February term, 1894, while the bill was not signed until the April term. It appears, however, from the record that a motion for a new trial was made at the February term, and by order of court the hearing of the motion was continued until the next term, and by leave of this court and consent of counsel, since the submission of the case in this court, the clerk of the circuit court has certified to this court an order entered at the February term, 1894, expressly giving plaintiff leave to file her bill of exceptions after the disposition of the motion.

Defendant objects that no tender has been made by Mrs. Smith of the premium, and therefore that no recovery can be had. Tender to the company is not necessary, because, if there was a delivery, and the policy took effect, the company received Spink's absolute obligation to pay; and under section 5 of the company's instructions to agents it is Spink to whom Mrs. Smith owes the balance due on the premium. As between Mrs. Smith and the company, there was payment.

The judgment of the circuit court is reversed, at defendant's costs, with instructions to order a new trial.

---

FRANKLIN BRASS CO. v. PHOENIX ASSUR. CO.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 92.

**FIRE INSURANCE—INCREASE OF RISK.**

The P. Ins. Co. issued to the F. Co. a "builder's risk" policy, insuring it against loss by fire on its factory buildings and machinery. The policy contained a written clause to the effect that the buildings were understood to be in course of construction, and that the insurance company was to be notified as soon as the assured was ready to commence manufacturing and the rate was to be adjusted, it being understood that the rate, after manufacturing was commenced, would be higher because of the increased risk. The policy also contained a printed clause to the effect that if the insured premises were so used as to increase the risk, or the risk was increased by the erection of neighboring buildings, or otherwise, without the assent of the insurance company, the policy should be void. The premises were destroyed by fire on September 4th. In an action on the policy, it appeared, without serious contradiction, that new policies were obtained by the assured, in other companies, which were to go into effect August 1st; that the assured had notified its agents to cancel the policy in suit; that the assured, without the assent of the insurance company, had erected a building on the premises, the existence of which materially increased the risk; that on August 4th the fires in the furnaces were started without notice to the insurance company; and that, at the time of the fire, as many as 30 persons were regularly employed in the factory, and a considerable quantity of manufactured goods had been turned out. *Held*, that the jury were properly instructed to render a verdict for the defendant.



**In Error to the Circuit Court of the United States for the Western District of Virginia.**

This was an action by the Franklin Brass Company against the Phoenix Assurance Company of London upon a policy of insurance. On the first trial, in the circuit court, a verdict and judgment were rendered for the plaintiff, which, on appeal to the circuit court of appeals, was reversed. 7 C. C. A. 144, 58 Fed. 166. On the second trial the court directed a verdict for the defendant. Plaintiff brings error.

T. J. Kirkpatrick, for plaintiff in error.

B. B. Munford and W. R. Staples, for defendant in error.

GOFF, Circuit Judge. This is the second time this case has been before this court, and the facts are sufficiently set forth in the opinion at October term, 1893, reported in 7 C. C. A. 144, 58 Fed. 166, and 8 U. S. App. 451. The judgment then complained of was reversed, and the cause remanded for a new trial. At the March term, 1894, of the circuit court for the Western district of Virginia, held at Lynchburg, it was again tried, and the jury, by direction of the court, returned a verdict for the defendant. The court refused to give the several instructions to the jury, asked for by the plaintiff, but directed a verdict for the defendant, to which action of the court the plaintiff below, now plaintiff in error, excepted. All the evidence offered to the jury is certified in the bill of exceptions. There was no exception taken to the action of the court in admitting or rejecting testimony during the trial. The action was at law on a policy of insurance issued by the Phoenix Assurance Company of London to the Franklin Brass Company, on the two-story frame factory building and other buildings connected therewith, and the engines, boilers, and machinery to be used in its business, contained in and on the premises of said last-named company, situated near James river, Buchanan, Botetourt county, Va. The policy was for one year from June 25, 1891, and was what is called a "builder's risk." The property mentioned in it was destroyed by fire on September 4, 1891. It was the usual fire insurance policy, the written portion thereof containing the following language:

"It is understood that the above buildings are in course of construction, and privilege is hereby given to complete the same; this company to be notified as soon as the assured are ready to commence manufacturing, and the rate to be adjusted."

It appears that the policy was written for one year, at the suggestion of the insurance agents, and that a new rate of premium was to be fixed when the assured were ready to manufacture, which rate was, because of the increased hazard, to be higher than that charged before manufacturing was commenced. A section in the printed portion of the policy reads as follows:

"If the above-mentioned premises shall be occupied or used so as to increase the risk, \* \* \* without notice to and consent of this company in writing, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured without the assent of this company indorsed hereon, \* \* \* then, and in every such case, this policy shall be void."

It clearly appears from the evidence that the party insured, as well as the insurance company, regarded the contract as a "builder's risk," and that a readjustment of the rate was to be made when the assured was ready to manufacture, or, if that was not done, that new policies were to be secured. It was shown that new policies were obtained by the assured, on the same property, in other companies, which were to go into effect on the 1st day of August, 1892, and that the assured notified its agents to have the policy now in suit canceled and the return premium remitted. The evidence also discloses that the insured company, after the date of the policy in suit, and without the assent of the insurance company, erected a building of pine timber, 60 by 25 feet in size, called a "Buffing Room," one corner of which was located 5 feet and 4 inches from the main building insured, and the uncontradicted testimony of the insurance experts who were examined before the jury was that this additional building did materially enhance the danger of destruction by fire of the buildings and contents thereof, as insured in the policy now in controversy. The testimony also shows that the said Franklin Brass Company, on the 4th day of August, 1892, after having secured the new insurance mentioned, caused the fires in the furnaces located in the insured buildings to be started, and this without having notified the insurance company, the defendant below. On this point we quote from the opinion rendered by this court in this case, to which we have before referred:

"By the 20th August, some ten or more operatives living in and around Buchanan were employed. The machinery was put in motion daily at the sounding of the whistle at seven o'clock in the morning. These operatives went to work, working until dinner time; then, after a short recess, worked until the factory closed for the night. They were paid off by the week. There is testimony tending to prove that at the time of the fire there were as many as 30 people employed in and about the factory. As many as 700 brass balls, which had been brought to the factory from the north in a partially completed state, were manufactured and sold upon order. Some thousands of brass hinges, one of the principal products of the works, were made, and only required to be polished in the buffing room—which was just about completed at the hour of the fire—to make them marketable goods. Several employes testify they had been working continuously day after day at the same presses, in the manufacture of the same class of goods, which presses were propelled by steam. While so engaged, the fire, which originated from the boiler, occurred, and the property was destroyed."

Under the circumstances thus set forth, can the plaintiff below—under the well-established rules of law applicable to insurance policies—recover on the contract set up in its declaration, and is there such conflict in the evidence as makes it necessary for the jury to pass on the fact? A careful examination of the case compels us to answer these questions in the negative. We do not find in the record such evidence as would have justified a verdict for the plaintiff, and we think it would have been the duty of the trial judge to have set aside such a verdict had one been returned.

While it is true that the written portion of the policy must govern, where there is a conflict between it and the printed provisions thereof, it is also true, we think, that there is no such conflict in the contract we are now considering; in other words, we

hold that the printed conditions of the policy, prohibiting an increase of the risk by the party assured, continued of binding force and effect, and that the written stipulations were not intended to and did not either modify or set them aside. This was in substance announced as the proper construction of the policy now in suit, when this case was formerly before this court, and now, after reargument by counsel, re-examination of the cases in point, and consideration of all the clauses and conditions of the contract, we are satisfied with the conclusion then reached, and announce our adherence to it. To construe the policy, as contended for by plaintiff in error, would be for the court, in effect, to make a new contract for the parties. That, the courts cannot do, but they must enforce the agreements duly made by parties competent to contract, and not permit the terms and conditions of the same to be violated or set aside. The terms of this policy are those usual to risks of the character described in it, they were agreed to by parties entitled under the law to so contract and bind themselves, and, while they may seem harsh, still they can be easily complied with, and long business experience has demonstrated that they are essential to the proper management of insurance companies, and that their enforcement is necessary in the interest of the assured as well as of the party insuring.

We think that the testimony conclusively proves that the Franklin Brass Company did commence manufacturing without having notified the insurance company of its readiness to do so, and without having had the rate of the risk occasioned thereby adjusted; and also that the terms of the policy were violated by the assured, when it caused an additional building to be erected very near the property insured, the assent of the insurance company not having been obtained and indorsed on the policy. This was so plainly shown at the trial that it was the duty of the judge presiding to direct a verdict for the insurance company, and his action in so doing is approved of by this court. The decisions are many and of the highest authority that, in cases where the testimony is of the character of that submitted to the jury in this case, it is not only proper, but it is the duty of the court, to direct a verdict, and in this case we think the conclusion follows, as matter of law, that the plaintiff below cannot recover, upon any view which can be properly taken of the facts that the evidence submitted to the jury tends to establish. Upon this proposition the following authorities are referred to: *Blount v. Railway Co.*, 9 C. C. A. 526, 61 Fed. 375; *Pleasants v. Fant*, 22 Wall. 116; *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 101 U. S. 16; *Griggs v. Houston*, 104 U. S. 553; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *Coyne v. Railway Co.*, 133 U. S. 370, 10 Sup. Ct. 382; *Gunther v. Insurance Co.*, 134 U. S. 110, 10 Sup. Ct. 448; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140; *Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619. It will not be necessary to further consider the questions

raised by the assignments of error, as the same are in substance involved in the action of the trial judge in directing the verdict for defendant below; and as we hold that it was his duty, under the circumstances shown in this case, to so direct, it follows that the judgment complained of must be affirmed.

---

CAMPBELL v. UNITED STATES.<sup>1</sup>

(Circuit Court of Appeals, Eighth Circuit. January 7, 1895.)

No. 445.

1. MARSHAL'S FEES—PER DIEM ALLOWANCE—SUNDAYS.

A marshal is not entitled to per diem compensation for attendance in the federal courts on Sundays, during the terms thereof, when neither is open for business, under Rev. St. § 829, allowing him a per diem for attendance when either is in session.

2. SAME—MEALS FURNISHED JURORS.

It is one of the incidental powers of the circuit and district courts of the United States to direct the marshal to furnish meals for jurors while they are deliberating upon their verdicts, and this power may be exercised in any case whether the United States is a party to the action or not. The disbursements made by the marshal in paying for these meals are expenses necessarily incurred for some of the "other contingencies" referred to in section 829, Rev. St.

3. SAME—SUMMONING JURORS—ADJOURNED TERM.

An adjourned term of court is not the same court as the original term, within Rev. St. § 829, providing that the marshal's fees for summoning jurors shall not at any court exceed \$50.

4. SAME—MILEAGE—TAKING PRISONER TO PLACE OF CONFINEMENT.

Where a marshal is paid 50 cents for each commitment of a prisoner, and 10 cents a mile for himself and each prisoner, and necessary guard for transportation of prisoners to the place of confinement, as provided by Rev. St. § 829, he will not be allowed mileage for travel to serve or fees for serving the warrants of commitment of the prisoners on the keeper of the prison.

5. SAME—SERVICE OF SEVERAL WRITS ON SAME TRIP.

Section 829, Rev. St., does not authorize the marshal, after he has received his actual expenses upon one writ for making a trip on which he serves several writs in favor of the government upon different persons, to thereafter recover his mileage upon the other writs so served.

6. SAME—SUMMONING SAME WITNESS IN DIFFERENT CASES.

Under Rev. St. § 829, providing that when more than two writs required to be served, in behalf of the same party, on the same person, might be served at the same time, the marshal shall be entitled to compensation for travel on only two of the writs, he should be allowed mileage on two, and only two, subpoenas, where on the same trip he serves several subpoenas for the government, in different cases, on the same person.

Error to the Circuit Court of the United States for the District of Minnesota.

Action by William M. Campbell against the United States. Certain claims were disallowed, and he brings error.

George N. Baxter, for plaintiff in error.

Edward C. Stringer, U. S. Atty.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

<sup>1</sup> Rehearing pending.

**SANBORN**, Circuit Judge. William M. Campbell, the plaintiff in error, was the United States marshal for the district of Minnesota from May 25, 1886, until May, 1890. He brought this action in the court below to recover mileage, fees, and disbursements under the provisions of the act of congress of March 3, 1887 (24 Stat. c. 359, p. 505; 1 Supp. Rev. St. p. 559); and he prosecutes this writ here to reverse the decision and judgment of that court disallowing the following claims.

1. A claim for per diem compensation for his attendance in the circuit court and in the district court on Sundays, during the terms thereof, when neither of these courts was open for business. In *U. S. v. Perry*, 4 U. S. App. 386, 395, 1 C. C. A. 648, 651, 50 Fed. 743, 747, after full argument, and upon careful consideration, this court held that the per diem compensation provided for a United States district attorney for attending court, in the discharge of his official duties, by section 824, Rev. St., could not be allowed or paid to him for Sundays or legal holidays, when the court was not open for business, notwithstanding the fact that they occurred during the term of court. The reasons for that decision, and the authorities in support of it, will be found in the opinion. They apply with equal force to the claim of a marshal for such compensation under section 829, Rev. St., and the decision of the court below upon this question was right. *McMullen v. U. S.*, 146 U. S. 360, 13 Sup. Ct. 127.

2. A claim for reimbursement for moneys expended by the marshal, in cases to which the United States were not parties, by order of the circuit and district courts, for meals for jurors, after they had been charged, and while they were confined, in charge of an officer, deliberating upon their verdicts. This expenditure was made by the marshal after the sundry civil appropriation act of 1888 went into effect. That act made an appropriation for "meals for jurors in United States cases when ordered by court" (25 Stat. c. 1069, p. 545), and a similar provision has been embodied in all subsequent appropriation acts. In the sundry civil appropriation acts of 1884, 1885, 1886, and 1887, an appropriation was made for "meals for jurors when ordered by court." 23 Stat. c. 332, p. 224; 23 Stat. c. 360, p. 511; 24 Stat. c. 902, p. 254; 24 Stat. c. 362, p. 541. Prior to 1884, no specific appropriation for this purpose had been made in any case; but the meals for jurors had been ordered by the courts, and the expenses incurred therefor had been paid by the government, as miscellaneous expenses of these courts. The only argument presented in support of the disallowance of this claim is that congress made no specific appropriation in 1888, or in any subsequent year, for the payment of moneys expended by the marshal for meals for jurors in cases in which the United States were not parties, although, prior to that time, congress had uniformly recognized these claims, and made appropriations for their payment. The question before this court, however, is not whether or not an appropriation has been made by congress to pay this claim, but whether or not the United States is justly indebted to the plaintiff in error for its amount. It is manifest that the existence and validity of a debt cannot be determined by the consent or refusal of the debtor to make immediate provision

for its payment. If they could be, there would never be any debts whose payment was not provided for, and there would be no occasion for their collection or discharge. It is common knowledge that, by the ancient common law, jurors were to be kept together, while deliberating upon their verdict, without food, drink, fire, or candle, until they could agree. Coke, Litt. 227b. But for more than a century it seems to have been the practice of the English and American courts to direct the marshal or sheriff to furnish refreshments to the jurors, when their deliberations were prolonged, and the ends of justice would, in the opinion of the presiding judge, be promoted by pursuing that course. It is evident to all who are familiar with jury trials that this practice saves expense to the government and to the litigants, and expedites the conclusion of lawsuits. It is not infrequent that tired jurymen, who have listened to a trial of many days' duration, and who, with empty stomachs, are wrangling over a doubtful question of fact, without any prospect of agreement, are brought, by a single meal, into a condition of mind and body that enables them to calmly review the evidence, and to agree upon a fair and just verdict, in a few hours. The expenditure of a few dollars for a meal or two for 12 jurymen, in cases such as this, frequently prevents a disagreement of the jury, obviates the necessity of another trial of the case, and saves the government the cost of the jurymen and officers of the court for many days. In 1799, in the trial of Fries for levying war against the United States, Mr. Justice Story kept the jury together in the same room, in a tavern, during adjournments of court, for 15 days. It seems that the necessity of the case and the length of the trial prompted him to cause their meals to be furnished to them during this period. *U. S. v. Fries*, 3 Dall. 515, note, Fed. Cas. No. 5,126. From that time to this, so far as we have been able to discover, the right to order the marshal to furnish meals, at the expense of the government, to jurors, in charge of an officer, deliberating upon their verdict, has been one of the conceded powers of the circuit and district courts of the United States. This power has been constantly exercised whenever its exercise was deemed wise by the trial judges, and the disbursements made by the marshals for this purpose have been paid by the government without question until the year 1888. The act of congress entitled "An act to regulate the fees and costs to be allowed clerks, masters and attorneys of the circuit and district courts of the United States and for other purposes," approved February 26, 1853, provided "that there shall be paid to the marshal his fees for services rendered for the United States, for summoning jurors and witnesses in behalf of the United States, \* \* \* for the commitment or discharge of prisoners; for the expenses necessarily incurred for fuel, lights and other contingencies that may accrue in holding the courts within the district, and providing the books necessary to record the proceedings thereof." 10 Stat. c. 80, p. 165; Rev. St. § 829. The courts, congress, and the accounting officers of the government treated the meals for jurors, ordered by the court, in all cases, as some of the "other contingencies" referred to in this act, and paid the marshal's disbursements on account of them, without question, under this act, from the date of

its passage until the year of the disallowance of this claim. There is inherent in every court power to supervise the conduct of its officers, and to direct the course of the trials conducted before it. In the conduct of jury trials, the court has the power to determine how long a jury that has not agreed shall deliberate upon their verdict; whether or not they shall be kept together, in charge of an officer, during the adjournments of the court until they have agreed; whether or not the marshal shall provide them with meals, at the expense of the government, during their deliberation; and when they shall be discharged. It is conceded that the circuit and district courts of the United States have all these powers in all cases, civil and criminal, in which the United States are parties. But these courts are invested with the same power to so conduct jury trials before them to which the United States are not parties that the ends of justice may be attained as they are to conduct in that way those to which the United States are parties. If, in the trial of the former, the courts, in the cautious exercise of a wise discretion, are of the opinion that a just and speedy decision of a protracted litigation will be promoted by furnishing meals to a hungry jury that is deliberating over complicated and vexatious questions of fact, they have the same power to order the marshal to furnish them at the expense of the government that they would have if the United States were parties to the trial. The national courts are not empowered to administer justice deliberately, fairly, and impartially in United States cases only, but all litigants before them are entitled to the same deliberate and impartial trial. Any other rule would render it at least doubtful whether any verdict in any of these courts in favor of the United States could ever be sustained in any case in which the jurors were furnished with meals at the expense of the government, for it is a general rule that a verdict cannot be sustained in a case in which the prevailing party has furnished the jury with refreshments during the trial. *Coke, Litt.* 227; *Com. v. Roby*, 12 Pick. 496; *People v. Myers*, 70 Cal. 582, 12 Pac. 719; *Doud v. Guthrie*, 13 Ill. App. 653; 12 Am. & Eng. Enc. Law, tit. "Jury and Jury Trial," p. 372; *Studley v. Hall*, 22 Me. 198; *Walker v. Walker*, 11 Ga. 203, 206; *Walker v. Hunter*, 17 Ga. 364, 414; *Mining Co. v. Showers*, 6 Nev. 291; *Springer v. State*, 34 Ga. 379; *Drake v. Newton*, 23 N. J. Law, 111; *Thomp. & M. Jur.* § 372. We cannot hold that the United States have placed themselves in the position of furnishing refreshments to jurors engaged in deliberating upon their own cases only. It is only on the ground that the United States furnishes meals for jurors in all cases, when ordered by the court,—on the ground that it furnishes them, not as a suitor, but as a government, to insure a fair trial and a speedy decision,—that verdicts in their favor in such cases stand unchallenged. The result is that the power to direct the marshal to furnish meals for jurors, at the expense of the government, while they are deliberating upon their verdict, in charge of an officer of the court, is one of the inherent incidental powers of the circuit and district courts of the United States, which they may exercise in any case before them, whether the United States are or are not parties to it. The dis-

bursements for such meals, made by the marshal, pursuant to the exercise of this power by the courts, are expenses necessarily incurred for some of the "other contingencies" referred to in the act of 1853 regulating the fees and costs of marshals and others (10 Stat. c. 80, p. 165; Rev. St. § 829), and the claim of the plaintiff in error against the United States for these disbursements should have been allowed.

3. A claim for travel and services summoning a panel of petit jurors upon a special venire to attend at an adjourned term of the circuit court, when the marshal had been paid \$50 for summoning one panel at the opening of the same stated term, but the court had discharged these jurors, had adjourned the court for a long interval to a day certain, and had issued the second venire for this second panel of jurors. It is conceded that the marshal performed the travel and rendered the service for which this claim is made, and the only ground for its disallowance is that the third clause of section 829, Rev. St., contains this provision: "But the fees for distributing and serving venires, drawing and summoning jurors by township officers, including the mileage chargeable by the marshal for each service, shall not at any court exceed fifty dollars,"—and the marshal was paid \$50 for summoning the jurors who attended at the opening of the stated term, and who were discharged when the court adjourned. This does not appear to us to be a fatal objection to this claim. The act of congress does not provide that these fees and this mileage shall not exceed \$50 at any term of court, but at any court. It is not infrequently the case that economy in the conduct of the business of a trial court, the interests of the government and of the litigants, demand that an adjournment of several weeks shall be taken; that the petit jurors in attendance be discharged; and that another panel be called. Where such a course is pursued, as in the case before us, there is a strong presumption that the public interests and the interests of the litigants were in that way best subserved. Such an adjourned term, after an interval of weeks, is as much a court as the original term; and, if the presiding judge directs the drawing and summoning of another panel of petit jurors for such a court, we are unable to find in this statute any prohibition of the marshal's recovery of his fees and mileage for this service, not exceeding \$50. In our opinion, \$50 of this claim should have been allowed.

4. Claims for travel to serve, and for service on the keeper of the prison, of temporary warrants of commitment of persons under arrest, charged with crimes against the United States, pending their examination before the United States court commissioners. These claims were properly disallowed. The marshal had already been paid 50 cents for each commitment, and 10 cents a mile for himself and each prisoner, and necessary guard for the transportation of these prisoners to the place of confinement. He was entitled to no more. Rev. St. § 829; *U. S. v. Tanner*, 147 U. S. 661, 13 Sup. Ct. 436.

5. A claim for travel, in going only, to serve, for the United States, certain warrants, subpoenas, and other process which the marshal served upon different persons for distinct causes on occasions, when



in each instance he served for the government on the same trip, and, at about the same time and place, another writ on another person, and in a different cause from any of those named in the process on account of which this travel is charged, and elected to and did receive for the service of this other writ his actual traveling expenses for the trip, under section 829, Rev. St. The question raised here is more clearly presented if we consider this claim for travel in a single instance. Let us suppose that the marshal had three writs in favor of the United States, in three different causes, against three different persons residing in the same locality, and that he served these three writs on the same trip, at about the same time and place, and elected to receive, and was paid, upon one of these writs, his actual traveling expenses on the trip. Is he thereby precluded from recovering his mileage on the other two writs? This is the question presented, in one form or another, by each item of this claim. Section 829, Rev. St., so far as it is material to the determination of this question, provides that the marshal shall receive "for travel in going, only, to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases, six cents a mile. \* \* \* But when more than two writs of any kind, required to be served on behalf of the same party, on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs. \* \* \*

In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath to the satisfaction of the court." The provision of this statute, that in cases where the marshal has several writs against the same person, that might be served at the same time, he shall recover mileage on but two writs, leaves no doubt but that he is entitled to mileage upon each writ when he has served several writs against different persons in distinct causes. *U. S. v. Fletcher*, 147 U. S. 664, 668, 13 Sup. Ct. 434; *Harmon v. U. S.*, 43 Fed. 560. When, therefore, the marshal had served the three writs, in the instances we have chosen to illustrate this question, he was entitled to mileage one way upon each of these writs. This mileage was given to him by this statute to compensate him for his expenses for travel and subsistence while he was executing the writs. He was necessarily compelled to travel both ways to serve these writs, and it is very possible that his actual traveling expenses exceeded the mileage upon any one of the writs. The statute gave him the option to receive the actual expenses of his trip, or the mileage that this trip had earned. He elected to take the actual expenses, and he now seeks to recover two-thirds of the mileage given by the statute, in payment for those very expenses. This is an attempt to recover at the same time the compensation provided for moneys expended, and the moneys themselves. The purpose of the provision which gives the marshal his option to receive his actual expenses or his mileage, undoubtedly, was to protect him against loss in cases where the expenses of serving a writ exceeded the mileage allowed by the statute; but it was never intended to permit him to speculate upon his option, or to recover any part of his mileage after he had elected

to receive the actual expenses that earned this mileage. The expenses of the trip constitute the consideration for the payment of all the mileage earned on all the writs in favor of the government served on that trip. The statute simply gives the marshal the option to surrender all claim to this consideration, and to recover the mileage, or to take back the consideration and forego the mileage; but he cannot recover back the consideration, and then successfully claim any part of the mileage. The result is that section 829, Rev. St., does not authorize the marshal to receive upon one writ the actual expense of the trip on which he served several writs in favor of the government upon different persons, and then to recover his mileage upon the others. The receipt of the expenses is a waiver of all right to the mileage, and the refusal to allow this claim must be affirmed.

6. A claim for travel, in going only, to serve subpoenas for the United States upon persons who were in each case served by the marshal on the same trip, and at the same time and place in another cause, and the marshal was allowed and paid for travel upon one subpoena only. Section 829, Rev. St., provides that "when more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation for travel on only two of such writs; and to save unnecessary expense, it shall be the duty of the clerk to insert the names of as many witnesses in a cause in such subpoena as convenience in serving the same will permit." The marshal was clearly entitled, under this provision of the statute, to mileage upon two—and upon only two—subpoenas on each occasion when he served several subpoenas for the government in different cases upon the same person and on the same trip, and to this extent this claim should have been allowed. The judgment below must therefore be reversed and the case remanded, with directions to enter a judgment not inconsistent with the views expressed in this opinion, and it is so ordered.

---

OWOSSO SAV. BANK v. WALSH.

(Circuit Court, E. D. Pennsylvania. January 8, 1895.)

No. 4.

1. AFFIDAVITS OF DEFENSE—PROMISSORY NOTES—INDORSEMENT—GENUINENESS OF—DENIAL.

In an action against the indorser of certain promissory notes it was alleged in the affidavit of defense that the said indorsements "may have been" obtained by fraud, and without the indorser's knowledge, and that he had no recollection whatsoever of having indorsed them, "and therefore denies that the alleged signature on said notes is his signature, and demands that proof thereof be required upon the trial of the cause." *Held* that, under the rule of court which provides that the genuineness of such indorsements shall be taken to be admitted unless denied by affidavit, these averments were sufficient to entitle the defendant to insist upon the proof which he demanded.

**2. SAME — DENIAL OF GENUINENESS OF INDORSEMENT — RULE OF COURT — EFFECT OF.**

A rule of court providing that the genuineness of indorsements of promissory notes shall be taken to be admitted unless denied by affidavit, was not intended to fix upon a party the admission of a fact which he does not remember, and therefore asks shall be proved, even though he acknowledges its existence to be possible.

**Rule for judgment for want of a sufficient affidavit of defense.**

The plaintiff, the Owosso Savings Bank, a corporation doing business in the state of Michigan, claimed of the defendant, a citizen of Pennsylvania, and a resident of the Eastern district of that state, the sum of \$13,007.40, with interest, being the amount alleged to be due by said defendant upon four promissory notes made by the J. H. Mahler Company, by J. H. Mahler, president, to the order of the Second National Bank of Owosso, Mich., and indorsed by the defendant, together with protest fees. The plaintiff averred that it was the holder of said notes, having taken the same in the usual course of business, before maturity. The affidavit of defense averred that the defendant "has no knowledge or recollection whatsoever of signing, executing, or indorsing the four several promissory notes upon which suit has been brought against him, and copies or alleged copies of which have been filed as part of the record of the above case, and therefore denies that the alleged signature on said notes is his signature, and demands that proof thereof be required upon the trial of the cause; that, if the said indorsement upon the notes in question should be proved to be that of this defendant, then he positively declares and testifies that the same was procured by fraud and deceit on the part of J. H. Mahler, the president of J. H. Mahler Company, the maker of said notes." The affidavit further averred that the defendant had been the holder of a number of shares of the stock of the said company, and had been anxious to obtain cash upon the same, said cash being due him as salesman in the employ of the company, and that "in the course of his negotiations in endeavoring to obtain withdrawal of his above-mentioned stock he was requested to sign, and did affix his signature to, a number of papers and documents which were presented to him for his signature by said J. H. Mahler, the said president of the company, and which the said Mahler alleged were necessary parts of said transaction; and this defendant avers that his signature may have been without his knowledge, and by the fraud and connivance of the said J. H. Mahler, obtained upon the notes upon which suit has now been brought, without the knowledge of this defendant." It was further averred that defendant had received no consideration therefor, did not sign them for the purpose of withdrawal of said stock, nor for any purpose, and had no knowledge of their existence until the suit was brought. He also averred that he was informed and believed that the said copies are not full and perfect, and craves that the originals, together with the certificates of protest, be produced, and duly proved upon the trial of the cause.

Wagner & Cooper, for plaintiff.

Louis Hutt, for defendant.

DALLAS, Circuit Judge. Rule 1 of this court provides that the genuineness of indorsements of promissory notes shall be taken to be admitted unless denied by affidavit. The affidavit of defense in this case concedes that the defendant's indorsement of the notes sued upon "may have been" obtained by fraud, and without his knowledge, but avers that he has no recollection whatsoever of having indorsed them, "and therefore denies that the alleged signature on said notes is his signature, and demands that proof thereof be required upon the trial of the cause." Although this denial is so peculiarly guarded as, perhaps, to justify some hesitancy in

relying upon it, yet it must, for the present purpose, be accepted as made in good faith, and, being so accepted, it is, I think, sufficient to entitle the defendant to insist upon the proof which he demands. The rule of court was not intended to fix upon a party the admission of a fact which he does not remember, and therefore asks shall be proved, even though he acknowledges its existence to be possible. The other matters set up in defense need not be now considered. Judgment for want of sufficient affidavit of defense denied.

---

## LEFAVOUR v. WHITMAN SHOE CO.

(Circuit Court, S. D. New York. December 31, 1894.)

## CONTEMPT—INTERFERENCE WITH SHERIFF'S POSSESSION OF ATTACHED PROPERTY.

Plaintiff had been an agent for defendant, conducting business in his own name, and selling goods, on credit, to sundry persons. He commenced an action by attachment, in a state court, against defendant, and caused the attachment to be levied upon the debts due from the persons to whom such goods were sold. The cause was removed to the federal court, and the attached property transferred from the sheriff to the marshal. While the debts were thus in the hands of the sheriff and marshal, plaintiff proceeded to collect the same, and received the proceeds. *Held*, that such conduct was a contempt of court.

Prior to October 30, 1893, plaintiff, Herbert Lefavour, conducted business on his own account at 96 Duane street, New York City. On that day he made a contract with defendant, the Whitman Shoe Company, of Boston, Mass., under which he thereafter conducted business at the same place as its agent, but under his own name; all goods, assets, book accounts, etc., of the business becoming the property of the Whitman Shoe Company. In August, 1894, the Whitman Shoe Company assigned all its property, including the business at 96 Duane street, New York, to William H. Daniels, for the benefit of its creditors. October 31, 1894, Lefavour commenced this action against the Whitman Shoe Company in the supreme court of New York, and caused an attachment to be issued and levied upon the property at 96 Duane street, including the book accounts.

November 10, 1894, the cause was removed to the United States circuit court, and on November 16th, pursuant to an order of that court, the attached property was delivered by the sheriff to the United States marshal. On November 20th an order was made directing the marshal to deliver the attached property to William H. Daniels, who had claimed the same, as assignee, the sureties upon the indemnity bond on such claim having failed to justify, and, under said order, the books, containing the accounts, with persons to whom goods had been sold, were delivered to Daniels. After the levy of the attachment, and both prior and subsequent to November 20th, the plaintiff Lefavour, with the assistance of Abraham A. Joseph, an attorney, collected a number of the book accounts outstanding at the time of the attachment, in some cases by solicitation, and in others by the threat or use of legal process. The defendant and Daniels now move to punish plaintiff and Joseph for contempt in collecting such accounts, alleging that such collection was misconduct by which a right and remedy of defendant and of Daniels was defeated, impaired, impeded, and prejudiced.

Abram Kling, for complainant.

George H. Adams, for defendant.

LACOMBE, Circuit Judge. Joseph denies under oath that he was aware of the facts, which were manifestly within the knowledge of the plaintiff. He may be given the benefit of the doubt, and as to him the motion is denied. The writ of attachment commanded the sheriff to attach and safely keep so much of the property within the county, which the defendant had or might have at any time before final judgment in the action, as will satisfy plaintiff's demand. In obedience to such writ, the sheriff, by his deputy, presented himself at the premises No. 98 Duane street, where the business of the defendant was conducted, and, serving the notice required by law, attached all personal property there found, including "all books of account, vouchers, and papers relating to the property, debts, credits, and effects of said defendant." Lefavour appears to have been present on this occasion, and to have himself pointed out to the sheriff the property, books, papers, etc., levied upon. It is no doubt true that the sheriff did not give to the several individuals and firms who were indebted to defendant the notice required by the New York Code, which, if served, would have made them liable should they thereafter pay such debts to any one except the sheriff or his proper representative. So far as the defendant was concerned, however, or any one claiming through the defendant with full knowledge of all the facts, levy was complete when the books and papers were taken into the custody of the sheriff, and the defendant's representative notified thereof. It appears that subsequent to the levy defendant has collected some of the money due to the defendant, enumerated in its books, and which he perfectly well knew was included within the writ and notice; and this money he collected as the representative and former business manager of the defendant. In so doing he has acted in disobedience of the writ, which ordered that the property should be safely kept by the sheriff. The removal of the cause to this court makes it the vindicator of the writ which, by section 4 of the judiciary act of 1875, is declared after removal to hold the goods or estate attached or sequestered to abide final judgment in this court. As to debts due to the defendant, therefore, which were collected by Lefavour prior to November 20, 1894, he seems to be plainly in contempt. As to like debts collected by him after November 20, 1894, the case is not so plain, and he may be given the benefit of the doubt. Proceedings to punish for contempt, however, are personal, and there is nothing to show that Lefavour has been served personally with notice of this application. Plaintiff may therefore take an order to show cause directed to Herbert Lefavour, requiring him to appear personally before this court on Saturday, January 5, 1895, at 11 o'clock in the forenoon, and there and then show cause why he should not be committed for 10 days as a punishment for his contempt of this court.

## UNITED STATES ex rel. GOLDSTEIN v. ROGERS.

## SAME v. AMERICAN STEAMSHIP CO.

(Circuit Court, E. D. Pennsylvania. January 22, 1895.)

Nos. 562 and 563.

## 1. IMMIGRATION—POWER OF COURTS TO REVIEW ORDERS FOR DEPORTATION.

The federal courts have no power to pass upon the acts of the commissioners of immigration when in the exercise of the right of excluding an alien upon the ground that said alien would, because of poverty and lack of opportunity to obtain employment, become a charge upon the civil authorities.

## 2. SAME—AUTHORITY TO DETERMINE QUESTION OF EXCLUSION.

Congress has the right to vest in certain officers, exclusive of the courts, the federal authority to determine whether a person, not a citizen or inhabitant of the United States, shall be excluded from admission to this country.

These were petitions for a writ of habeas corpus filed by Bernard Blum against John J. S. Rogers, commissioner of immigration for the port of Philadelphia, and by the same relator against the International Navigation Company.

The petitions averred that the relator, Bernard Blum, was an uncle of Israel Goldstein, a native of Poland; that the said Goldstein was unlawfully detained on board one of the steamships of said company upon the order of said Rogers. The answer of the International Navigation Company set forth that the said Goldstein had been an immigrant on board the steamship Kensington, and that by order of the said commissioner he was about to be deported in another vessel of the same company. The answer of the commissioner set forth that the said Goldstein, upon arrival at the said port, having been examined, had been found to have but \$4.25 upon his person, was a tailor by trade, and was bound for New York City; that in the opinion of the commissioner, which opinion had been affirmed on appeal by the bureau of immigration at Washington, the said Goldstein was likely to become a charge upon the public, for three reasons: First, owing to the small amount of his property; second, owing to the congested condition of the tailoring trade in New York City; third, owing to the nonliability of his said uncle, the relator, to support him. Therefore it had seemed advisable to order his deportation as a pauper immigrant.

Charles Hoffman, for relator.

Ellery P. Ingham, U. S. Atty., for Rogers.

DALLAS, Circuit Judge. I have considered, in the light of the arguments of counsel and the cases cited by them, the objections and traverse filed yesterday to the returns upon these writs. It is, I think, desirable that a decision should be promptly made, and therefore I will not postpone it by awaiting opportunity to reduce my views to writing. I am clearly of opinion that congress has, without exceeding its constitutional power, vested in certain officers, exclusive of the courts, the final authority to determine whether a person, not a citizen or inhabitant of the United States, shall be excluded from admission to this country. Israel Goldstein is, admittedly, an alien. Therefore the jurisdiction which has been exercised in his case was rightfully assumed, and the proceedings which ensued are not subject to review by this court upon habeas corpus or otherwise. The writs of habeas corpus are, for this reason, discharged.

## In re CHIN YUEN SING.

(Circuit Court, S. D. New York. December 27, 1894.)

## IMMIGRATION—BAIL ON APPEAL FROM DENIAL OF WRIT OF HABEAS CORPUS.

The court being prohibited from admitting to bail an applicant for a writ of habeas corpus, who is a Chinese immigrant seeking release from detention by the collector of customs, while the application is being considered in the first instance, it would be a manifestly improper exercise of discretion to admit such applicant to bail, pending an appeal from a denial of the writ, whether the court is prohibited from so doing or not.

Application to release on bail, pending appeal from a decision of this court dismissing the writ. The relator is a Chinese immigrant. The collector of the port decided against his right to land, and detained him under the statutes.

B. C. Chetwood, for the motion.

W. Macfarlane, U. S. Atty., opposed.

LACOMBE, Circuit Judge. It is unnecessary to decide the question argued upon this application, viz. whether or not this court is expressly forbidden by statute from releasing on bail pending appeal, where the relator is a Chinese immigrant. Concededly, there is such a prohibition, where the application is being considered by the court in the first instance. Act May 5, 1892, § 5. That being so, it would be a singular exercise of discretion which would release an immigrant on bail after the court has decided that he should not be permitted to enter the country, when the statutes require that he shall not be released on bail before the court has so decided, and when there is still a possibility that its decision might be favorable to him. Application denied.

---

WHITE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 15, 1895.)

## CUSTOMS DUTIES—CLASSIFICATION—MANUFACTURES OF JUTE AND FLAX — BURLAPS.

Articles woven of flax, and of jute and flax, less than 60 inches in width, used chiefly in the manufacture of clothing, for the particular purposes of stiffening collars and fronts of coats and other garments, and as bands in trousers, etc., the goods being known commercially as "canvas," "padding," "ducks," "coatings," etc., are properly dutiable as manufactures of flax, under paragraph 371 of the tariff act of October 1, 1890, and as manufactures of jute and flax, under paragraph 374 of that act, and are not dutiable as burlaps, not exceeding 60 inches in width, under paragraph 364 of the same tariff act.

At Law.

Appeal by the importers from a decision of the board of general appraisers affirming the decision of the collector of the port of New York in the classification for customs duties of certain articles entered at that port from a foreign country March 13, 1893, which articles were classified for duty, as to part thereof, as manufactures of jute and flax, valued at over 5 cents per pound, at 40 per cent. ad valorem, under paragraph 374 of the tariff act of October 1, 1890, which is as follows:

"374. All manufactures of jute, or other vegetable fibre, except flax, hemp or cotton, or of which jute, or other vegetable fibre, except flax, hemp or cotton, is the component material of chief value, not specially provided for in this act, valued at five cents per pound or less, two cents per pound; valued above five cents per pound, forty per centum ad valorem."

As to the other part of the merchandise composed entirely of flax, it was classified by the collector as manufactures of flax, under 100 threads to the square inch, at 50 per cent. ad valorem, and, over 100 threads to the square inch, 35 per cent. ad valorem, under paragraph 371 of the same tariff act, which is as follows:

"371. All manufactures of flax or hemp, or of which these substances, or either of them, is the component material of chief value, not specially provided for in this act, fifty per cent. ad valorem: provided, that until January first, eighteen hundred and ninety-four, such manufactures of flax containing more than one hundred threads to the square inch, counting both warp and filling, shall be subject to a duty of thirty-five per centum ad valorem in lieu of the duty herein provided."

The importers duly filed their protest with the collector, claiming the merchandise to be burlaps, not exceeding 60 inches in width, and dutiable at 1½ cents per pound, under paragraph 364, Schedule J, of the same tariff act, which is as follows:

"364. Burlaps, not exceeding 60 inches in width, of flax, jute or hemp, or of which flax, jute, or hemp, or either of them, shall be the component material of chief value (except such as may be suitable for bagging for cotton), one and five eighths cents per pound."

The board of general appraisers, upon the testimony taken in a previous case, in which a decision of the board in favor of the importers was subsequently affirmed by the circuit court (In re White, 53 Fed. 787), found in the present case that the protests of the importers were not well taken, and were accordingly overruled, and the decision of the collector affirmed. The case being appealed into the circuit court by the importers, further evidence was taken before a referee in the circuit court, and the case came on to be tried upon the return of the board of general appraisers, and the evidence taken in the case above cited (In re White, reported in 53 Fed. 787), and upon the evidence now taken in the circuit court. The testimony in behalf of the importers tended to show that, at the date of the passage of the tariff act in question, the term "burlaps" included in trade and commerce the more or less coarsely-woven material composed either exclusively of jute, as in the former Case of White, reported as above, or of jute and partly of flax, and occasionally of all flax; that, prior to 35 years ago, burlaps were chiefly, if not entirely, composed of flax, but that, after the introduction of jute as a cheaper raw material, the commercial burlaps for many years prior to 1890 had consisted very largely of articles manufactured entirely of jute, although often combined with a warp or weft thread of flax; that the commercial burlaps came in the standard width of 40 inches, and that they were known in trade and commerce as wide as 140 inches, and as narrow as 20 inches, or even less; and that the present importations were included within the general class of burlaps. Numerous trade witnesses called in behalf of the government's contention gave testimony tending to show that in 1890, and for many years prior thereto, the commercial burlaps was a coarse-woven article, composed entirely of jute, and containing not more than from 20 to 30 threads to the square inch, including warp and filling; that the articles included in the present suit were not known or considered commercially in trade as "burlaps," but were known by their specific names, such as "Pelissier canvas or padding," "Cream padding," "Paris duck," "coating," etc.; that these articles were used in the manufacture of clothing for the particular purposes of stiffening the collars and fronts of coats and other garments, and for use as bands in trousers, etc. The witnesses from the clothing trade also testified that they purchased and used in their business an article commercially known as "burlaps," which was a coarse, heavy fabric composed of jute, which was employed to give weight and body to cheap articles of clothing. Other trade witnesses knew the commercial "burlaps"; namely, the coarse, heavy-woven jute articles, of 40 inches in width, and wider, which



were used in the upholstery trade for the covering of furniture, etc., and were entirely distinct from the canvas, paddings, and coatings involved in the present suit. It was also shown by competent evidence in behalf of the government that the articles covered by the invoices in the present case were of much finer texture than burlaps which were recognized as such by the government's trade witnesses, the articles in suit running from 44 to 70 threads to the square inch. On the trial it was contended on behalf of the government and the decision of the board of general appraisers that the evidence taken in the former case before the board of appraisers and in the present case in the circuit court showed that the canvases, paddings, ducks, coatings, etc., now under consideration, were an entirely different article from the jute goods which were decided to be burlaps in the White Case, 53 Fed. 787; and that the board of general appraisers and the circuit court were amply justified in finding that the present importations were not commercially burlaps, but were manufactures of flax, or of jute and flax, known by the specific names above given. The United States attorney also contended that the omission in the tariff act of 1890 of the special provisions for "ducks, canvas, paddings," as found in Schedule J of the tariff act of March 3, 1883, existing, as did that provision, alongside of a provision for manufactures of flax, and a provision for burlaps, in the act of 1883, did not throw such ducks, canvas, and paddings into the designation of "burlaps," found also in paragraph 364 of the tariff act of October 1, 1890, but relegated them to the special provisions in the later act for manufactures of flax, and manufactures of jute and flax, as correctly decided by the collector; citing *Robertson v. Rosenthal*, 132 U. S. 460, 10 Sup. Ct. 120.

Stephen G. Clarke, for the importers.

Wallace Macfarlane, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty.

WHEELER, District Judge (after stating the facts). This importation is of goods woven of flax, and of jute and flax, much less than 60 inches wide, and used chiefly in clothing. Similar goods were found, in favor of the same importers, to be burlaps, and assessed as such. In *re White*, 53 Fed. 787. These are protested to be burlaps, not exceeding 60 inches in width, under paragraph 364 of the tariff act of 1890, but are found now to be manufactures of jute and of flax not specially provided for, under paragraphs 371 and 374. Such goods were specially mentioned, as manufactures of flax, jute, or hemp, in the tariff act of 1883, and provided for as such. That special mention was omitted in the act of 1890; but they were such manufactures, and not burlaps, before, and that omission did not change the nature of the goods, nor the class to which they belonged. *Robertson v. Rosenthal*, 132 U. S. 460, 10 Sup. Ct. 120. The former finding, although followed by the court as a finding, was not conclusive, if misleading, as to future importations. *Falk v. Robertson*, 137 U. S. 225, 11 Sup. Ct. 41. The finding in this case seems to have been well warranted, and, as said by Judge Coxe in respect to the former finding, it should be undisturbed. Decision of board of general appraisers affirmed.

## In re BORGEFELDT et al.

(Circuit Court, S. D. New York. December 6, 1894.)

No. 1,005.

## CUSTOMS DUTIES—MAGIC-LANTERN SLIDES.

Slides designed for use in magic lanterns, for the amusement of children, are toys, and dutiable as such, under paragraph 436 of the tariff act of October 1, 1890.

Appeal by importers from the decision of the United States board of general appraisers.

The merchandise consisted of magic-lantern slides, being two pieces of glass about two inches wide by seven inches long, joined by a paper border pasted around the outer edge, upon the inner surface of one of which there are colored designs of persons, animals, etc., intended for use in a magic lantern to throw enlarged pictures upon a wall or plain surface, and suitable for no other purpose, and were imported separately from the lanterns. These goods were classified by the collector as manufactures of glass dutiable at the rate of 60 per cent. ad valorem under paragraph 108 of the act of October 1, 1890; the importers claiming that the same were dutiable at the rate of only 35 per cent. ad valorem under paragraph 436 of said act as toys. Upon taking the case to the board of general appraisers, the decision of the collector was affirmed, the board holding that in the condition as imported the articles were not toys for the amusement of children, whereupon the importers appealed. The evidence taken in the case, after the return of the board, tended to show that the pictures on the slides represented animals, birds, and such subjects as "Red Riding Hood," etc.; that they were adapted for use in magic lanterns for the amusement of children; that they were bought and sold in the toy trade, and used for no other purpose except for the amusement of children, and not for scientific purposes, and that commercially they are known as toys, both when sold together with, or separately from, the magic lantern.

Everit Brown, for importer.

W. C. Low, Asst. U. S. Atty., for collector.

Contended that the slides were not in fact toys, of themselves, in the condition in which they were imported, but only parts of toys, a magic lantern being necessary to the completed toy; that the act of 1890 made no provision for parts of toys, but only for toys as a completed article, and that they were properly assessed for duty as "manufactures of glass," in the precise condition in which they were imported; citing *U. S. v. Schoverling*, 146 U. S. 81, 13 Sup. Ct. 24; *Robertson v. Gerdan*, 132 U. S. 454, 10 Sup. Ct. 119; *Isaacs v. Jonas*, 148 U. S. 653, 13 Sup. Ct. 677.

COXE, District Judge (orally). The question in this cause is one of fact, whether or not slides designed for use in magic lanterns, for the amusement of children, are toys. It seems to me that upon the new evidence taken in this court there can be no doubt that they are toys. It is contended on behalf of the collector that something additional has to be done to make them effective as toys. I fail to see how that changes their character in the least. It is true that they have to be put through a magic lantern; it is true that the lantern has to be lighted, and it is also true that a room has to be darkened before the shadow which is thrown upon the wall is made effectual for the amusement of children, but none the less these are toys, just as the sticks that make the noise on the mimic drum are

toys. It would hardly do to say that such a drum was not a toy because there were no sticks with it, or vice versa. I shall hold, therefore, that upon the new evidence these importations are toys. The decision of the board of general appraisers is reversed.

---

UNITED STATES v. JAHN et al.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

CUSTOMHOUSE CHARGES—FEES FOR WEIGHING AND GAUGING.

The charges for weighing and gauging merchandise, entered for export, originally provided by Acts Cong. July 26, 1866, and March 2, 1867, and afterwards embodied in sections 3023, 3024, Rev. St. U. S., were fees, and, as such, were abrogated by section 22 of the customs administrative act of June 10, 1890.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Gustave A. Jahn & Co., on August 15, 1890, imported into the port of New York a quantity of molasses, which, later in the month, they withdrew from warehouse, and exported to the port of Montreal. Upon such withdrawal and exportation, a charge of 10 cents per cask was exacted by the collector for gauging the molasses, under the provisions of section 3023, Rev. St. U. S. The importers paid the charge under protest, and their protest was referred to the board of general appraisers, who sustained the decision of the collector. The importers then applied to the circuit court for a review of the decision of the board of general appraisers, and that court reversed their decision, Wheeler, J., filing (Jan. 7, 1892) the following opinion:

"In the matter of this appeal of Gustave A. Jahn, as to the charge of so much per hundred pounds for weighers' services on goods entered for exportation. The appeal is against the allowance of those charges, on the ground that by the act of 1883 they were abolished. Now, the first time that any charge was made on that account for any goods entered for exportation was in the act of 1866 (14 Stat. 289). That was an act by itself, consisting of three sections, the first of which is: 'That upon all weighable articles hereafter exported, upon which a drawback or returned duty is allowed, and upon all weighable goods withdrawn from bonded warehouse for export, there shall be levied and collected, by the collectors of the several ports, three cents per hundred pounds, to be determined by the returns of the weighers.' And by section 2: 'That the office of measurer at the port of New York is hereby abolished, and the duties heretofore performed by them shall be performed by the weighers.' And section 3 is: 'That the weighers at the port of New York shall receive from and after the passage of this act, an annual salary of twenty-five hundred dollars: provided, that the increase of compensation, over and above the present salary of said officers, shall not exceed in any fiscal year, the amount of fees earned by them.'

"Now, this charge is connected right in there under the term 'fees.' The charge is a fee for a weigher, provided for by this act for the first time. Now, as to the gaugers, a similar thing is provided by the act of 1867 (14 Stat. 470) in the tariff act at large, section 3: 'That upon all merchandise gaugeable by law hereafter exported, upon which drawback or return duty is allowed, and upon all goods gaugeable by law, withdrawn from bonded warehouses for export, there shall be levied and collected by the collectors, of the several ports, ten cents per cask.' Then section 4: 'That the gaugers at the port of New York shall receive, from and after the first day of April, eighteen hundred and sixty-seven, an annual salary of two thousand dollars:

provided, that the amount of compensation of said officers, as hereby established, shall not exceed in any fiscal year the amount of fees earned by them.' Thus the charges of gaugers on exportations are put in here for the first time, and are called 'fees.'

"Now, these two sections (section 1 of the act of 1866, and section 3 of the act of 1867) are brought forward into the Revised Statutes in sections 3023 and 3024, exactly as they were enacted then. The other sections have become useless, so they are not brought forward into the statutes. But when these laws were passed these were fees. The dropping out of those sections does not change them at all, although the word 'fees' is lost out by the revision of the statutes into the Revised Statutes. The only question is whether they are fees now. Well, they are a specific charge for a specific thing, not relating to the actual worth of the things done, as for a quantum meruit. But, whether worth so much or not, they are to have so much a hundred pounds for weighing, and so much a cask for gauging, and that is essentially a thing that comes under the name of 'fees,' although in this statute it is not called a 'fee.'

"Now, the act of 1890 (section 22) provides 'that all fees exacted and oaths administered by officers of the customs, except as provided in this act, under or by virtue of existing laws of the United States, upon the entry of imported goods and the passing thereof through the customs, and also upon all entries of domestic goods, wares, and merchandise for exportations, be, and the same are hereby abolished.' The point here is whether that abolishes these fees. Now, it is argued that these are not included, because they are not called 'fees' in the statute. But the point is not whether they are called 'fees' in the statutes. The point is whether they are fees within the meaning of this act,—this section 22 of the act of 1890. Now, congress did not content itself by abolishing the particular sections of the law relating to fees, and leaving the rest as it was; but they declared emphatically that all fees exacted by customs officers in passing goods through the customhouse, or passing them through the other way, shall be abolished; that is, the whole thing was cut up by the roots, so that the goods passed through without any charge for fees. Here was a thing exacted. The collector of the port exacted three cents on a hundred pounds of sugar entered by these appellants for exportation. The appraisers held that those two sections of the Revised Statutes were not repealed, so far as this was concerned. But I think congress meant to repeal that, and cut it all out, and leave the goods free, so that there should be nothing in the nature of fees charged or exacted by an officer in passing goods through the customhouse, either way, and that the appellants were entitled to have this sugar go through without this charge. Therefore I decide that this charge, as a charge or fees, was improperly made. I have looked into the case of *Oberteuffer v. Robertson*, 116 U. S. 499, 6 Sup. Ct. 462, as to charges. In that case all charges were abolished, just as in this case all fees were abolished. There they said all charges were cut right out, no matter where expressed in the statute; after that they were gone. The decision of the appraisers is reversed."

The government now appeals.

Edward Mitchell, U. S. Atty. (Chas. Duane Baker, Asst. U. S. Atty., of counsel), for the United States.

Stanley, Clarke & Smith (Edwin B. Smith, of counsel), for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. August 15, 1890, the appellees imported at the port of New York certain molasses, which later in the month they withdrew, and exported for drawback to Montreal, Canada. Before they were allowed the privilege, the collector compelled them to pay certain charges for weighing and gauging the molasses upon their exportation entry, against which they protested. The board of general appraisers sustained the action of the collector, and their

decision was reversed by the circuit court. From the decision of the circuit court the government took the present appeal. The question raised by the appeal is whether these charges were "fees," and as such abrogated by section 22 of the act of June 10, 1890, known as the "Customs Administrative Act," which provides as follows:

"That all fees exacted and oaths administered by officers of the customs except as provided in this act under or by virtue of the existing laws of the United States, upon the entry of imported goods and the passing thereof through the customs, and also upon the entry of domestic goods, wares and merchandise for exportation, be and the same are hereby abolished: \* \* \* provided that where such fees under existing laws constitute in whole or in part the compensation of any officer, such officer shall receive from and after the passage of this act a fixed sum for each year equal to the amount which he would have been entitled to have received as fees for such services during said year."

Such charges as those in controversy for weighing were first authorized by the act of July 26, 1866, and by that act they were treated and denominated as "fees" in section 3, which permitted weighers to receive "the amount of fees" earned by them over and above the fixed salary of those officers. By the act of March 2, 1867, charges for gauging were allowed, and by that act charges like those in controversy for gauging were treated and denominated as "fees," by a provision similar to that in the act in respect to weighers. The provisions in these two acts were embodied in Rev. St. §§ 3023, 3024, so far as they allow compensation and fix the amount. But in the meantime, by subsequent legislation, the sections fixing the salary of weighers and gaugers had become inapplicable, and they were therefore omitted in the Revision, and the word "fees" dropped out of the statutes. We agree with Judge Wheeler, who decided the case in the circuit court, that the omission in the Revised Statutes to denominate these charges as "fees" is of no significance. Inasmuch as the charges were in their inception treated and denominated by statute as "fees," and as they were "fees" in the ordinary definition of the word, being a recompense prescribed by law for official services, we cannot doubt that they were intended to be included in the category of fees which were abolished by congress by the customs administrative act. Furthermore, it appears that, by the construction of the officers of the treasury department, down to the time of the passage of the customs administrative act, such exactions were uniformly regarded as fees. If the questions were doubtful, this construction would be persuasive, and, as has often been declared by the courts in cases of doubt or ambiguity, should turn the scale. The decision of the circuit court is affirmed.

---

GAY MANUF'G CO. v. CAMP.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 106.

1. PRACTICE—EFFECT OF FINDINGS OF MASTER—APPEAL.

The findings of a master or commissioner on matters of fact referred to him are prima facie correct, and, when sustained by the circuit court,

should not be overruled in the appellate court, unless they are without testimony to support them, or the preponderance of evidence is greatly against them.

2. **CONTRACTS—LIQUIDATED DAMAGES—PENALTY.**

Receivers of an insolvent corporation made a lease of certain timber and mill property, under direction of the court, to C. and others, which provided that, if it should be terminated before the date set for its expiration, for any default of the lessees, the damage suffered by the lessors, in addition to unpaid rent and unpaid purchase money for timber, in the interruption of earnings, necessity of seeking new lessees, possible lower rent, etc., should be fixed at \$5,000, agreed on as liquidated damages. The lease was terminated a few days before the expiration of the term, for default of the lessee. All rent was subsequently paid, and a special master found that no damage beyond the deferred rent had been suffered by the lessors. *Held* that, in view of these facts and the terms of the lease, the provision for \$5,000 damages must be held to be a penalty, and not liquidated damages.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This was an appeal from an order of the circuit court overruling exceptions and confirming the report of a special commissioner, to whom was referred the petition of William N. Camp and others for the payment to them of certain moneys by the receivers of the Gay Manufacturing Company.

A. H. Taylor, for appellant.

Robert R. Prentiss, for appellee.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

**SIMONTON, Circuit Judge.** The property of the Gay Manufacturing Company, a body corporate of the state of Virginia, was placed in the hands of receivers by a decree of the circuit court of the United States for the Eastern district of Virginia. By the permission and order of the court, these receivers entered into a contract with William N. Camp, P. D. Camp, and James L. Camp on 2d September, 1889, whereby the latter were let in as lessees of certain mill property at Suffolk, Va., a part of the estate in the hands of the receivers, for a term of two years, at \$10,000 per annum. During their tenancy the lessees removed some parts of the machinery and substituted others, put on the premises extra machinery, and made some additions, not, however, attached to the freehold. The annual rental, as we have seen, was fixed at \$10,000, and several covenants were entered into between the parties. Two of these are essential to the understanding of this case,—the fifth and seventh. The fifth will be hereafter discussed. The seventh is in these words:

"Seventh. Said parties of the second part agree to operate said mill and machinery in a workmanlike and careful manner, and to keep said mill, machinery, equipments, and tools so as aforesaid leased to them in running order, good condition and repair, replacing such parts as may become worn out and unfit for use, and to restore the same to the party of the first part at the end of this term in the same condition in which it is received, necessary wear and tear excepted; and the damages for the breach or nonperformance of this clause shall be independent of, and in addition to, damage for other causes herein mentioned."

The fourth clause having provided for the annulling and termination of the contract on breach of condition by the lessees, the receivers applied to the circuit court on 25th July, 1891, by petition setting forth the lease and its covenants, and charging the breach thereof by the Camps by the nonpayment of rent and purchase money of timber and lumber sold, and praying the authority of the court to annul the lease, and re-enter and take possession, as in its terms provided. To this petition the Camps appeared, and answered. The answer admitted the allegations of the petition, the existence of the default alleged therein, and submitted the respondents to the action of the court. Thereupon the court directed the receivers to proceed in all respects in accordance with the lease, to enter upon and take into their possession the property of the Gay Manufacturing Company leased to the Camps, to take possession of lumber, the property of the Camps, found there, and also the lumber of C. B. Leet & Co., with whom the receivers had a contract for the sale of certain lumber, and to sell the same to satisfy the sum due them, and to bring any lawful action or other lawful proceeding against the Camps or C. B. Leet & Co. to recover the balances due by them to the Gay Manufacturing Company. Under this order the receivers entered, ousted the Camps and took possession, and collected the rent due, and the purchase money for the timber and lumber. W. N. Camp, who was really the only party in interest, the others having disclaimed on the record, informed the receivers that there was on these premises personal property belonging to him, and asked leave to remove it. The receivers declined to grant this permission, except under an order of the court. Neither Camp nor the receivers asked for such an order, and the property remained on the premises, and was, and continued to be, used by the receivers. W. N. Camp then filed his petition in the circuit court, alleging that he had left on the premises certain machinery and other personal property of the value of \$2,776.19, set out in an exhibit to the petition; that this property was necessary and convenient for the successful operation of the mill, and that it was mutually understood that the receivers were to pay him the value of the same; that the receivers took possession of it, and have ever since used it in the business and conduct of the mill. The prayer is that they be ordered to pay him that sum, with interest. This petition was presented to the circuit court, and an order was passed granting leave to file it, and referring it and the questions raised thereby to Lee Britt, Esq., as special commissioner, directing him to inquire as to the facts stated in the petition, and report to the court what amount of money, if any, is due to the said William N. Camp by reason of the facts stated in the petition, together with any other matter specially stated deemed pertinent by the commissioner, or required by any of the parties to be so stated. Notice of references was required to be given only to the counsel of the respective parties. This order was wholly *ex parte*. No answer was ever required or filed to the petition. The counsel for both parties, however, appeared before the commissioner, and the record discloses no protest or objection to his going on with the references or taking

testimony. It is too late now to object either to the order of reference or to the fact that the commissioner acted under it. *City of Memphis v. Brown*, 20 Wall. 289. The commissioner took the testimony offered by the parties, and made his report in writing. He finds the facts in favor of the claim of the petitioner for machinery and other property left by Camp in the mill, necessary and convenient to its successful operation, of which receivers took possession and have since used, and recommends that the receivers be ordered to pay for the same at its just value,—\$2,776.19,—with interest from 2d September, 1892. Evidently he acted upon the theory that the receivers had converted the property to their own use, and that Camp, waiving the tort, could recover on the implied assumption. He disallows the claim of the receivers against W. N. Camp for repairs to the mill and machinery which they were compelled to make on taking possession, holding that Camp had returned the property as he had received it, necessary wear and tear excepted. He also disallows for the same reason a claim of \$790, made by receivers against Camp for repairs they made on a locomotive called "Brooks"; and finds against them on a claim made by them, based on the allegations that Camp had not cut the quantity of lumber he had contracted to cut, holding that this was their fault in not furnishing the timber. These findings of the commissioner were excepted to, and, with the exceptions, were heard by the court below, and the commissioner's findings were affirmed. They will be disposed of before coming to another and more important exception.

The finding of a master or commissioner on matters of fact referred to him are *prima facie* correct. *Medsker v. Bonebrake*, 108 U. S. 66, 2 Sup. Ct. 351. When they are sustained by the circuit court, they should not be overruled, unless they are without testimony to support them, or the preponderance of the evidence is greatly against his conclusion. *Bridges v. Sheldon*, 18 Blatchf. 507, 7 Fed. 17. In this case, reviewing the testimony in the record, we cannot say, that his finding "that Camp left upon the premises personal property, and machinery necessary and convenient for the use of the mill, and that the receivers took possession and continued to use the same," is not supported by evidence, or that it is overcome by the preponderance of the evidence. The receivers knew that Camp claimed the property, and that he had demanded its delivery. They very properly would not act without an order of the court. But they need not have used the property.

Another and much more difficult question arises upon an exception to the report of the commissioner that he had not allowed the receivers \$5,000, provided in the lease as liquidated damages in case its provisions, or any of them, be violated, and the lessors thereupon resume possession. No mention whatever is made of this question in the report of the commissioner. Nor does the record disclose the fact that any exception was taken before him because of his failure to notice it. The only mention of this matter of liquidated damages is in the testimony of Mr. Taylor, who says that he had given notice to W. N. Camp of the claim. The commissioner mentions in detail sums of money claimed by the receivers as



breaches of the lease, and claimed by them as a set-off against Camp's demand. He says nothing as to the liquidated damages. "Under correct chancery practice, no exception to a master's report can be heard by the court which was not taken before the master, so that he can reconsider his decision." *Story v. Livingstone*, 13 Pet. 359; *McMicken v. Perrin*, 18 How. 510. This was not insisted upon, however. *Hatch v. Railroad Co.*, 9 Fed. 856. Mr. Justice Bradley in *Gaines v. New Orleans*, 1 Woods, 104, Fed. Cas. No. 5,177, called attention to the rule, but did not enforce it in that case, as it had escaped counsel on both sides. He, however, gave notice that it would be enforced thereafter. In the case at bar the judge below simply confirmed the report of the commissioner, giving no reasons. The appellee raises the question of its consideration here. In our opinion, the proper practice should have been followed. But to prevent further litigation it may be best to express an opinion on the question now. The fifth clause of the lease is as follows:

"And it is particularly agreed between the parties hereto that whenever upon the termination of this contract at any time before the date herein set for the expiration hereof, by reason of the breach or nonperformance of any of its terms or conditions by said parties of the second part, whereas, besides the rent accrued and unpaid, and the unpaid purchase money of the timber cut, for which the parties of the second part would be liable to said party of the first part, it is contemplated and expected that further loss and damage would be suffered by said party of the first part by reason of the interruption of the earnings and operations of said party of the first part, and the contemplated possibility of having to seek other lessees or operators in the place of said parties of the second part, and possibly or probably the necessity of accepting a less rental for its mills, or less prices for its timber than are fixed by the terms hereof, and by reason of all the contemplated uncertainties and disadvantages of the situation in which said party of the first part would be placed in such event, loss would be incurred by said party of the first part, which loss or damage or disadvantage it would be difficult to estimate or determine with accuracy, therefore, in lieu of all such claim for loss or damage, the sum of five thousand dollars is now hereby estimated, assessed, and accepted between the parties hereto as liquidated damages to be paid by the parties of the second part unto the party of the first part, which the parties of the second part hereby declare to be due, and promise and bind themselves to pay, unto said party of the first part, or its assigns, immediately upon the termination or annulment or declaration of the termination or annulment of this contract by the party of the first part for any of the causes or reasons herein set out for which said contract is to be terminated and annulled, in addition, as aforesaid, to the sums due and to be paid for rent and as the price of the timber cut; and, as aforesaid, a lien shall be had and exercised by said party of the first part for such liquidated damages on said accounts in the manner and form hereinbefore mentioned upon the timber cut by said parties of the second part, to be appropriated and taken by said party of the first part as above mentioned."

The lease was for two years from 2d September, 1889, at \$10,000 per annum. On 25th July, 1892, there was due and unpaid for 15 days the rent for one month, due July 2, 1892, and some money for lumber,—in all \$2,529.43; and on this default the lessors entered. Subsequently, it is to be presumed, from no claim having been made for it before the commissioner, they received the whole rent due to 2d September, 1892, and this is stated to be a fact in appellee's brief. When before the commissioner, they set up claims for other breaches of the lease, which were disallowed. So, the only breach of the

lease—the nonpayment of rent—having been satisfied by payment, are the lessors entitled to the payment of \$5,000 as liquidated damages under these circumstances? This will depend upon the question, is this sum of \$5,000 inserted as a penalty or as liquidated damages? "Upon this subject," says Deady, J., in *Harris v. Miller*, 6 Sawy. 319, 11 Fed. 118, "the law is peculiar, and, instead of giving effect to the contract of the parties according to their intentions, it assumes to control them according to its standard of justice." In *Spencer v. Tilden*, 5 Cow. 150, the court says:

"This doctrine, which converts damages apparently stipulated or fixed by the parties into a penalty, came from the civil law, through the court of chancery, and has at length obtained a firm hold in the courts of common law. It is obvious that, in order to enforce it, courts must disregard the particular expressions of the parties; for, the moment we agree that a party may, by calling a real penalty liquidated damages, or throwing it in the form of an alternative in a contract, or substituting its payment for some specified default, secure the whole to himself, without regard to the real damages, we bring back the oppressive rule of the common law. The griping creditor will always use the particular form or phraseology of contract which will secure him his pound of flesh, unless the courts interfere in all cases, and tell him that, from the very nature and essence of his bond, whatever he claims, and in whatever shape or upon whatever footing, if it be in truth plainly beyond the legal amount of damages, so far it shall be no more than nominal."

The rule laid down in *Barton v. Glover*, Holt, N. P. 43, is:

"When a sum of money, whether in the name of a penalty or otherwise, is introduced in a covenant or agreement merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered the principal intent of the deed or contract, and the penalty as the accessory, and therefore only to secure the damages really incurred."

The fact that the parties speak of it as liquidated damages is not conclusive. *Lampman v. Cochran*, 16 N. Y. 275. The doctrine is well stated by Sanford, J., in *Bagley v. Peddie*, 5 Sandf. 192:

"Where it is doubtful on the face of the instrument whether the sum mentioned was intended to be stipulated damages or a penalty to cover actual damages, the courts hold it to be the latter. (2) On the contrary, where the language used is clear and explicit to that effect, the amount is to be deemed liquidated damages, however extravagant it may appear, unless the instrument be qualified by some of the circumstances hereafter mentioned. (3) If the instrument provide that a larger sum shall be paid on the failure of the party to pay a less sum, in the manner prescribed, the larger is a penalty, whatever may be the language used in describing it. (4) When the covenant is for the performance of a single act or acts, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum as damages for a violation of any such covenants, that sum is to be deemed liquidated damages, and not a penalty. (5) Where the agreement secures the performance or omission of various acts of the kind mentioned in the last proposition, together with one or more acts in respect to which the damages on a breach of the covenant are certain or readily ascertainable by a jury, and there is a sum stipulated as damages to be paid by each party to the other for a breach of any one of the covenants, such sum is held to be a penalty merely."

The principle derived from this quotation is that the circumstances of each case determine whether the sum stated be liquidated damages or a penalty; and this without regard to the words used, perhaps sometimes in disregard of the intent of the parties. And whenever it appears that the damages occasioned are easily esti-

mated in money, the covenant is construed as a penalty. A fortiori is this construction applied to a case like the present, when the only breach established is the nonpayment of rent within the stipulated period, accompanied by proof that the rent then due and all rent subsequently accruing has been paid to the lessors, and accepted by them. "The subject-matter of the contract and the intention of the parties are the controlling guides. If, from the nature of the agreement, it is clear that any attempt to get at the actual damage would be difficult, if not vain, then the courts will incline to give the relief which the parties have agreed to. But if, on the other hand, the contract is such that the strict construction of the phraseology would work absurdity or oppression, the use of the term 'liquidated damages,' will not prevent the court from inquiring into the actual injury sustained, and doing justice between the parties." 2 Sedg. Dam. 215 (399, 400); 1 Pom. Eq. Jur. §§ 433, 444.

In this case, the order of court authorizing the receivers to re-enter and take possession of the leased property was passed on 25th July, 1891. The lease, by its terms, expired September 2, 1891. It therefore had only 38 days to run. It does not appear on what day the receivers actually took possession, but it is quite impossible that any substantial damage could have resulted from the annulling of the lease a few days before the expiration of its term, and the exaction of a penalty of \$5,000 as the consequence of such a default would be grossly excessive and inequitable. The judgment of the circuit court is affirmed, with costs.

---

PRATT v. LLOYD et al.<sup>1</sup>

(Circuit Court, E. D. Pennsylvania. November 8, 1889.)

No. 1.

1. PATENTS—REISSUE—ENLARGING OR NARROWING CLAIM.

A reissue is not invalid for enlargement of specifications and claims, where the specifications contain merely a fuller statement of the ideas originally expressed, and the claims contain nothing which is not expressed or plainly implied in the original; nor for narrowing a claim, where what is omitted from the original is plainly implied, the device being incomplete without it.

2. SAME—INFRINGEMENT.

The Pratt reissue patent No. 7,795, for improvement in door-hanging devices, held not invalid for anticipation or for unwarranted enlargement of specifications and claims, and infringed.

This was a suit by Elias E. Pratt against Lloyd & Supplee to restrain the defendants from infringing complainant's reissued letters patent No. 7,795, dated July 17, 1887, for improvements in devices for hanging car doors. The complainant is a resident of Massachusetts, and the defendants are residents of Philadelphia. The bill asked the usual decree for an injunction and accounting.

<sup>1</sup> See Pratt v. Sencenbaugh, 64 Fed. 779.

The defenses were: First, that the reissue was invalid, because it was not for the same invention as the original patent; second, that by reason of the condition of the prior state of the art complainant's patent was either anticipated, or the invention thereunder claimed does not involve patentable novelty, and for these reasons the patent is void; third, that the defendants have not infringed complainant's patent.

The particular feature of the invention which was involved in the controversy related to claims 2 and 3 of the reissued patent, as follows, viz.: "(2) In a device for hanging the door of a car, the laterally elongated staple or lug, F, constructed and arranged to operate with the trucks, D, and door, G, substantially as set forth and specified. (3) The door, G, lugs, F, trucks, D, and runlet, B, combined and arranged to operate substantially as set forth and specified." The elements recited in these claims are stated by the specification to constitute a door-hanging device, which, in connection with the drawings, is described in the following language: "In the drawing, A represents the side of the car; G, the door; and P, the opening in the car which the door is designed to close. Immediately above this opening there is a runlet, B, attached to the side or body of the car by the screws, x, f. This runlet is provided with inwardly and horizontally projecting flanges or lips, C, C, near its base, forming a track on which the trucks or wheels, D, D, roll or traverse, the door, G, being suspended by means of the staples or lugs, F, F, which work in a slot or longitudinal opening between the flanges, and rest on the axles, z, z, by which the trucks are connected. The upper ends or loops of the staples are flattened or laterally elongated, as best seen in Fig. 4, having a straight horizontal section from d to p. \* \* \* The elongated staples or lugs, F, give free play to the wheels, and prevent the parts from cramping or binding in moving the door. They also materially lessen the friction, the axle, z, rolling on the underside of the lug, F, instead of rotating in a fixed bearing or box, as the door is moved back and forth in opening and closing the same. \* \* \*" The italics indicate the added specifications in the reissue.

Edward Wilhelm, an expert witness on behalf of the complainant, testified in part as follows: "In comparing the specification and drawing of the Pratt reissue, with the specification and drawing of the original patent, I find that they both describe and illustrate the same devices, combined and arranged to operate in the same manner in both. Both specifications and drawings describe and illustrate a door-hanging device comprising an overhead track composed of two parallel rails separated by an intervening slot or space, trucks which run upon the two rails, and which are each composed of two wheels secured to an axle extending transversely over the slot between the rails, hanger irons which are elongated in the longitudinal direction of the rails, and which rest upon the axles between the wheels, and extend downwardly through the slot between the rails and a door which is attached to the hanger irons below the rails, and is supported by these irons. The description of these devices is the same in both specifications, and, in addition to the description and drawing in the original patent, the description of the reissue is somewhat elaborated, as well as the drawings of the reissue, which latter represent in Figs. 3 and 4 enlarged views of the truck and hanger iron, which are not represented on so large a scale in the original drawing. \* \* \* In comparing the second claim of the reissue with the second claim of the original patent, it appears that the element which is designated as the runlet, B, in the second original claim, is absent in the second reissued claim; but it is very obvious that something which takes the place of this runlet must be present as an implied element of the combination of the second claim, and \* \* \* that includes two rails, of any suitable construction, forming a slot between them, and upon which the wheels of the truck travel; so that, including this implied element, the second reissued claim embraces the same number of elements as the second original claim. The remaining question is, then, only whether the elements themselves in the second reissued claim are the same elements, or substantially the same, which are referred to in the second original claim. There is no question that the door, G, and trucks, D, are the same in both claims. The element called the lugs, F, in the second original claim, is identified in the second reissue claim as the laterally elongated staple or lug, F. The original patent states, with ref-

v.65F.no.7—51

erence to these lugs, F: 'The elongated staples or lugs, F, give free play to the sheaves, and prevent the parts from cramping or binding in moving the door.' No other staples or lugs are described, and I therefore conclude that the lugs, F, of the second original claim, are elongated staples or lugs, which perform the functions ascribed to them in the specification. With reference to the fourth element of the second original claim, which is designated as the runlet, B, the question is whether the implied element of a double track, with a slot between the rails thereof, the track being suitably supported, is substantially the same device which is designated by the term, 'runlet, B,' in this second claim. \* \* \* It seems to me that, so far as the operation of the other elements of the claim is concerned, this runlet could be replaced with perfect propriety by a runlet which lacks the protective or housing features of the runlet of the patent, and still be a substantial equivalent of the runlet, B. Mr. Hunter (the expert for the defendants) seems to lay too much stress on the protective feature of the runlet, and he seems to lose sight of the fact that the housing of the track, sheaves, etc., is only one of the results which are mentioned in the last paragraph of the specification of the original patent preceding the claims, and he does not at all refer to the other result, which is stated in the same paragraph as follows: 'The elongated staples or lugs, F, give free play to the sheaves, and prevent the parts from cramping or binding in moving the door.' This feature of the patented device is certainly expressed as clearly in the original patent as the protective feature of the runlet."

Geo. W. Hey, for complainant.

Francis T. Chambers, for defendants.

Before McKENNAN, Circuit Judge, and BUTLER, District Judge.

BUTLER, District Judge. An extended discussion of this case is unnecessary.

It is scarcely disputed that the defendants' device infringes the reissued patent. It plainly does infringe.

The defendants' position—that the reissue is void because of anticipation and unjustifiable enlargement of specifications and claims—cannot be adopted.

We do not find anything in the art showing such anticipation.

The reissue we think is fully justified by what appears in the original specifications and drawing and the patent issued thereon. The specifications as well as the drawings plainly exhibit everything embraced. The enlargement of the former is nothing more than a fuller statement of the ideas originally expressed. No additional invention or thought is introduced. The second claim of the reissue, which is objected to, contains nothing which is not expressed or plainly implied in the original patent. On hasty reading the claim may seem to be narrower than the second claim of the original. On careful examination however it appears to be substantially the same as the latter. While the runlet or covered tracks are not expressly named it is plainly implied. The device described would be incomplete without it, or another substantially like it. The analysis and comparison of these claims by Mr. Wilhelm, plaintiff's expert, seems to be accurate, and may be accepted as a fuller expression of the court's views on this subject. We find the second and third claims infringed, and a decree will be entered accordingly.

## DIAMOND MATCH CO. v. ADIRONDACK MATCH CO. et al.

(Circuit Court, D. Vermont. January 31, 1895.)

## PATENTS—DURATION—FOREIGN PATENTS.

Under Rev. St. § 4887, providing that patents shall be so limited as to expire with any foreign patent for the same invention "having the shortest term," the United States patent does not cease when a foreign patent ceases because of nonpayment of patent office fees for more than a part of the term for which the patent might, on payment of all the fees, remain in force.

Suit by the Diamond Match Company against the Adirondack Match Company and others.

J. W. Russell, for orator.

Hamilton S. Peck, for defendants.

WHEELER, District Judge. This bill is brought upon letters patent of the United States, No. 313,064, dated March 3, 1885, and granted to Ezra B. Eddy, George H. Millin, and Edward Mousseau, of the dominion of Canada, for an improvement in apparatus for dipping matches. The defendants have pleaded section 19 of the Canadian statute of 46 Vict., of May 25, 1883, which provides that:

"The term limited for the duration of every patent of invention issued by the patent office shall be fifteen years, but at the time of the application therefor it shall be at the option of the applicant to pay the full fee required for the term of fifteen years or the partial fee required for the term of five years or the partial fee required for the term of ten years. In case a partial fee only is paid, the proportion of the fee paid shall be stated in the patent and the patent shall notwithstanding anything therein or in this act contained cease at the end of the term for which the partial fee has been paid unless a/ or before the expiration of the said term the holder of the patent pays the fee required for the further term of five or ten years and takes out from the patent office a certificate of such payment (in the form which may be from time to time adopted) to be attached to and refer to the patent."

—That letters patent of the dominion of Canada, No. 20,572, dated November 13, 1884, were granted to the same inventors for the same invention under that statute, subject to the conditions of that act, and to the option of the applicants contained in the patent for the payment of the full fee for the term of fifteen years, or a partial fee for a term of five or ten years, and that a partial fee for five years only has ever been paid, wherefore the Canadian patent expired on November 13, 1889; and they say that for that cause the patent of the United States expired at the same time. This plea has now been argued, and *Bate Refrigerating Co. v. Hammond Co.*, 129 U. S. 151, 9 Sup. Ct. 225, has been much relied upon in argument to support it. The patent in question there was issued in January, 1877, for five years, under, and conformed to, the Canadian statute of 35 Vict., of June 14, 1872, which provided:

"(17) Patents of invention issued by the patent office shall be valid for a period of five, ten, or fifteen years, at the option of the applicant, but at or before the expiration of the said five or ten years the holder thereof may obtain an extension thereof for another period of five years, and after those second five years may again obtain a further extension for another period of five years, not in any case to exceed a total period of fifteen years in all;"

—And was kept in force five years at a time for fifteen years. The United States patent was issued during the first five years, and the question was whether it would expire at the end of that five years. It was held not to have been extinguished by any expiration of the Canadian patent then, because that patent did not expire then. Whether it would have expired if the Canadian patent had been left to expire then was not in question. This decision was explained in *Pohl v. Brewing Co.*, 134 U. S. 381, 10 Sup. Ct. 577, by saying (page 386, 134 U. S., and page 579, 10 Sup. Ct.):

"The ground of this conclusion was that the 'term' of the Canadian patent granted in January, 1877, was, by the Canadian statute, at all times a term of fifteen years' duration, made continuous and uninterrupted by the action of the patentee, as a matter entirely of right, at his own option."

A French and a German patent were in question, each of which had been granted for 15 years, but might, and did, expire for non-payment of annuities, or not being worked; and such expiration was held not to limit the United States patent for the same invention, granted afterwards, because the term of time of a foreign patent would be the same although it might be suffered to lapse or become forfeited. The term of the foreign patent seems to be the space of time during which the monopoly is placed within the patentee's control, without reference to whether he sees fit to retain it for the whole time or not. Therefore the provision of section 4887 of the Revised Statutes that patents shall be so limited as to expire with any foreign patent for the same invention "having the shortest term," seems to mean the expiration of such term of the foreign monopoly as the patentee is by the grant of the foreign patent given power over and control of. By the Canadian statute now in force the term limited for the duration of this monopoly was 15 years, which has yet several years to run. The patent in suit appears to have the same time to run. Plea overruled, the defendants to answer over by March rule day.

---

#### BUFFINGTON'S IRON BLDG. CO. v. EUSTIS.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1895.)

No. 504.

##### 1. PATENTS—IRON-BUILDING CONSTRUCTION—CLAIMS.

The thirteenth claim of the Buffington patent, No. 383,170, for "improvements in iron-building construction," being "the combination, with the posts and girts, of the angle plates connecting them, and forming supports for the veneer shelves," does not include a claim for the idea of supporting horizontal sections of masonry veneer on the iron framework of a building, or the combination of such veneer and the shelves supporting it with the iron frame, merely because shelves and veneer supported thereon in horizontal sections are described in the specifications of the patent.

##### 2. SAME.

The thirteenth claim of the patent, for "the combination, with the posts and girts, of the angle plates," etc., is not for any posts, in combination with the angle plates, but for the laminated posts described in the speci-

cations, and claimed 12 times in the patent, either alone or in combination, and is not infringed where the posts used in a combination are not laminated.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Suit by the Buffington's Iron-Building Company against William H. Eustis. The bill was dismissed, and complainant appeals.

Lysander Hill (P. H. Gunckel filed a brief), for appellant.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree dismissing a bill brought to recover damages for the infringement of letters patent No. 383,170, issued May 22, 1888, to Leroy S. Buffington, for "improvements in iron building construction." The bill was dismissed on the ground that the appellee was not an infringer because he used no such arrangement of tie beams and girts and no such framing posts as are described and claimed in the patent. The chief contention here is that, if the appellee has not made use of the precise combination of laminated posts, girts, tie beams, and other fastenings described and claimed in the patent, the thirteenth claim thereof is broad enough to cover "any building composed of any kind of iron and metal or masonry work, having exterior walls of masonry or of suitable material, supported at proper intervals upon the framework." The record discloses the fact that there are two methods of constructing fireproof buildings. By the earlier method, the masonry walls support the metal girts, beams, and framework within. By a later method a substantial metal frame supports a veneer of masonry or other like material either upon parts of the frame itself, or upon shelves attached to or supported by it, and placed at each story or at other proper intervals, so that a horizontal section of the veneer may rest upon each shelf. Counsel for appellant insist that Buffington was the inventor of this later method of construction; that it is a manifest improvement upon the earlier method; and that he has claimed and secured the exclusive right to this improvement by his patent. They base this contention upon a single claim of the patent, which reads: "(13) The combination, with the posts and girts, of the angle plates connecting them, and forming supports for the veneer shelves;" and they maintain that, because shelves and veneer supported thereon in horizontal sections are described in the specifications of this patent, they should be read into this claim, and all buildings in which a veneer of masonry or other like material is supported by a frame of iron or steel should be held to be infringements of this patent. Is this the proper construction of this thirteenth claim?

In his specifications the patentee makes the following statement:

"My invention relates to fireproof buildings composed chiefly of iron; and the objects of the invention are mainly—First, the construction of an iron building in a manner that will practically obviate undue expansion and contraction during the extremes of heat and cold; second, a novel construction and arrangement of the main structure, and of the stairs and elevator shafts, whereby there is attained the necessary strength and stability, together with



compactness and the utilization of the space to the best advantage; and, third, an improved plan of floors, and means of bracing the iron beams in fireproof floors in such structure. \* \* \* In the several views, A, A, designate laminated framing posts composed of plates, a, of iron or steel, laid together so as to break joints, and secured together by bolts or rivets, &c. The plates should be relatively long, and those for the lower portion of the posts of unequal length, so that as other plates are added they may overlap and break joint throughout the entire length of the structure. The posts are made to suitably diminish in thickness for the successive stories by omission of an outer plate, a, at proper intervals, so that the general shape of the posts will be tapering from foundation to roof, and they can of course be constructed in this manner of any desired height, regard being had to the size and proper proportioning of the plates in the structure, and thus form, when braced, a continuous skeleton or frame extending from bottom to top of the structure. \* \* \* Around the entire exterior of the framing, except the window spaces, is a sheathing, P, of wire lath or other suitable material for the inner support of a thick covering, Q, of mineral wool or other non-conducting substance, and this is in turn covered on its exterior surface by a second sheathing, P', of wire lath or other suitable material, and R is an exterior veneering of stone or other suitable material, supported at each story (and at closer intervals when necessary) by shelves, s, that rest upon and are secured to projecting portions, c', of the angle plates, c, and the veneering is secured at proper points by anchor rods, t, that are made fast to the braces, B, B'."

The patent has 14 claims. Those material to the questions under consideration here are:

"(1) A building having a continuous skeleton of metal, a covering of veneer, and a nonconducting packing between the skeleton and veneer for the purpose set forth. (2) In a building frame, a continuous diminishing laminated post formed of layers of metal plates secured together and arranged to break joints, and decreasing in number towards the top." "(5) In iron-building construction, the combination, with a framing composed of laminated posts suitably connected by braces and girts, of an exterior covering of nonconducting material, and a stone or other veneering exterior thereto, and supported on shelves secured to the framing, substantially as set forth." "(7) In a building frame, a series of continuous framing posts composed of metal plates secured with their flat sides together and breaking joints, in combination with girts and tie beams secured thereto at each floor, substantially as set forth." "(9) The combination, with the framing posts and braces, of the wire lath or equivalent coverings, the nonconducting packing, and the veneering supported by the shelves, and anchor rods, substantially as and for the purposes set forth." "(13) The combination, with the posts and girts, of the angle plates connecting them, and forming supports for the veneer shelves."

In support of their contention for this broad construction of the thirteenth claim of this patent, counsel for appellant cite *Johnson v. Root*, 2 Fish. Pat. Cas. 291, 298, Fed. Cas. No. 7,409; *Weighing Mach. Co. v. Blauvelt*, 50 Fed. 213; *Parham v. Sewing Mach. Co.*, 4 Fish. Pat. Cas. 468, 486, Fed. Cas. No. 10,713; *Forbush v. Cook*, 2 Fish. Pat. Cas. 668, Fed. Cas. No. 4,931; *Lee v. Pillsbury*, 49 Fed. 747, 749; *Alaska Refrigerator Co. v. Wisconsin Refrigerator Co.*, 47 Fed. 324, 327, and other authorities, to the effect that a claim for an improvement in an operative machine which describes the indispensable elements of the improvement and their relation to the older parts of the machine is sufficient, although it does not specifically claim old and well-known parts that are clearly requisite to the operation of the improved machine. Their argument is fairly illustrated by their treatment of *Johnson v. Root*, *supra*. They say that in that case, in an action upon a claim for the "feeding of the

materials to be sewn by means of a vibrating piercing instrument, whether said instrument be the needle itself or an independent instrument in the immediate vicinity thereof as herein described," it was held that so far as a table and cloth holder, both of which were necessary to the operation of the instrument, modified or changed the action of the feeding instrument, they might be deemed to be covered by the claim; and they argue that if the patentee in this case had made his claim for "supporting the horizontal sections of masonry walls by means of steel shelves, substantially as described," such a claim would have secured to the inventor not only the shelves, but the entire steel frames supporting them, so far as any function the frames performed modified the action of the shelves. The conclusive answer to this argument is that supporting horizontal sections of masonry by means of steel shelves is just what the patentee in this case has not claimed, but by his failure to claim has abandoned to the public. A claim of a table and a cloth holder would not have covered the vibrating piercing instrument which fed the materials, or its function of feeding them, in *Johnson v. Root*, nor will a claim for a projection on an angle iron or a post to support a shelf cover the shelf, the articles that may be placed upon it, or its function of supporting them.

The statute requires the inventor to particularly point out and distinctly claim the improvement or combination which he claims as his discovery. Rev. St. § 4888. When, under this statute, the inventor has made his claim, he has thereby disclaimed and dedicated to the public all other combinations and improvements apparent from his specifications and claims that are not mere evasions of the device, combination, or improvement he claims as his own. The purpose of a claim in a patent is to notify the public of the extent of the monopoly secured to the inventor, and, while it is notice of his exclusive privileges, it is no less an estoppel of the patentee to claim under that patent any combination or improvement he has not therein pointed out and distinctly claimed as his discovery or invention. The presumption is, and it is generally the fact, that any such unclaimed combination or improvement was not the invention or discovery of the patentee; that it was old and well known; and that for that reason he did not intend to claim it. But whether he did intend to claim it or not is immaterial, in an action for the infringement of a patent, where no claim for mistake or inadvertence in preparing the specifications or claims can be heard. The patent itself is a solemn declaration of the inventor that every improvement, device, and combination not claimed by him therein is not his invention or discovery, but is the property of the public. It is full and legal notice to every one; notice on which every one has the right to rely that he may freely use such improvements and combinations without claim or molestation from the patentee. The public generally does use them, and it would be rank injustice to permit a patentee, after a combination or device that he did not claim has gone into general use, and years after his patent was granted, to read that combination or device into one of the claims of his patent, and to recover for its infringement of every one who has used it on the faith of his

solemn declaration that he did not claim it. *Stirrat v. Manufacturing Co.*, 10 C. C. A. 216, 61 Fed. 980; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278; *Miller v. Brass Co.*, 104 U. S. 350, 352; *Mahn v. Harwood*, 112 U. S. 354, 357, 361, 5 Sup. Ct. 174, and 6 Sup. Ct. 451; *Wollensak v. Reiher*, 115 U. S. 96, 5 Sup. Ct. 1137; *Parker & Whipple Co. v. Yale Clock Co.*, 123 U. S. 87, 8 Sup. Ct. 38.

The patent of Mr. Buffington, when it is examined in the light of these principles and authorities, itself furnishes conclusive evidence, not only that he did not claim, but that he never intended to claim, the idea of supporting horizontal sections of masonry veneer on the iron framework of a building as his discovery, or the combination of such veneer and the shelves supporting it with the iron frame as his invention. The purpose of supporting sections of veneer upon an iron frame is to obviate the necessity of constructing masonry walls, for the lower stories of high buildings, thick and heavy enough to sustain the weight of the upper stories. Under this new method of construction, the walls of the lower stories are not required to be thicker than those above them. But this was not the object of Buffington's invention. So far as his invention has to do with the outer walls of the building, its sole object was to obviate the undue expansion and contraction of the metal frame during the extremes of heat and cold. It is difficult to see how thinning the masonry walls could diminish the expansion and contraction within. This method of supporting the masonry in sections, when considered by itself, would seem to detract from, rather than to promote, the object of this invention, for the thicker the walls the less the variation of temperature within. Nor does the inventor point out in his specifications or claim that diminishing the thickness of the masonry walls would have any other effect. On the other hand, he relies chiefly, if not entirely, upon two improvements, which he describes, to accomplish his object, viz.: The continuous tapering laminated iron or steel posts, and the thick covering of mineral wool or other nonconducting substance around the exterior of the framing, except the window spaces. Indeed, the only references to the veneer, or to the shelves supporting it, found in the specifications, is a reference to a drawing which "is a perspective view from the exterior of a portion of a post, the girts, beams, angle plates, and shelf for the veneer," and the following description, which closes the specification, and follows the reference to the nonconducting material packed around the exterior of the building: "And R is an exterior veneering of stone or other suitable material, supported at each story (and at closer intervals when necessary) by shelves, s, that rest upon and are secured to projecting portions, c', of the angle plates, c, and the veneering is secured at proper points by anchor rods, t, that are made fast to the braces, B, B'." In this state of the specifications, it is incredible that this inventor postponed his claim to so radical an improvement as that of supporting the masonry walls of a building on the iron or steel frame, or on shelves supported thereby, instead of supporting the frame upon the walls, until he had made 12 other claims, and then rested it upon the words: "The combination, with the posts and girts, of the angle plates connecting them, and forming supports for the veneer shelves." Such a claim,

in our opinion, restricts the patentee to the combination of the specific elements it names and their equivalents, and is a clear renunciation of the broad claim the appellant makes before this court.

If there was any doubt of the soundness of this view, a reference to the fifth and ninth claims of the patent would dispel it. The fifth claim is for the combination of the frame, laminated posts, girts, and braces, and the exterior covering of nonconducting material, "and a stone or other veneering exterior thereto, and supported on shelves secured to the framing, substantially as set forth." The ninth claim is for the combination, with the posts and braces, of the wire lath, the nonconducting packing, "and the veneering, supported by shelves and anchor rods, substantially as and for the purposes set forth." These claims, when compared with the absence of the veneering and the shelves from the combination described in the thirteenth claim, lead irresistibly to the conclusion that it was not by mistake or inadvertence that they were omitted from that claim, but because the only use of them the patentee claimed or intended to claim as his invention or discovery was in combination with the laminated posts and the nonconducting covering.

The thirteenth claim must accordingly be restricted to the specific combination it describes, and the next question is, did the appellee make use of that combination? In the court below the appellant insisted that the building of the appellee infringed upon the seventh, eighth, and thirteenth claims of this patent. It is conceded in this court that there was probably no infringement of the seventh and eighth claims, and the record clearly sustains the concession. The laminated tapering framing posts are an essential element of each of those claims, as they are of every claim in the patent except two, and no such posts were used in appellee's construction. He used posts each of which was composed of four Z-bar irons, one of the webs of each of which was bolted to a central plate. They were not formed of metal plates in layers secured with their flat sides together so that the plates would break joints, they were not continuous from the base to the top of the building, and they were not made to diminish in thickness for the successive stories by the omission of an outer plate at proper intervals. As we have said, the chief object the patentee thought he attained by his invention was the prevention of the undue expansion and contraction of the iron or steel frame on account of heat and cold, and the laminated posts and the thick covering of mineral wool or other nonconducting substance were the two elements in his improvement upon which he relied to accomplish this end. The absence of these laminated posts from the structure of the appellee is a conclusive answer to the charge of infringement, not only of the combinations described in the seventh and eighth claims, but also of that described in the thirteenth; for it is evident that "the posts" there claimed, in combination with the girts and angle plates, are none other than the laminated posts described in the specifications, and claimed either alone or in combination by this patentee 12 times in this patent. It was not any metal posts in combination with the girts and angle plates that he intended to claim here, but the laminated posts which he described as essential

to the purposes of his invention. It was not the posts, but the lamination of the posts, and their construction in the manner he described, that was the indispensable element of this combination. Iron or steel posts of other construction might be subject to undue expansion and contraction. The claim of the patentee was that such laminated posts as he had described would not be. It follows that any combination which contained no laminated iron or steel posts, although it did contain metal posts, lacked an indispensable element of the combination in the thirteenth claim in this patent, and could not infringe it. All the elements of this combination were old, and the absence from it of a single essential element was fatal to the claim of infringement. *Hailes v. Van Wormer*, 20 Wall. 353, 372; *Bragg v. Fitch*, 121 U. S. 478, 483, 7 Sup. Ct. 978.

The decree below must be affirmed, and it is so ordered.

---

#### THE SCOTTISH DALE.

HANSON et al. v. THE SCOTTISH DALE.

(District Court, D. Washington, N. D. January 14, 1895.)

No. 858.

#### ADMIRALTY—SETTLEMENT OF CLAIM—FEES OF MARSHAL.

Under Rev. St. § 829, providing that, when the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of 1 per cent. on the first \$500 of the claim or decree, and one-half per cent. on the excess, provided that, where the value of the property is less than the claim, commission shall be allowed only on the appraised value thereof, where a case is dismissed without any formal appearance of a claimant, on payment of a sum less than that claimed, and without any appraisal, commissions will be allowed only on the amount paid in settlement.

#### In Admiralty.

Libel in rem to recover \$100,000 for a salvage service. After the issuance of a monition and attachment, and arrest of the vessel thereunder, without the formal appearance of any claimant, the case was dismissed in consideration of \$7,500 paid in satisfaction of the demand. In settling the costs, a question was raised and submitted to the court as to whether the marshal became entitled to a commission on the amount sued for or on the amount paid.

L. C. Gilman, for libellant.

HANFORD, District Judge. The question submitted to me involves a construction of the following subdivision of section 829 of the Revised Statutes:

"When the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per centum on the first five hundred dollars of the claim or decree, and one-half of one per centum on the excess of any sum thereof over five hundred dollars; provided, that when the value of the property is less than the claim, such commission shall be allowed only on the appraised value thereof."

The marshal's right to a commission is disputed on the ground that the case does not come within the letter of the statute, as the money received in settlement was not paid by a party to the record; and on the further ground that a percentage on the large amount sued for would be excessive, and, no decree having been rendered nor appraisement of the vessel, there is no other basis for compensation. This statute has reference to suits in rem. Such a case may be settled by the parties without any claimant having appeared. The libellant is a party on the one side, and whoever has such an interest in the vessel or share in the liability as to settle the case may be regarded as a party, in the sense intended by the statute, without having entered a formal appearance. It is very difficult, however, to apply this statute to a case like the one presented, where a claim—not a claim to the property, but a claim adverse to a vessel—is asserted by the libellant, and settled without a decree, and settled for less than the amount sued for. It is difficult, within the exact terms of this statute, to find a basis for computation of the marshal's commission. I consider that the marshal is entitled to something in the way of compensation, in addition to the specific fees for services, because his fees upon the writ amount to very little, and the responsibility he is obliged to assume when he executes process and seizes a ship is very great. In every such case he has to become, while the vessel is in his custody, responsible for its value. He must incur risk of being sued for any alleged wrong in seizing the property. If he should meet with opposition, he may be obliged to use force, and to assume all incidental liabilities. For his services and responsibility congress intended that he should receive compensation in addition to the amount of expenses incurred, and his right to compensation is in no wise affected by the filing of a claim or appearance of a party to contest the libellant's demand. *The Russia*, Fed. Cas. No. 12,170; *The City of Washington*, Fed. Cas. No. 2,772; *The Acadia*, Fed. Cas. No. 23.

I do not take the position that the court has power to exact payment of fees not authorized by law, nor to scale down the marshal's bill to an amount less than the statute allows him to charge; but I hold that this statute, construed according to the manifest intent thereof, entitles the marshal to compensation on a percentage basis, and that the court has power to fix the amount by computation at the rate given for cases in which the amount of the libellant's recovery is decreed by the court, instead of being fixed by agreement between the parties. *The Clintonia*, 11 Fed. 740; *Robinson v. 15,516 Bags of Sugar*, 35 Fed. 603; *Smith v. The Morgan City*, 39 Fed. 572. I will fix, as the marshal's compensation in this case, a percentage at the rate specified in this statute,—not the double rate, but the rate specified in this statute upon the amount paid in settlement. That much, at least, is allowed by the statute.

## GEORGE W. BUSH &amp; SONS CO. v. THOMPSON.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 105.

## 1. SHIPPING—RIGHT TO SELECT STEVEDORE.

In the absence of any provision to the contrary in the charter party, or any different custom of the port, a vessel is entitled to employ a stevedore of its own selection, to load the cargo furnished to it by the charterer, provided such stevedore is competent.

## 2. SAME—CUSTOM OF THE PORT OF SAVANNAH.

There is no custom in the lumber trade at the port of Savannah, Ga., that a shipper shall have the right to select his own stevedore.

Appeal from the District Court of the United States for the District of Maryland.

This was a libel by Abram P. Thompson, master of the schooner William Neely, against the George W. Bush & Sons Company, for breach of a charter party. The district court rendered a decree for the libellant (60 Fed. 631). Respondent appeals.

The court stated the case as follows: The schooner William Neely was chartered by the George W. Bush & Sons Company, of Wilmington, Del., for a voyage from Savannah, Ga., to New York. A charter party was signed March 28, 1892, containing, among others, the following provisions: "The said party of the second part doth engage to provide and furnish to said vessel a full and complete cargo, under and on deck, of resawed Y. P. lumber, with stowage, and to pay to said party of the first part, or agent, for the use of said vessel during the voyage aforesaid, four and 87/100 dollars per M. feet, freight measurement, for all delivered and free wharfage. It is understood and agreed that, if charterers give the vessel fifty M. feet per day at Savannah, the rate of freight is to be four and 75/100 dollars per M. foot and free wharfage. Charterers are responsible both at loading port and discharging port up to a draught of 17½ feet. Should the vessel draw more than 17½ feet, lighterage, either in New York or Savannah, to be had at the expense of vessel. It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from the time the vessel is ready to receive or discharge cargo: At least forty M. feet per day, Sundays excepted, to be allowed for loading and dispatch for discharging; and that for each and every day's detention by default of said party of the second part, or agent, eighty-five dollars per day, day by day, shall be paid by said party of the second part, or agent, to the said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside, within reach of the vessel's tackles, at ports of loading and discharging." The charterers directed the schooner's master to report for cargo to the Georgia Lumber Company, at Savannah, and he did so on May 2, 1892. The lumber company advised the master as to the wharf at which he was to load, and the lumber for his cargo, much of which was then ready alongside within reach of the schooner's tackles. A controversy arose between the manager of the lumber company and the master, relative to the selection of a stevedore, the master having contracted with Sam Daniels, a stevedore of the port of Savannah, who he claimed was experienced and competent, while the manager objected to him as being untrustworthy and incompetent. The master insisted on his right to select his own stevedore, and put Daniels and his gang to work. They had loaded part of the cargo, when the officers of the lumber company refused to deliver the residue of the cargo, and ordered Daniels and his men off the wharf, which was owned by the company. The lumber company repeatedly offered to deliver the lumber if the master would employ any other stevedore, while the master, refusing to discharge Daniels, notified the com-

pany daily that his vessel was ready for the cargo, and that the stevedores were employed to stow it. This contention continuing, the schooner was, at the request of the lumber company, removed from the wharf on the 17th day of May, 1894, by the harbor master, and on the 24th of that month the master rechartered at reduced rates. On June 27, 1892, the master of the William Neely, and agent of her owners, filed a libel in the district court of the United States for the district of Maryland, against said George W. Bush & Sons Company, in which it is claimed that the failure to load the vessel at Savannah, under the charter mentioned, was wholly the fault of the Georgia Lumber Company, the agent of the charterer, and that the libellant was in no way responsible for the same. Damages were claimed to the amount of \$2,500, because of said failure to load the schooner, and for loss of time resulting therefrom, and process of attachment was prayed against the goods, chattels, credits, and effects of the charterer, then in the district of Maryland. The case was duly matured, and came on to be heard, when the court found for the libellant, and entered a decree against the stipulator and respondent for the sum of \$2,010.35, with costs. From this decree an appeal has been allowed.

Edgar H. Gans, for appellant.

Robert H. Smith, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

GOFF, Circuit Judge. The charter party is silent as to the matter of the employment of the stevedore. It is usual to provide in it that the vessel shall engage the services of the stevedore of the charterer. Such a provision is fair, and the stevedore so employed is under the direction of the master, and may be discharged for carelessness or incompetency. In the absence of such provision, the vessel can employ its own stevedore, if the custom of the port does not otherwise provide. Having failed to reserve that right, the charterers in this case were not at liberty to demand that they be permitted to furnish the stevedore, as the master had that right, provided he selected a competent one. The cargo was lumber, and the stowage of the simplest character. The evidence shows that the stevedore engaged by the master was fully competent, of great experience, and well known at the port of Savannah, where he had so worked for many years. That he had previously had trouble with the shippers, and that his employment was extremely distasteful to them, while a matter that was proper to be submitted by them to the master in connection with the propriety of the employment, is without weight, when presented for the purpose of controlling his conduct or overruling his action. It was the duty of the schooner to stow the cargo, the shipper having placed it at her side, within reach of her tackle. The vessel, under the circumstances of this case, was entitled to select the stevedore, and she was required to pay him for his services, being also responsible for the manner in which he discharged them. *Portland Shipping Co. v. The Alex. Gibson*, 44 Fed. 371; *The Keystone*, 31 Fed. 412; *Muller v. Spreckels*, 48 Fed. 574; *Sack v. Ford*, 13 C. B. (N. S.) 90; *Richardson v. Winsor*, 3 Cliff. 395, Fed. Cas. No. 11,795; *Culliford v. Gomila*, 128 U. S. 135, 158, 9 Sup. Ct. 50; *Scrutt. Charter Parties*, art. 50, p. 94. The appellant insists that it is proven by the testimony that, by the usage



of the lumber trade at the port of Savannah, the shipper has the right to select the stevedore. The court below did not find from the evidence the existence of such usage, and in this finding we concur. It is shown that during the past few years a number of the shippers at that port have endeavored to establish such a custom, but it also appears that their action has not been acquiesced in by the shipmasters, and has not been of that certain, uniform, and known character as will authorize a court to hold it to be a custom binding upon the trade and controlling masters, in the absence of stipulations in the charter party. Judge Morris, who heard the case below, in disposing of it, used the following language, which we approve of and hereby include in our opinion:

"The case comes to this: That the respondents who chartered the schooner contracted to furnish her at Savannah with a full and complete cargo of lumber; that the lumber was tendered, but with a condition annexed which was not warranted by the charter party, nor by any usage of the port. It was in fact refused, unless the master would submit to a requirement which was not in the charter party or sanctioned by usage. The master having already in good faith contracted with a competent stevedore, selected by himself, he could not be compelled to dismiss that stevedore as a condition of the cargo being furnished to him. There was therefore a refusal to furnish cargo in compliance with the stipulation of the charter party. *Hudson v. Hill*, 43 L. J. C. P. 273."

For the reasons given, the decree appealed from is affirmed.

---

CROOKS et al. v. THE FANNY SKOLFIELD.

SKOLFIELD et al. v. THREE HUNDRED PACKAGES OF COCOANUT OIL.

(District Court, E. D. New York. December 28, 1894.)

1. SHIPPING—LOSS BY BAD STOWAGE.

A ship accountable by the bill of lading under which cocoanut oil was shipped, for leakage caused by bad stowage, is liable where the leakage was caused by allowing the oil casks to remain on deck for two weeks in the hot sun, and by the use of green cocoanuts for dunnage.

2. SAME.

Stowage of cargo held to be bad, where heavy casks of oil were placed on small casks of plumbago, and the ship held liable for the damage resulting.

Libels by Robert Crooks and others against the Fanny Skolfield, and by Samuel Skolfield and others against Three Hundred Packages of Cocoanut Oil.

Evarts, Choate & Beaman (Mr. Cleveland, of counsel), for libellants Crooks and others.

Owen, Gray & Sturges (Mr. Sturges, of counsel), for the Fanny Skolfield.

BENEDICT, District Judge. The first of the above-named actions is brought to recover of the bark Fanny Skolfield the value of some 12,000 pounds of cocoanut oil, which were lost during the voyage of

importation from Colombo, Ceylon, to the port of New York. By the terms of the bill of lading under which the oil was shipped, the vessel was not to be accountable for leakage, unless caused by bad stowage. After an examination of the evidence, I am satisfied that the weight of it goes to show that the oil was delivered on board the vessel in good order and condition, and that the casks containing it were not insufficient; and that the leakage in question was caused by negligent stowage on the part of the vessel, in allowing many of the casks of oil, after they were delivered to the ship, to remain on the deck in Ceylon, before they were put below, some 14 days, in very hot weather; and it was also negligence on the part of the ship, in my opinion, to use green cocoanuts for dunnage. According to the weight of evidence, green cocoanuts are not proper dunnage for such a cargo. The ship was also, in my opinion, guilty of negligence in stowing heavy casks of cocoanut oil upon small casks of plumbago, unable to sustain the weight of the oil casks. The loss of the oil sued for arose, in my opinion, from one or all of the above faults, and the ship is liable therefor.

The second of the above-named actions is brought by the owners of the ship against the casks of oil above mentioned to recover for damage to the plumbago, which was stowed below the oil, by leakage of oil upon the plumbago; which leakage, it is claimed, was caused by the insufficient condition of the casks containing the oil. As already stated, the weight of the evidence is that the casks were not insufficient, and that the damage to the plumbago arose from bad stowage by the ship of the oil which was placed above the plumbago. For that the ship alone is liable.

There must be a decree in the first of the above-named cases for the libellant, with an order of reference to ascertain the damages; and in the second case the libel must be dismissed, with costs.

---

THE HENRY CLARK v. O'BRIEN.

(District Court, E. D. Pennsylvania. January 18, 1895.)

No. 88 of 1891.

**NAVIGABLE WATERS—PIERS—INJURY TO VESSEL.**

Where a vessel, in going out of a harbor, gets out of her course, and is injured by striking a pier, the owner of the pier, though it is an obstruction to navigation, is not liable for the loss, the vessel having been at fault in starting out in the existing state of the wind, sea, and tide, especially without a pilot, and in persisting in her efforts to get out after it had become hopeless, and in not anchoring when driven towards the pier.

Libel by the Henry Clark against Albert H. O'Brien for injury received by striking a pier belonging to defendant.

Lindley M. Garrison, for libellant.

John G. Lamb and Joseph Thompson, for respondent.

**BUTLER**, District Judge. The schooner, which was two-masted, 102½ feet long, and 25 feet wide, having run into Absecon Inlet,

August 24, 1892, under stress of weather, started out to sea the next morning. Her master was not familiar with the channel, though he had run it once, two years before, and was well acquainted with the coast. He followed another vessel in, and started back without such aid, or the employment of a pilot. When he started the wind was light, and the tide, and a heavy sea, were against him. He encountered difficulty from the start, and, as the wind gradually died down, it materially increased. His course was unsteady and very slow. After beating against the waves for probably two hours, without reaching the sea, the vessel left her course and ran upon a bar, which she crossed into deeper water, towards the shore. After floundering about here for a while she ran against the end of an iron pier, built upon piles, extending from the shore 800 to 1,000 feet into the water. She was seriously damaged by the collision, and subsequently filled and sank. The suit is against the owners of the pier for the loss sustained.

Two questions are raised, first, was the schooner in fault? Second, is the pier an unlawful obstruction to navigation? As respects both, the burden is on the libellant. The pier being distant from her proper course, she must show that the collision was unavoidable or at least that its occurrence was not the result of her fault.

There is much conflicting testimony on this subject; but the weight of it is in my judgment very clearly against the libellant. I believe she was wrong: (1) In starting out in the existing state of the wind, the sea and tide, and especially in doing so without the aid of an experienced pilot; (2) in persisting in her effort to get out, after it had become virtually hopeless, instead of waiting or returning; (3) in not anchoring when driven towards the bar or subsequently when it was passed.

It would be a waste of time to cite and analyze the testimony. As I have said it is conflicting and irreconcilable. After reading what is said by the several witnesses on each side, I am convinced that the statement of Capt. Yates, an experienced pilot, who was an eyewitness of the occurrence, is substantially accurate. The libellant followed him when passing in the evening before, and he watched her the next morning from the time she started, until the collision occurred. Familiar as he was with the channel (living at Absecon) he says he would not have ventured to take her out, at the time; that she was badly handled; and that if her anchors had been dropped as she approached the bar, or after crossing it, they would have saved her. The testimony of Capt. Conover, who also watched her efforts to get out, is substantially the same; and the statements of these witnesses are amply corroborated.

It is unnecessary to examine the second point.

## MARKWOOD v. SOUTHERN RY. CO.

(Circuit Court, E. D. Tennessee, N. D. March 2, 1895.)

**CORPORATIONS — CITIZENSHIP — CONSTRUCTION OF STATUTE — REMOVAL OF CAUSES.**

Act Tenn. 1877, c. 31, entitled "An act to declare the terms on which foreign corporations organized for mining \* \* \* may carry on their business \* \* \* in this state," providing (section 1) that such corporations may become incorporated in the state, and carry on the business authorized by their respective charters, and enjoy the rights and do the things therein specified, upon the terms therein declared, and (section 2) that they shall file a copy of their charter in the office of the secretary of state, and (section 3) that "such corporations shall be deemed and taken to be corporations of this state, and shall be subject to the jurisdiction of the courts of this state, and may sue and be sued therein in the mode \* \* \* directed in the case of corporations created \* \* \* under the laws of this state"; and Act Tenn. 1891, c. 122, amending the former act so as to include corporations chartered for any purpose, and providing (section 4) that, "when a corporation complies with the provisions of this act, it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this state, and subject to the jurisdiction of the courts of this state, just as though it were created under the laws of this state,"—do not make such a corporation a corporation of Tennessee; and therefore, being sued in the courts of that state, it may, by reason of its citizenship in the other state, remove the cause to a federal court.

**2. SAME.—CONSTRUCTION OF STATUTE.**

A corporation of one state, doing business in another by permission of the latter, does not thereby become a citizen of this state also, unless the language of the act granting permission clearly evinces a purpose to adopt such corporation or to create a new corporation.

**3. SAME.**

To make such corporation of one state a corporation of another state also, the language used must imply creation or adoption, and must, in form and effect, establish between the latter state and such company the same relations as exist between such state and a corporation originally created by that state.

**4. SAME.**

A mere declaration or indication of purpose in the caption or otherwise is not controlling in the interpretation where the operative parts of the statute in effect only prescribe the terms and conditions upon which a foreign corporation is authorized to do business in a state other than that which created it.

Action by C. H. Markwood against the Southern Railway Company. Heard on motion to remand.

Henderson, Jourolman, Welcker & Hudson, W. S. Dickinson, and Kirkpatrick, Williams & Bowman, for plaintiff.

Hacker, Deadrick & Epps and Burrow Bros., for defendant.

CLARK, District Judge. This action for damages for personal injury was brought in the circuit court of Washington county, and removed on defendant's application into the circuit court of the United States for the Northern division of the Eastern district of Tennessee, upon the ground that defendant is a corporation created and organized under the laws of the state of Virginia, and a citizen of that state, and a nonresident of Tennessee. The plaintiff filed a plea to the jurisdiction, setting up, in substance, that under

certain statutes of Tennessee, and compliance with the provisions thereof by the defendant, it "was, and still is, by adoption and domestication, a Tennessee corporation," with averment that this was so at and before the suit was instituted. To this plea defendant demurred. No question is made on the form or sufficiency of the pleadings by which the issue is presented, and the court is left to treat, as squarely raised, the question whether the defendant company, admitted to have been originally created by statute of Virginia, has been made a corporation and citizen of Tennessee also, and therefore not entitled to remove the case. This depends on the effect of the legislation referred to, being the act of the general assembly of the state of 1877 (chapter 31), and the amendatory act of 1891 (chapter 122). Such parts of the acts as materially affect the matter now under consideration are as follows:

"An act to declare the terms on which foreign corporations organized for mining and manufacturing purposes may carry on their business, and purchase, hold and convey real estate and personal property in this state."

The first section provides that such corporations "may become incorporated in this state, and may carry on in this state the business authorized by their respective charters, or the articles under which they are or may be organized, and may enjoy the rights, and to do the things therein specified, upon the terms and conditions, and in the manner and under the limitation herein declared."

Section 2 requires a copy of the charter to be filed in the office of the secretary of state, and an abstract thereof to be recorded in the office of register in each county where business is to be carried on or lands acquired.

"Sec. 3. Be it further enacted, that such corporations shall be deemed and taken to be corporations of this state and shall be subject to the jurisdiction of the courts of this state, and may sue and be sued therein in the mode and manner that is, or may be, by law directed in the case of corporations created or organized under the laws of this state."

Section 4 confers power to acquire and convey real estate for corporate purposes, and releases the right of escheat.

Section 5 makes the property of the corporation liable for its debts, just as that of natural persons, but provides that resident creditors of the state shall have priority in the distribution of assets or subjection of the same, or any part thereof, to be payment of debts over all simple contract creditors, being residents of any other country or countries, "and also over mortgage or judgment creditors, for all debts, engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments." The corporation is then made liable to taxation just as a natural person.

Section 6 grants the right to operate railroads and other methods of transportation to and from mines.

Section 7 limits the time for beginning operations, and provides that the company "shall in good faith continue the same under the powers of said corporation in this said charter or articles of associa-

tion as in this act declared; it being a chief object of this act to secure the opening and development of the mineral resources of the state, and to facilitate the introduction of foreign capital, and upon the failure of any such corporation to commence in good faith to develop and work some portion of its property within this state within one year after filing its said charter or articles of association in the office of the secretary of state, all rights and privileges conferred by this act, shall lapse and become void and of no effect."

Section 8 grants power to establish towns and villages.

"Sec. 9. Be it further enacted, that if any such charter or articles of association, or any part thereof, filed as aforesaid in the office of the secretary of state, should be in contravention or violation of the laws of this state, all such parts thereof as may be found to be in conflict with the laws of this state shall be null and void."

The amendatory act may as well be given in full:

"Section 1. Be it enacted, by the general assembly of the state of Tennessee, that chapter 31 of the Acts of 1877 be so amended and enlarged as that the provisions of said act shall apply to all corporations chartered or organized under the laws of other states or counties for any purpose whatsoever which may desire to do any kind of business in this state.

"Sec. 2. Be it further enacted, that each and every corporation created or organized under or by virtue of any government other than that of this state, for any purpose whatever, desiring to own property or carrying on business in this state of any kind or character, shall first file in the office of the secretary of state a copy of its charter and cause an abstract of same to be recorded in the office of the register in each county in which such corporation desires, or proposes to carry on its business, or to acquire or own property, as now required by section 2 of chapter 31 of Acts of 1877.

"Sec. 3. Be it further enacted, that it shall be unlawful for any foreign corporation to do, or attempt to do, any business or to own or to acquire any property in this state, without having first complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than \$100.00 nor more than \$500.00, at the discretion of the jury trying the case.

"Sec. 4. Be it further enacted, that when a corporation complies with the provisions of this act, it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this state, and subject to the jurisdiction of the courts of this state just as though it were created under the laws of this state.

"Sec. 5. Be it further enacted, that when such corporation has no agent in this state upon whom process may be served by any person bringing suit against such corporation, then it may be proceeded against by attachment, to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment he, his agent or attorney, need only make oath of the justness of his claim, that the defendant is a corporation organized under this act, and that it has no agent in the county where the property sought to be attached is situated, upon whom process can be served.

"Sec. 6. Be it further enacted, that the said chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this act, be and the same is declared to be in full force."

Of course, the word "counties," in the first section, is an error in copying or printing, and should be "countries." It is not controverted, but admitted, that defendant has filed a copy of its charter in the office of the secretary of state, and otherwise complied with this legislation. Whether defendant is a corporation engaged in interstate commerce, and therefore not subject to the provisions of the acts, and whether having voluntarily complied with the law

renders it continuously subject to the provisions and penalties of the statutes, are questions not made in argument. The statutes have been before the supreme court of the state in *Young v. Iron Co.*, 85 Tenn. 189;<sup>1</sup> *State v. Phoenix Ins. Co.*, 92 Tenn. 420, 21 S. W. 893; *Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; and *Manufacturing Co. v. Gorten*, 93 Tenn. 590, 27 S. W. 971. But the question now raised was not involved in any of those cases, and has never been decided by that court. The interpretation of the acts, with respect to the point now presented, is left, therefore, to be determined by the rules established by the federal courts. The question of the effect of similar legislation has often been before the United States supreme court, as well as the courts at circuit, and has been much considered. The plaintiff's contention is that the legislation is not merely a license or authority to foreign corporations to carry on business in this state, but that its effect is to make them corporations and citizens of Tennessee in the fullest sense possible. Various difficulties are suggested affecting the validity of the legislation, construed as plaintiff insists it must be. It will be observed that the amendatory act, in its caption, does not purport to do more than extend the original act to all foreign corporations, and both acts stand under the caption of the original act so far as that is important. Whether under the title, expressing the purpose to prescribe terms on which these corporations may do business in the state, it would be germane and competent to create them corporations of Tennessee, and thereby completely change their relations to the state, I do not find it necessary to decide. It is also argued that the statutes, according to the plaintiff's view, would be in violation of the constitution of the state (article 11, § 8), which, among other things, ordains:

"No corporation shall be created, or its powers increased or diminished by special laws; but the general assembly shall provide by general laws, for the organization of all corporations hereafter created, which laws may, at any time, be altered or repealed; and no such alteration or repeal shall interfere with, or divest, rights which have become vested."

The history of legislation on this subject, and the reasons which led up to this provision, occurring for the first time in the constitution of 1870, are well understood. That the legislature should, upon full consideration of the subject, provide, by general laws, for the formation of corporations, and thereby adopt a system, secure uniformity in powers granted, and avoid the confusion and danger attending special legislation, were objects clearly contemplated. This has been done, and these concerns are now classified, and the powers of each class clearly defined and limited, and the right to obtain charters, franchises, and powers extended to all on equal terms. These corporations were multiplying in number and increasing in magnitude as never before. A large part of the business of the country was going into their hands, and particularly the development of the state's material resources. It had come to be well understood that charter powers and franchises, when granted

and accepted, became contract rights, and passed under constitutional protection as such, and could not thereafter be revoked, controlled, or restrained, except to a very limited extent, and hence the reservation of the power to alter and repeal, which is carefully guarded by express provision in the general incorporation act, passed under this provision. If a charter obtained under this general law should contain powers not authorized by the statute, it is hardly to be doubted that the charter would be void as to the unauthorized powers. *Heck v. McEwen*, 12 Lea, 97; *Railroad Co. v. Johnson*, 8 Baxt. 332. If these statutes are subject to this constitutional restriction, and are to be construed as having made these corporations, created under foreign legislation, also corporations and citizens of Tennessee, and with necessarily all the power and protection belonging to those of the state's own original creation, I think the conclusion that the acts are antagonistic to the constitution is one from which there is no escape. There is no attempt to classify these corporations, or to require that their franchises and powers shall conform to the same law which governs those created by the state. Indeed, it cannot be known in advance with what powers a foreign corporation may come to this state, and, with the simple method here provided, become a corporation of the state, and pass at once beyond the power of exclusion from the state's borders, and under the fullest constitutional and legal protection extended to other corporations of the state. It may be safely said, I think, that the ordinary English company, in addition to general powers, possesses all the special powers which belong to a dozen or more corporations formed under the general laws of the state. On the theory that these are now corporations and citizens of this state, and entitled to the same rights, I think serious difficulty would be found in sustaining as valid the arbitrary discriminations made in sections 5 of both the original and amendatory acts. If it be suggested that the constitutional limitation applies only to the original creation of corporations in the state, and that this is general legislation, then far more serious consequences follow. The legislation in question makes no reservation of the right to alter or repeal the charter of any corporation created or adopted by these acts, as required by the constitution; and the provision of the constitution, if self-executing, is so only as to legislation coming within its operation. If the constitutional restraint does not apply, and the statutes are not within its province or purpose, it would seem to follow, necessarily, that when these corporations, with their foreign-granted powers and franchises, have accepted the provisions of these acts, and become citizens and corporations of Tennessee, they pass under the protection of the constitutions, federal and state, against impairment of contract rights, just as before the constitution of 1870, and the power of exclusion, repeal, or material control is gone. A question much like this arose in *Railroad v. Vance*, 96 U. S. 458, under provision in the Illinois constitution, which, however, differed from the constitution of this state, in the following qualification: "Except for municipal purposes, and in cases where, in the judgment of the general assembly, the objects



of the corporation cannot be attained under general laws." The court, following the decision of the supreme court of the state, held that, when the general assembly passed a special law, it would be presumed to have thought a special law necessary to meet the situation.

Section 9 of the act amounts to no more than a harmless generality, without specific or practical meaning or effect. Putting aside the criminal law, there would remain no laws with which these foreign charters would conflict, except the distinct policy and laws embodied in the constitutional provision, and the general act passed pursuant thereto. To attempt to bring these foreign charters into harmony with this policy is impracticable, and is to admit indirectly the application of the constitution, which is denied directly. Treated as foreign corporations, with the state's power to exclude, revoke license, and prescribe conditions, the legislation is free from difficulty or criticism. However, it is not deemed necessary for the purposes of this case to reason out or positively decide these and other points which suggest themselves in a study of the subject. They are adverted to in passing, for the purpose of observing that I do not think the legislature could have been unmindful of the difficulties surrounding the subject. Nor do I think legislation apparently so simple on its face, and as declared in its title, was designed to be so far-reaching and fundamental in its effect. If so, it is reasonable to suppose that some parts of these acts would have been omitted, and that other legislation needful in such a change of relation would have been enacted; for it is to be borne in mind that all corporations subject to the act are presumed to have complied with its provisions. *Young v. Iron Co.*, 85 Tenn. 189, 2 S. W. 202; *Louisville & N. R. Co. v. Mississippi & T. R. Co.*, 92 Tenn. 681, 22 S. W. 920. And it is established that a company cannot, for any purpose of its own, plead or rely upon failure to comply with the act. *Ehrman v. Insurance Co.*, 1 Fed. 471, and *In re Comstock*, 3 Sawy. 218, Fed. Cas. No. 3,078. So that theoretically and practically, upon plaintiff's construction of the acts, we have no such thing as a foreign corporation doing business in Tennessee. The proposition would render nugatory all the existing legislation of the state directed to foreign corporations. The distinction between foreign and domestic corporations, it is believed, is still maintained in the revenue laws, and is recognized by the supreme court of the state in a case as late as that of *Cumberland Tel. & Tel. Co. v. United Electric Ry. Co.*, 93 Tenn. 492, 29 S. W. 104, wherein the power in the legislature to revoke a franchise is declared to exist in respect to domestic corporations since the constitution of 1870, and as to a foreign corporation by virtue of the power of exclusion from the state.

But has this legislation effected a change in the citizenship and domicile of these foreign companies? The statutes must be interpreted, if possible, without violence to the language, so as to make them consistent with the constitution and paramount law. This is the rule of both state and federal courts. It has often been decided that corporations, for the purpose of federal jurisdiction,

will be conclusively presumed to be citizens of the state creating them, and that they cannot migrate or change their domicile. *Shaw v. Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935; *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. 1004; *Bank v. Earle*, 13 Pet. 519. This proposition refers, however, to the want of power in the corporation, of its own motion and by anything it may do, to effect a change in its citizenship; for a corporation created by and a citizen of one state may, by appropriate legislation, be created a corporation also of another state (*Railroad v. Vance*, 96 U. S. 450; *Memphis & C. R. Co. v. State*, 107 U. S. 581, 2 Sup. Ct. 432); or adopted as a corporation of such state, with charter and powers, just as organized in the state of its creation (*Railroad v. Harris*, 12 Wall. 82; *Railroad Co. v. Wheeler*, 1 Black, 297; *Martin v. Railroad Co.*, 151 U. S. 677, 14 Sup. Ct. 533). It could not be claimed that these statutes invest the companies with any corporate franchises or powers, such as imply creation; and, if the result insisted on has been accomplished, it is by the adoption of these corporations, as they exist under the foreign laws. In *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094, Mr. Justice Miller, delivering the opinion of the court, states and applies the rules of interpretation as follows:

"It does not seem to admit of question that a corporation of one state, owning property and doing business in another state, by permission of the latter, does not thereby become a citizen of this state also; and so a corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi river to its eastern boundary, may, by the permission of the state of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire state, and may use and operate the line as one road by the permission of the state, without thereby becoming a corporation or citizen of the state of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the state of Indiana as have been conferred on it by the state which created it, constitutes it a corporation of Indiana. It may not be easy in all such cases to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration and the intent to enable the corporation already in existence under the laws of another state to exercise its functions in the state where it is so received. The latter class of laws are common in authorizing insurance companies, banking companies, and others to do business in other states than those which have chartered them. To make such a company a corporation of another state, the language used must imply creation or adoption in such form as to confer the power usually exercised over such corporations by the state or by the legislature, and such allegiance as a state corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the state conferring such powers."

In *Goodlett v. Railroad*, 122 U. S. 405, 7 Sup. Ct. 1254, this entire statement is quoted with approval as expressing the established doctrine on the subject. This case involved the construction of an act of the general assembly of Tennessee applicable to the Louisville & Nashville Railroad Company alone, and embraced no other subject. The title of the act was: "An act to incorporate the Louisville and Nashville Railroad Company." The act is set out in full in the opinion, and need not be here repeated. Mr. Justice Harlan, speaking for the court, said:

"Looking, then, at the body of the Tennessee act of December 4, 1851, we find no language clearly evincing a purpose to create a new corporation, or to adopt one of another state, in such form as to establish the same relations, in law, between the latter corporation and the state of Tennessee, as would exist in the case of one created by that state. The act grants to a named company, 'incorporated by the legislature of Kentucky,' a right of way, within designated limits, for the construction of a railroad, with all the rights, powers, and privileges in its original and amended charter, 'except as further provided in this act.' The remaining sections of the act are, in form, additions and alterations of the charter of the Kentucky corporation; but, in effect, they only prescribe the terms and conditions upon which that corporation was given the right of way, and permitted to construct a railroad and exercise its powers in Tennessee."

And further on:

"Taking the whole of that act together, we are satisfied that it was not within the mind of the legislature of Tennessee to create a new corporation, but only to give the assent of that state to the exercise by the defendant, within her limits, and subject to certain conditions, of some of the powers granted to it by the state creating it. This construction is not, if indeed it could be, affected by the subsequent legislation of Tennessee. While the titles of the acts of January 10, 1852, December 15, 1855, and March 20, 1858, give some slight support to the position taken by the plaintiff, the acts themselves do not militate against the conclusions here expressed. In legal effect, they only impose other terms and conditions than those prescribed in the original act upon the exercise by the defendant, within Tennessee, of the powers and privileges conferred by its charter, as granted by Kentucky. Upon the authority of the cases cited, and for the reasons herein stated, we are of the opinion that the Louisville and Nashville Railroad Company is a corporation of Kentucky, and not of Tennessee, and, consequently, that the action was removable, upon its petition and bond, into the circuit court of the United States."

A critical analysis of the act is made, the previous cases reviewed, and the opinion is an instructive one. It is sufficient now to say that I think the act went much further to support the contention that the corporation had been adopted or created a corporation of Tennessee than the legislation now under consideration.

In all the cases examined, the question arose in reference to a particular statute applicable to a named company only, as distinguished from a general act or acts of the character now in question. It would seem that such distinction has a material bearing on the interpretation. In respect to a special act passed in regard to an existing company whose powers and purposes are well known, the general assembly might well be understood as intending to make such company a domestic corporation, and invest it with rights as such; while a similar law extending to all corporations existing or hereafter created would not justify such conclusion. Under the general law, nothing could be known as to the special powers or objects of the companies to be thus made corporations and citizens of the state. The doctrine of the cases of *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* and *Goodlett v. Railroad* is to the effect that a statute of the character now considered will not be held to create or adopt a corporation as distinguished from granting license or authority, unless the purpose to do so is evinced in clear and unmistakable terms, so that the act must necessarily be so construed. And this was said in respect to a special or par-

icular statute in the sense above indicated. This and all the cases are to the effect that a mere declaration in the title or body of the act is not sufficient to make the foreign corporation also a domestic one, nor can the mere use of general terms do so. The efficient and operative terms of the act must be sufficient in force and effect to accomplish the result. It requires more than a formal, general statement. Taking these acts together, and looking at them as a whole, I think the purpose and effect were to subject these corporations to the jurisdiction and process of the state courts as domestic ones, to bring them within the power of taxation, and that there was no purpose beyond this, except the main purpose which the act, in section 7, declares for itself. If the purpose was to make these companies corporations of this state, I think the legislation falls short of giving effect to such purpose. Any general or formal terms and phrases in the act are limited and restrained by specific terms in the same section, and by the general effect and purpose of the acts taken as a whole, and this rule applies particularly to section 3 of the original and section 4 of the amendatory act. No reason can be assigned for an intention by the general assembly to do more than this, unless it was to defeat jurisdiction of the United States courts, and this would be to impute to the acts a purpose which would render them invalid if expressed. *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44; *Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931.

I am aware that my predecessor, the Honorable D. M. Key, in cases involving this question, uniformly held that this legislation had effected no change in the citizenship of the foreign corporations, and had left federal jurisdiction unaffected. It is well known that Judge Key gave to questions of jurisdiction the most conservative, thoughtful consideration, and this, with his long experience and eminence as a judge, both state and federal, give to his opinion great weight in the determination of the question.

In view of what has been said, and upon the authority of the cases cited, as well as the cases of *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 10 Sup. Ct. 1004, and *Martin v. Railroad Co.*, 151 U. S. 673, 14 Sup. Ct. 533, I am of the opinion that the case was properly removed to this court, and the motion to remand is therefore overruled.

---

#### PRICE v. LEHIGH VAL. R. CO.

(Circuit Court, N. D. New York. January 28, 1895.)

##### REMOVAL OF CAUSES—TIME OF APPLICATION.

When the time allowed by the laws of the state to defendant to answer has expired, without legal extension, the right of removal is lost, although there is an understanding between the parties for an extension of the time to answer, for their mutual convenience, and although the state court has power to enlarge such time, or to open defendant's default and receive an answer.

This was an action by Charles L. Price against the Lehigh Valley Railroad Company, brought in a court of the state of New York,

and removed by defendant to the United States circuit court. Plaintiff moved to remand.

Herbert Price, for plaintiff.

Taber & Brainard, for defendant.

COXE, District Judge. When the defendant permitted the 20 days allowed by the New York Code of Civil Procedure to expire without legal extension it lost the right to remove. The defendant was required "by the laws of the state" to answer the complaint on or before October 19, 1894. Assuming that the language of the removal act "or the rule of the state court" (25 Stat. 433, 435) is applicable where the time to answer is fixed by the laws of the state, it does not aid the defendant. The time to answer was not extended by a rule of the state court. It was extended pursuant to an understanding between the parties for their mutual convenience. Oral stipulations of this kind are not recognized. Rule 11, N. Y. Sup. Ct.; *Leese v. Schermerhorn*, 3 How. Pr. 63; *Broome v. Wellington*, 1 Sandf. 664. In legal contemplation it was as if a default existed after October 19th, and, although the state court was clothed with power to enlarge the time and even to open a default and receive defendant's answer, it had no power to revive a right once lost by noncompliance with the statute. The removal on December 13th was too late. It was sanctioned neither by statute nor by rule. *Doyle v. Beaupre*, 39 Fed. 289, and cases cited; *Austin v. Gagan*, Id. 626; *Delbanco v. Singletary*, 40 Fed. 177; *Velie v. Accident Co.*, Id. 545; *Daugherty v. Telegraph Co.*, 61 Fed. 138; *Spangler v. Railroad Co.*, 42 Fed. 305; *Bowers v. Supreme Council*, 45 Fed. 81. Remand granted.

---

RHINO v. EMERY et al.

(Circuit Court, S. D. Ohio, W. D. January 12, 1895.)

No. 4,595.

1. EQUITY—CANCELLATION OF DEED—INADEQUACY OF CONSIDERATION.

A bill to set aside a deed alleged that it was procured from the grantor "for the grossly inadequate consideration of \$3,000, no portion of which" was ever paid to him, "or to any other person for his use," and that the real estate so conveyed "was soon thereafter sold for more than eight times" that amount. *Held*, that insufficiency of consideration was not shown, it appearing that the transaction was between mother and son, either of whom would have been the heir of the other dying intestate, and that the property, being in a city, might fluctuate largely in value in a short time, the time of the subsequent sale not being stated.

2. JUDGMENT—RELIEF ON GROUND OF FRAUD—ACCOUNTING FOR PROCEEDS OF SALES OF DECEDENT'S REAL ESTATE.

Real estate of a decedent was sold on regular proceedings in a probate court for such sale for payment of his debts. The sales were duly confirmed, and distribution of the proceeds was made, by judgments of that court, having full jurisdiction. *Held*, that one claiming under parties to those proceedings could not maintain a bill seeking to hold others who had received the proceeds accountable therefor, on the ground of fraud and collusion, without first setting aside the judgments, which could not be done in such a collateral proceeding.

**8. LIMITATION OF ACTIONS—EFFECT OF FRAUD—NOTICE FROM RECORDS.**

A bill charging fraud and collusion by a testatrix and a devisee under her will, in procuring from an intestate, under whom complainant claimed, a deed of certain land to said testatrix for an inadequate consideration, and in procuring land in which said intestate had an interest to be sold in proceedings in the probate court, and in the making and acceptance of devises and bequests contained in the will, and in other transactions, and asking for the cancellation of said deed and an accounting of the proceeds of the intestate's estate in the hands of the devisees of said testatrix and of their grantees, was filed after the time within which complainant was entitled by statute to bring an action to contest the validity of the will. *Held*, that the bill could not be maintained without any averment that complainant made or caused to be made the slightest inquiry in regard to the transactions complained of, as the deed and will were of record, and the records thereof were relied on by complainant to support his allegations of fraud, and to charge the devisees' grantees with notice of the frauds, and the record of the probate court gave full information as to the proceedings therein, even though the papers in the case were, as alleged, off the files.

This was a suit by Gustavus F. Rhino against Thomas J. Emery, John J. Emery, William G. Roberts, trustee under the will of Eliza A. Berry; and in his own right, Howard C. Hollister, as executor of Eliza A. Berry, Sarah A. Weller, and M. E. Sperry, to set aside certain transactions on the ground of fraud, and for an accounting. Demurrers by defendants to the bill for insufficiency were sustained, and an amended bill was filed, in which Hollister was not made a defendant. Defendant John J. Emery was not served with process. Defendants Thomas J. Emery, William G. Roberts, and Sarah A. Weller demurred to the amended bill.

The allegations of the amended bill were as follows:

Your orator complains and says that one James Berry intermarried with one Rachel Rolston; and that there were born of said marriage three children, to wit, James Berry, an only son, and two daughters, Nancy Berry and Betsy Berry; and that the said Nancy Berry and Betsy Berry both died without issue; and that the said James Berry, the son of the said James Berry and Rachel Berry, whose maiden name was Rolston, intermarried with one Eliza A. Rhino, a daughter of Abram Rhino and Catherine Rhino, whose maiden name was Catherine Boyd; and the said James Berry, who intermarried with Eliza A. Rhino, as aforesaid, departed this life, testate, in Hamilton county, Ohio, on the — day of —, A. D. 1864, leaving, him surviving, his relict, Eliza A. Berry, and two children born of the marriage last aforesaid, to wit, a son, James Berry, and a daughter, Kate E. Berry, as his next of kin and sole heirs at law; and the said Kate E. Berry intermarried with one Robert Brady, whom she survived, and died testate, without issue, July, A. D. 1882; and the said Eliza A. Berry, relict of the said James Berry, died testate, on the — day of —, A. D. 1886; and the said James Berry died intestate, without issue, and unmarried, May 13, A. D. 1891, and at the time of the death of the said James Berry, last aforesaid, to wit, on the 13th day of May, A. D. 1891, the blood of the Berrys and Rolstons, his ancestors, on the paternal line, became extinct.

And your orator further says that, at the time of the death of the said James Berry, the son of James Berry and Eliza A. Berry, aforesaid, to wit, on the 13th day of May, A. D. 1891, your orator, Gustavus F. Rhino, and the defendant M. E. Sperry, were the nearest of kin and sole heirs at law of the said James Berry, last aforesaid, of the name or family of Rhino; that is to say, your orator was the only son and the said M. E. Sperry was the only daughter of John Rhino, a son of Abram Rhino and Catherine Rhino, whose maiden name was Catherine Boyd, as aforesaid, which said John Rhino, then deceased, in his lifetime was the brother of the said Eliza A. Berry, a daughter of the said Abram Rhino and Catherine Rhino, whose maiden name was

Catherine Boyd, as aforesaid, and which said Eliza A. Berry was the mother of the said James Berry, aforesaid, who died May 13, A. D. 1891; so that your orator, Gustavus F. Rhino, and the said defendant M. E. Sperry, stood in the relationship of first cousins to the said James Berry last deceased, as aforesaid, and so your orator, as heir at law and next of kin, became entitled upon the death of the said James Berry, on the 13th day of May, A. D. 1891, as aforesaid, to one moiety of the estate, real, personal, and mixed, which the said James Berry was seised of or entitled to at his death, by virtue of the statute in such case made and provided; the other children of the said Abram Rhino and Catherine Rhino, whose maiden name was Boyd, as aforesaid, to wit, Jefferson Rhino, who in his lifetime was a brother of the said Eliza A. Berry, and Prudence Rhino, who in her lifetime was a sister of the said Eliza A. Berry, having each departed this life without leaving any lawful issue.

Your orator further says that the said James Berry, the son of the said James Berry and Rachel Berry, whose maiden name was Rolston, as aforesaid, at the time of his death, was seised of an estate in fee simple in the lands and tenements situate in the city of Cincinnati, Hamilton county, Ohio, and described as follows, to wit: "All that certain lot of ground, with the improvements thereon, in the city of Cincinnati, state and county aforesaid, situate on the north side of Centre (now Longworth) street, commencing 72 feet and 6 inches west from the northwest corner of Race and Centre (or Longworth) street, at the southwest corner of lot No. 103, and running northwardly with the line of said lot 82 feet to a 10-foot alley; thence west, with said alley, 27 feet; thence south, at right angles, 82 feet, to Centre (now Longworth) street; thence east, with Centre street, 27 feet, to the place of beginning. \* \* \* Also, the real estate following, to wit: All that certain lot or parcel of land situate, lying, and being in the city of Cincinnati, county of Hamilton, and state of Ohio, on the northwest corner of Water and Race streets, fronting on Water street 49½ feet (or half the width of a full lot), and on Race street from said corner to Benjamin Little's brick house 26 feet, be the same more or less, and extending back so far as to form right angles with the lines of said parcel of ground; being part of lot numbered on the general plan of said city 413, being the same premises conveyed to James Berry by Richard Air, sheriff of Hamilton county, Ohio. Also, the real estate following, to wit: All that certain lot of land in the city of Cincinnati, in the western part thereof, fronting on the south side of Third street 22 feet, and running back to a 10-foot alley; being the only lot between James Ferris' lot, heretofore purchased by him from Harrison, and the lot reserved by said Harrison for himself, and being the same lot conveyed to James Hindman by Richard Harrison by deed recorded in Book No. 65, page 234, Hamilton County Records, and being the same premises conveyed by said Hindman to said James Berry."

Your orator further says that the said James Berry died possessed of considerable property, and by his will be appointed and constituted his said relict, Eliza A. Berry, his executrix, without bond, provided she remained single and never married, and devised to her a life estate in all of said real estate of which he so died seised and possessed as aforesaid, and bequeathed to her, absolutely, all his personal estate. And, by said last will and testament, the said James Berry devised the remainder of his said real estate, expectant upon the determination of the life estate therein devised to his said relict Eliza A. Berry, to his two children, the said James Berry and Kate E. Berry, and provided also that in case of the death of either of his said children, surviving his said relict, Eliza A. Berry, the surviving child should take the portion of the one so dying; and he also provided by his said will that his said relict, Eliza A. Berry, should have power and authority to sell and dispose of all of his said real estate, or any part thereof, for the sole purpose of paying the debts of the said testator, James Berry, aforesaid, all of which will more fully and at large appear by a certified copy of said will, herewith filed, and made part of this bill, marked "Exhibit A."

Your orator further says that the said Eliza A. Berry qualified as executrix under the last will and testament of her said husband, the said James Berry, and proceeded to administer upon the estate of her said husband, James Berry, deceased, and paid off the indebtedness of the estate, which was small, within

the five years next ensuing after the death of the said James Berry, as your orator is advised and charges the fact to be.

Your orator further says that Kate E. Brady, the daughter of the said James Berry and Eliza A. Berry, in the month of July, A. D. 1882, died, testate, leaving her said mother, Eliza A. Berry, and her said brother, James Berry, her surviving, and, by her last will and testament, devised, among other things, all her real estate to her mother, Eliza A. Berry; and that the said defendant William G. Roberts, as her counsel, drafted her said last will and testament, and was one of the attesting witnesses thereto, all of which will more fully and at large appear by a certified copy of said will, herewith filed, and made part hereof, marked "Exhibit B."

Your orator further says that the said intestate, James Berry, the only son of the said James Berry and Eliza A. Berry, was from his early infancy, and during the whole period of his life, a person of unsound mind, and of weak understanding, and wholly incapable at any period of his life of transacting any business by reason of his mental incapacity and imbecility; and that upon the death of the said Kate E. Brady, in the month of July, A. D. 1882, who, while living, had been a barrier to the perpetration of the frauds herein-after mentioned, the said defendant William G. Roberts and the said Eliza A. Berry, his mother, immediately combined and confederated for the fraudulent purpose of securing the title to the said real estate derived by the said intestate from the will of his father, James Berry, the son of the said James Berry and Rachel Berry, whose maiden name was Rolston, and depriving the said intestate, James Berry, of the same, in order that they themselves might appropriate the property of the said James Berry to their own exclusive use and benefit, as in fact they thereafter did, as will appear hereinafter in this bill.

Your orator further says that in the month of August, A. D. 1882, the said Eliza A. Berry had much passed her three score years and ten, and that her son, the said James Berry, was verging to the age of 40 years, and that the said Eliza A. Berry had a life estate in all the real estate of which her said husband, James Berry, died seised, and which is fully set forth and described in his said last will and testament, and that the said James Berry, her son, was at that time wholly without fortune or estate, except his fee-simple interest in the whole of said real estate, expectant upon the death of his mother, Eliza A. Berry, which at her advanced age, in the natural order of things, would soon drop and fall into possession; yet your orator says that the said William G. Roberts, as the legal adviser of the said Eliza A. Berry, and a person having great influence over her, acting in concert with the said Eliza A. Berry, and influencing her, they together, on the 21st day of August, A. D. 1882, fraudulently procured a deed from the said James Berry, who at the time was a person of unsound mind, conveying all of said real estate to the said Eliza A. Berry, for the grossly inadequate consideration of \$3,000, no portion of which said sum was ever paid to the said James Berry or to any other person for his use, and the said Roberts both drafted the said deed of conveyance and signed the same as one of the attesting witnesses, all of which will more fully and at large appear by a certified copy of said deed, herewith filed, and made part hereof, marked "Exhibit C." The said real estate so conveyed as aforesaid was soon thereafter sold for more than eight times the amount of the said \$3,000, as will hereinafter appear.

Your orator further says that on the 13th day of April, A. D. 1885, the said William G. Roberts and Eliza A. Berry procured an order from the probate court of Hamilton county, Ohio, appointing the said William G. Roberts statutory guardian of the said James Berry, who had then attained the age of 42 years, all of which will more fully and at large appear by a certified copy of said order, herewith filed, and made part of this bill, marked "Exhibit D."

And your orator further says that on the 16th day of April, A. D. 1885, the said Eliza A. Berry, as executrix of the estate of the said James Berry, deceased, in furtherance of her fraudulent scheme, and under the fraudulent pretense of paying the debts of the testator, the said James Berry, deceased, instituted suit in the probate court of Hamilton county, Ohio, against herself and against her son, the said James Berry, and against the said William G. Roberts, guardian of her said son, James Berry, for the purpose of selling



part of said real estate, under the pretense of paying the debts of the testator, the said James Berry, deceased, all of which had been paid or barred by the statute of limitations long prior thereto; and that on the 18th day of April, A. D. 1885, she obtained a judgment for the sale of said lands, long after her power to sell had become inoperative, and soon thereafter, to wit, on the 6th day of May, A. D. 1885, obtained an order confirming said sale, and ordering deeds conveying to the purchasers the said lands so sold under the irregular and void proceedings in said suit, and the said William G. Roberts acted as one of the attorneys of record in said suit for the said Eliza A. Berry, and rendered all the active service for her in the several characters in which she there appeared. Said suit was numbered on the docket of the probate court No. 3,943. And the pleadings therein, after diligent search, at the time of the institution of this suit, and for many months prior thereto, appeared to have been lost, mislaid, or abstracted from the files of the said probate court, and the same so remained off the files of said court and out of the custody of said court until the month of March, A. D. 1894, when the same were discovered, and found to be in the hands and possession of the defendant William G. Roberts, who all the time since the institution of this suit had knowledge of their whereabouts and your orator's desire for their inspection.

Your orator further says that, by the petition in said suit for the sale of said real estate, it appears upon the face of the petition that all the pretended debts of the said James Berry, who had departed this life more than 21 years prior to the filing of the petition in said suit, had been barred by the statute of limitations, and the power of sale of said executrix had become inoperative in the matter of the sale of said lands for the payment of debts.

Your orator further says that, among the claims in said suit, which was recognized and enforced as a debt of the said testator, James Berry, was a fraudulent, fictitious, and unreal note, pretended to have been executed by said Eliza A. Berry and the said James Berry, her son, and the said Kate E. Brady, her daughter, to one Henry Schwener, for the sum of \$3,000, due three years after date, bearing interest at the rate of 7% per annum, together with six interest-bearing notes, each for the sum of \$105, to secure the payment of the interest on said pretended note for \$3,000. Said pretended note, together with the indorsements thereon, is expressed in the words and figures following, to wit:

"\$3,000.

Cincinnati, March 4, 1880.

"Three years after date, we or either of us promise to pay to the order of Henry Schwener \$3,000, with interest from date and until paid at the rate of 7% per annum, payable half-yearly, secured by mortgage, value received. but the interest to date of maturity has been provided for by six notes, of even date herewith, for \$105 each, made by us payable to the order of said Schwener in 6, 12, 18, 24, 30, & 36 months after date, respectively; and it is agreed by us that, in case of default of payment of any one of said interest notes at maturity, this note for \$3,000, the principal, shall be considered as due, payable, and collectible, and the mortgage securing the same foreclosable immediately after any such default.

her

"Eliza A. X Berry.  
mark.

"James Berry.

"Catherine E. Brady.

"Attest: C. A. Kehler."

Indorsed:

"\$3,087. Without recourse on me in any event whatever.

"Henry Schwener.

"\$3,087.00.

Cin., O., Feb. 3, A. D. 1887.

"Received of Howard C. Hollister, executor of last will and testament of Eliza A. Berry, deceased, the sum of three thousand and eighty-seven dollars, in full for the balance of principal and interest of the within note and mortgage, paid No. 1,757, of H. R. & H., Attys.

"Kehler, Roelker & Jelke, Attys."

And your orator further says that, to secure the payment of said fraudulent, pretended, fictitious, and unreal notes above mentioned, a pretended, fictitious, fraudulent, and unreal mortgage was executed to the said Henry Schwener on the Longworth street property hereinabove described, bearing date March 4, A. D. 1880, all of which will more fully and at large appear by a copy of said petition, herewith filed, and made part hereof, marked "Exhibit Berry," and by a copy of said mortgage, herewith filed, and made part hereof, marked "Exhibit Schwener."

Your orator further says that the said Eliza A. Berry, in her lifetime, sometimes alleged and pretended, and the said defendant William G. Roberts and the Emery defendants and the defendant Sarah A. Weller now allege and pretend, that, prior to his death, the said testator, James Berry, executed and delivered a note to one H. E. Alexander for the sum of \$3,000, bearing interest at the rate of 7% per annum, and, to secure the payment of the same, executed a mortgage upon the said Longworth street property aforesaid for said amount, and that said note and mortgage remained unpaid, and that the said Schwener note and mortgage were executed to raise money to pay off said note and mortgage to said Alexander, and that the same were so paid by the money borrowed from the said Schwener, and that said Schwener, having possession of said notes and mortgage executed to him by the said Eliza A. Berry, James Berry, and Catherine E. Brady, indorsed and transferred the same without recourse, and that the said Schwener was a man of large means, engaged in the business of buying and selling notes and mortgages; whereas your orator charges the contrary thereof to be the truth, and says that the said mortgage to said Alexander had long been paid prior to the said suit instituted by the said Eliza A. Berry on the 16th day of April, A. D. 1885, for the payment of debts of the said testator, and that the said Eliza A. Berry, James Berry, and Kate E. Brady never borrowed any money whatever from the said Henry Schwener, nor obtained anything whatever of value from him, and that the said Henry Schwener never loaned them any money whatever or advanced to them anything of value whatever, and that the said Schwener never indorsed and transferred said notes without recourse or in any other manner, and that he never had the possession of said note and mortgage at any time, and that he never knew of their existence, and that he never knew or met the said Eliza A. Berry or Catherine E. Brady or James Berry, and that he never received any money by reason of or on account of said notes and mortgage, and that he was not a man of large means, and that he did not deal in buying and selling notes and mortgages, but, on the contrary, was a bookkeeper, on a salary, for the firm of F. Jelke & Son, at No. 47 Walnut street, Cincinnati, and the said Schwener was a man of small means, who could not at any time have loaned the sum of \$3,000 aforesaid, and never did so loan the said sum of \$3,000 to the said Eliza A. Berry, James Berry, and Catherine E. Brady, or to any one of them, and that no money as proceeds of said fraudulent, fictitious, and unreal note and mortgage was ever paid to the said H. E. Alexander.

Your orator further says that the mortgage to H. E. Alexander was on the 10th day of March, 1863, executed by the said James Berry and the said Eliza A. Berry, his wife, on the said Longworth street property above mentioned, to secure a note for \$3,000, due one year after date, with interest at 7% per annum, and at the time of the institution of said suit by Eliza A. Berry for the sale of lands, as aforesaid, 22 years, 1 month, and 6 days had elapsed since the making and signing of said note and mortgage, and the power of said Eliza A. Berry to sell under the will had become inoperative, the debt having long since been paid, and presumably barred by the statute of limitations, all of which will more fully and at large appear by an office copy of said mortgage, herewith filed, and made part hereof, marked "Exhibit Alexander."

Your orator further says that on the 23d day of August, A. D. 1886, the said Eliza A. Berry made her last will and testament, and the same was drafted by the said defendant William G. Roberts, and that she soon thereafter departed this life, and that on the 9th day of September of said year the same was duly admitted to probate in Hamilton county, Ohio, and by her said last will and testament she appointed the said defendant William G.

**Roberts trustee under said will, and also devisee, and that he, the said Roberts, was one of the attesting witnesses to said will, and Howard C. Hollister, a member of the law firm of which said Roberts was also a member, was appointed executor of her said will by the said Eliza A. Berry, at the instance of said William G. Roberts, and there came into his hands, as executor, various sums of money which he as executor duly turned over to the said William G. Roberts, trustee and devisee, as aforesaid.**

Your orator further says that, under the suit above mentioned for the sale of lands, there was about \$12,000 realized from said fraudulent sales; and that there came into the hands of the executor \$8,120.64, part of the proceeds of said sale; and that no part of said moneys was at any time accounted for or paid over to the said James Berry, in his lifetime, by said William G. Roberts, trustee as aforesaid.

Your orator further says that the said Eliza A. Berry, by her last will and testament, after making some provision for the support and maintenance of her said son, James Berry, among other things devised and bequeathed to the said William G. Roberts and Sarah A. Weller all of her said estate, to be equally divided by them at the death of her said son, all of which will appear more fully and at large by a certified copy of said last will and testament, herewith filed, and made part hereof, marked "Exhibit E."

Your orator further says that the said William G. Roberts, with a full knowledge of the provisions of the last will and testament of the said James Berry, and of the demented condition of the son, the said James Berry, and the fraud practiced upon the latter by the deed above mentioned which was procured from him, conveying his expectancy in his father's estate to his mother, Eliza A. Berry, yet, nevertheless, accepted the devises and bequests under the last will and testament of the said Eliza A. Berry and of the trust conferred upon him by the said will, in fraud of the rights of the said intestate, James Berry.

Your orator further says that on the 9th day of September, A. D. 1890, the said William G. Roberts, as guardian of the said James Berry, procured an order of the probate court of Hamilton county, Ohio, founded upon his own affidavit, committing the said James Berry as an insane person to the asylum for the insane at Longview, Hamilton county, Ohio, where the said James Berry, on the 13th day of May, A. D. 1891, departed this life, at which time your orator and the said M. E. Sperry, as next of kin and sole heirs at law of the said intestate, James Berry, became entitled upon his death, in equal moieties, each of the estate of the said James Berry, real, personal, and mixed, by virtue of the statute in such case made and provided.

Your orator further says that at the time of the death of the said intestate, James Berry, there remained, unconsumed and undisposed of, a valuable parcel of land, on the north side of Longworth street, between Race and Elm streets, now known as "No. 48 Longworth Street," and also a considerable amount of money, proceeds of the sale of said lands; and that the said William G. Roberts, as trustee and devisee of the last will and testament of the said Eliza A. Berry, together with his wife, Annie M. Roberts, and the said Sarah A. Weller, by deed bearing date December 8, 1891, in consideration of the sum of \$16,700, sold and conveyed the said real estate to the said Thomas J. Emery and the said John J. Emery, all of which will more fully and at large appear by a certified copy of said deed, herewith filed, and made part hereof, marked "Exhibit F"; and that if said money for the purchase of said lands was paid by the said Emery defendants to the said Roberts, as trustee and devisee as aforesaid, he now holds the same in trust for your orator and the said M. E. Sperry, the heirs at law of the said intestate, James Berry.

Your orator further says that the said William G. Roberts, as trustee under the will of said Eliza A. Berry, filed his final account in the probate court of Hamilton county; and that the same, on the 3d day of November, A. D. 1891, was allowed and confirmed; and that in said account he filed, as of date September the 22d, A. D. 1891, what purports to be a settlement in full as trustee with the said Sarah A. Weller, as devisee and legatee under the last will and testament of the said Eliza A. Berry. Said settlement is expressed in the words and figures following, to wit:

"Cin., O., Sept. 22, A. D. 1891.

"Recd. of W. G. Roberts, trustee under the will of Eliza A. Berry, dec., the sum of \$600, in cash, in full for my share of the personal estate and property and proceeds thereof, and the rents and issues received by him; and this is a final settlement with him as such devisee and legatee under the will of said deceased.

her  
"Mrs. Sarah A. X Weller.  
mark.

"Witness: Nellie G. Robinson."

Your orator further says that he believes and charges the fact to be that the said Emery defendants have not paid the said \$16,700, purchase money, to the said Roberts, but that they have some secret understanding by which said payment is deferred, and that a trust of some kind or nature now subsists between them, and that the said Sarah A. Weller has not received any portion of the said \$16,700, proceeds of sale, as alleged.

Your orator further says that all of the frauds alleged in this his amended bill, hereinabove enumerated, have been discovered by him within four years next before the institution of this suit, except such as have been discovered in the present month of March, since the return of the papers in said suit No. 3,943.

Your orator further says that the said defendants Thomas J. Emery and John J. Emery, at the time of their purchase of said Longworth street property, were in a position to know, and did know, the provisions of the will of the said James Berry, and of the demented condition of his son, James Berry, the intestate, and that the said Eliza A. Berry had but a life estate in the lands whereof the said testator died seised, and that the power to sell under said will alone for the payment of the said testator's debts, and of the fact that there were no debts of the testator remaining unpaid at the time of the institution of said suit aforesaid, for the pretended payment of debts, more than 21 years after the death of the testator; and they likewise had notice of the irregular and void proceedings in said suit, as reference to the proceedings therein will show, and that the defendant William G. Roberts was the attorney for the said Eliza A. Berry in the institution and conducting of said suit, and at the same time guardian for the said intestate, also a defendant in said suit, and that the said Roberts represented all parties to said suit, himself, as guardian, being a party, and that the relation of parent and child existed between the said Eliza A. Berry and the said intestate, James Berry, and that the relation of trustee and cestui que trust also existed between the said William G. Roberts and the intestate, James Berry, and that said Roberts in said suit represented all interests, as attorney, of the parties to said suit, being the said Eliza A. Berry, both plaintiff and defendant, in her different characters, and the said William G. Roberts, as guardian of the said intestate, James Berry, and they also had notice that the said intestate, James Berry, had, but a short time before the institution of said suit, conveyed his expectancy as sole heir at law in all the real estate of which his said father died seised, to his mother, the said Eliza A. Berry, for the grossly inadequate consideration of \$3,000, no part of which was ever paid to him, and that one parcel of said real estate alone was sold to the said Emery defendants soon after the death of the said intestate, James Berry, for the sum of \$16,700, and that the other two parcels of said land were sold under the proceedings in said suit for about \$12,000; and the said Emery defendants also had notice of the Schwener note and mortgage above mentioned, and of the Alexander mortgage above mentioned, and of the will of the said Eliza A. Berry, drafted and attested by the said William G. Roberts, who was made and constituted under said will both trustee and devisee, and of the adjudication of lunacy aforesaid against the said intestate, James Berry, and that he was, from the cradle to the grave, an imbecile, wholly incapable of making a deed; and they also had notice that the said Roberts had accepted the devises and bequests, along with the trust under the said will of Eliza A. Berry, with a full knowledge of the frauds perpetrated upon the said intestate, James Berry, and of the fact that the said William G. Roberts was an active participant with the said Eliza A. Berry in all her acts

and doings in the perpetration of the said frauds upon the said intestate, James Berry, and, further, that the said Roberts, by undue influence, had perpetrated a fraud upon the said Eliza A. Berry, an aged and ignorant woman, in obtaining from her the testamentary dispositions in his favor, contained in her said last will and testament, in fraud of the rights of the heirs at law, your orator and the said M. E. Sperry, the nearest of kin and next of blood to the said intestate, James Berry.

The prayer of the amended bill was as follows:

Your orator prays that the said defendants William G. Roberts, trustee under the will of Eliza A. Berry, and in his own right, and the said Sarah A. Weller, may be compelled to render a full and perfect account of the estate of the intestate, James Berry, which came into their hands; and that they be charged with the amount of all money paid into the hands of William G. Roberts by Howard C. Hollister, as executor of Eliza A. Berry, and divided between them, with interest thereon, from the time the same came into their hands, respectively; and that the deed from the said James Berry to Eliza A. Berry be rescinded, canceled, and annulled for fraud; and that the said William G. Roberts and Sarah A. Weller be adjudged volunteers, and held as trustees for whatever amount of money or other property belonging to the estate of the intestate, James Berry, that may have come into their hands through the acts and doings of Eliza A. Berry during her lifetime and under her said will; and that the said deed from the said William G. Roberts and wife and Sarah A. Weller, executed to the said Thomas Emery and John J. Emery, be canceled, rescinded, and held for naught; and that the said Thomas J. Emery and John J. Emery be required to account for the rents and profits of the said lands since the date of the said conveyance to them, and during their possession and enjoyment of them; and that your orator shall have, generally, such other and further relief as the nature of his case may require.

Blackburn, Hounshell & Rhyno, for complainant.  
Herbert Jenney, for defendant.

SAGE, District Judge. The suit is, in substance, to set aside certain transactions, on the ground of alleged fraud. The consideration set forth in the deed made by James Berry, Jr., to his mother, Eliza A. Berry, on the 21st of August, 1882, to wit, \$3,000, is sufficient to support it. The transaction was between mother and son. They were heirs to each other. Either dying intestate, the other would have been his or her heir. The averments in support of the charge that the consideration was inadequate, that the property was afterwards sold for a much larger sum, are by no means conclusive. How much time intervened before that sale is not set forth. Values of real estate in cities not infrequently fluctuate largely in a short time. Although it is averred that no part of the consideration was paid to James Berry, Jr., or to any other person for his use, there is no averment that it was not applied to his use.

As to the proceedings in the probate court and the sales made thereunder, the proceedings were all regular, and the sales were duly confirmed. Distribution of the proceeds was made by the judgment of that court, which had full jurisdiction in the premises. Those proceedings have never been set aside. It is quite true that a judgment may be impeached in equity for fraud and collusion, but only by strangers, and, as to strangers, only by those who, if the judgments were given full credit and effect, would be prejudiced in regard to some pre-existing right. Freem. Judgm. § 335, and cases

there cited. No judgment can be impeached for fraud by a party or privy to it. *Id.* § 334, and cases cited thereunder. The complainant and the defendant M. E. Sperry are both in privy to James Berry, Jr., and Eliza A. Berry, his mother. Their claim is expressly as first cousins and heirs of said James Berry.

The bill does not seek to set aside those judgments, but it does seek to avoid them by holding Roberts and Mrs. Weller accountable for the proceeds of the sales made thereunder. That cannot be accomplished without first setting aside the judgments, which cannot be done in a collateral proceeding. So long as the judgments remain unreversed, payments made under them must stand.

The death of Eliza A. Berry occurred in 1886, and her will was probated in September of that year. By that will, she gave all her property, which would include the property conveyed to her by her son under his deed in 1882, to Roberts, in trust for the support of her son, and, upon his death, divided the residue between Roberts and Mrs. Weller. James Berry died May 13, 1891, and, by the will of Eliza Berry, whatever then remained of her estate passed by its terms to Roberts and Mrs. Weller. On December 8th of that year, the real estate on Longworth street was conveyed to the Emerys. There is nothing in the bill charging Mrs. Weller with any connection with the alleged combinations and confederations. It is claimed that she derived a benefit from them, but that is not sufficient to hold her. Eliza A. Berry's will was probated and of record in 1886. The complainant had the right, under section 5858 of the Revised Statutes of Ohio, to contest it. The provision is that a person interested in a will may contest the validity thereof in a civil action in a court of common pleas of the proper county. By section 5866 the action must be brought within two years. There are certain exceptions which do not apply in this case.

In *Wood v. Carpenter*, 101 U. S. 136, it is held that a party seeking to avoid the bar of the statute on account of fraud must aver or show that he used due diligence to detect it, and that, if he had the means of discovery in his power, he will be held to have known it. In this class of cases, says the court, the plaintiff is held to stringent rules of pleadings and evidence, and must clearly bring himself within the exceptions which he claims. The court, referring to the case before it, says:

"It will be observed, also, that there is no averment that, during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. The judgments confessed were of record, and he knew it. It could not have been difficult to ascertain, if the facts were so, that they were shams."

In *Teall v. Slaven*, 40 Fed. 774, it was held that a party alleging fraud must be diligent in making inquiry; that means of knowledge are equivalent to knowledge; that a clue to the facts which, if diligently followed, would lead to discovery, is in law equivalent to a discovery.

In *Godden v. Kimmell*, 99 U. S. 211, the rule is stated that the cestui que trust "should set forth in the bill specifically what were the impediments to an earlier prosecution of the claim, and how

she or he came to be so long ignorant of their alleged rights." To the same effect, see *Marsh v. Whitmore*, 21 Wall. 185; *Richards v. Mackall*, 124 U. S. 187, 8 Sup. Ct. 437; *Speidel v. Henrici*, 120 U. S. 377, 387, 7 Sup. Ct. 610.

There is no averment in the bill that the complainant ever made or caused to be made the slightest inquiry in regard to the transactions complained of. The deed and will were of record. The complainant relies upon those records to support his allegations of fraud and his averment that the defendants Thomas J. and John J. Emery were chargeable with notice of the frauds averred. If so, the complainant also was in like manner chargeable. It is averred that the papers in the case in the probate court were off the files. But there was the record of the court, from which the complainant could have obtained all the information that he could have derived from the papers themselves.

It was suggested, orally, that the record was destroyed when the courthouse was burned. This is *dehors* the record; but, if the court could take judicial notice of the burning of the courthouse, it could also take judicial notice of the date of the burning, which was in March, 1884, more than a year before the institution of the suit in which the record under consideration was made.

A demurrer to the original bill for insufficiency having been sustained, and the amended bill, framed to cure the defects of the original bill, being now found to be insufficient, the demurrer to it will be sustained, and the bill dismissed.

---

#### FOSTER v. BEAR VALLEY IRR. CO.

(Circuit Court, S. D. California. February 11, 1895.)

No. 591.

#### ESTOPPEL—CORPORATION—ACQUESCENCE OF STOCKHOLDERS.

The B. L. & W. Co., a corporation organized to acquire water rights, and sell or lease the same for irrigation and other purposes, was the owner of a dam controlling the waters of the A. river, and held, by contract with the owners of the S. F. and N. F. ditches and the R. canal, certain rights of way for such water through said ditches and canal. In February, 1887, said company issued to its stockholders transferable certificates, entitling them to certain quantities of water from the dam, to be delivered at S., a point on the S. F. ditch, for which such stockholders, by concurrent contracts, agreed to pay one dollar per year for each certificate. From the time of the issue of such certificates, the holders thereof, at the request of the general manager of the B. L. & W. Co., and with the knowledge and approval of its directors, received the water to which they were entitled, not at S., as provided in the certificates, but at various points along the R. canal, which led from S. to a point about  $3\frac{1}{2}$  miles distant; this arrangement being for the advantage in certain respects of both parties. The certificate holders, with the knowledge of the company, constructed expensive and permanent works to connect with said R. canal, and to receive their water from it, and continued so to receive the water, without any charge in addition to the one dollar per year provided for in the certificates and contracts, until March, 1893, when the board of directors of the B. L. Co., which had succeeded to all the property, rights, and obligations of the B. L. & W. Co., passed a resolution fixing a charge for right of way of such certificate holders' water from S. through the R.

canal at two dollars per year in addition to the one dollar provided for in the certificates and contracts, pursuant to which resolution demand was made for such two dollars per year from March, 1893. *Held*, that the B. L. & W. Co. and the B. I. Co., as its successor, were estopped to demand from the certificate holders any sum for use of the R. canal in addition to the one dollar per year stipulated in the contracts, notwithstanding that there had been no formal action of the board of directors, and that three of the seven directors of the corporation, who consented to its course of conduct, were themselves interested as certificate holders; the whole transaction having been open, and easily to be known by any one interested in the corporation who paid attention to its affairs, and no stockholder having protested.

This was a suit by James Gilbert Foster, a creditor of the Bear Valley Irrigation Company, against that corporation, to procure the appointment of a receiver of its property, and enforce payment of its debts. Receivers were appointed, and, by an order entered April 2, 1894, were directed to proceed to collect all debts due the corporation. Pursuant to this order, the receivers made demands upon F. P. Morrison and sundry others for certain sums claimed to be due from them to the corporation. Morrison and the others petitioned the court to direct the receivers to withdraw their demand. The receivers answered, and the cause is heard on the petition and answer.

Chapman & Hendrick and W. J. Hunsaker, for receivers.  
Gibson & Titus and Bicknell & Trask, for petitioners.

ROSS, District Judge. This suit was commenced by a creditor of the defendant insolvent corporation, to, among other things, procure the appointment of a receiver of its property and the enforcement of the payment of its debts, so far as possible. The defendant corporation is the successor in interest of another corporation, called Bear Valley Land & Water Company. The Bear Valley Land & Water Company was incorporated under the laws of the state of California, with a capital stock of \$360,000, divided into 3,600 shares, of the par value of \$100 each, for these purposes, among others:

"To acquire, by appropriation, purchase, condemnation, or otherwise, the ownership of water, water rights, and water privileges in the county of San Bernardino, state of California, and to hold, use, sell, or lease the same, or any part thereof, for domestic, irrigating, manufacturing, and other beneficial uses; also, to acquire, by purchase, condemnation, or otherwise, the ownership of rights of way over land in said county, so far as the same may be necessary, for the construction, maintenance, and use of dams, reservoirs, canals, ditches, pipes, flumes, conduits, and aqueducts necessary to collect, store, convey, and distribute water for each and all of the aforesaid purposes, and to purchase, own, hold, and construct, and maintain, and use such structures and waterworks, and sell or lease the same, or any part thereof."

The defendant, Bear Valley Irrigation Company, was likewise incorporated under the laws of the state of California, for similar purposes, in addition to other purposes, not necessary to be stated. The Bear Valley Land & Water Company, in 1884, constructed a large and costly dam in San Bernardino county, in one of the tributaries of the Santa Ana river, thereby impounding, among other waters, the waters of that stream, for the purposes of distribution and sale for domestic use, irrigation, and other beneficial purposes.



At that time, the summer flow of the Santa Ana river at the mouth of the Santa Ana cañon, known as the "Divide," was appropriated and diverted by means of two ditches, one called the "North Fork Ditch," and the other the "South Fork Ditch"; and with the appropriators of those waters, by means of those ditches, the Bear Valley Land & Water Company, in the year 1885, entered into certain contracts. By the contract with the owners of the North Fork ditch, the Bear Valley Land & Water Company acquired, among other things, a right of way for the carriage of its water through that ditch from its head, at the point known as the "Divide," to a point known as "Haven's Corner," distant in a westerly direction about eight miles; and, by the contract with the owners of the South Fork ditch, the Bear Valley Land & Water Company acquired, among other things, a right to carry its water through the South Fork ditch from its head, at the Divide, to a point in an easterly and southerly direction distant about three miles, known as the "Sycamore Tree"; and to this point the Bear Valley Land & Water Company, by the contract, agreed to deliver certain water free of expense to the owners of the South Fork ditch. On the 12th of February, 1887, the Bear Valley Land & Water Company acquired from the Redlands Water Company (also a California corporation) a certain aqueduct known as the "Redlands Canal," extending from the sycamore tree to the Redlands reservoir, upon the condition, however, that the Redlands Water Company should have—

"The perpetual right of way through said canal, and any enlargement thereof, or any addition thereto, and through any canal or aqueduct constructed hereafter in lieu thereof by party of the second part [Bear Valley Land & Water Company], its successors and assigns, for the following amounts of water belonging to the party of the first part [Redlands Water Company], to wit: (1) 108 inches of water, measured under a 4-inch pressure, known as the 'Santa Ana Tunnels' and 'Morton Cañon' water. (2) The water represented by 50 shares of the Sunnyside division of the South Fork ditch, reduced to a constant stream equal and proportionate with the total amount of water represented by said 50 shares, including the right of way for said water accumulated in accordance with the provisions of a certain contract between the South Fork ditch of the Santa Ana river and the party of the second part, recorded in the recorder's office of said county, dated —, 1886, and recorded in book — of Agreements, at page — thereof. (3) An amount of water, not to exceed 200 inches of water, measured under a four-inch pressure, of waste water, from Mill creek, whenever there may be water in the Mill creek water ditch, so called, for party of the first part."

The grant contained this further provision, among others:

"The right of way for all the water particularly above described through said canal, or any enlargement thereof or addition thereto, or any canal built in lieu thereof as aforesaid, shall have precedence of any other right of way for the conveyance of any and all other water to be conveyed in said canal, enlargement thereof, addition thereto, or in any canal that may be built in lieu thereof, as aforesaid."

The grant contained the further provision that the Bear Valley Land & Water Company should receive the water so specifically described at the head of the Redlands canal, and that it should suffer no loss in transit between that point and the Redlands reservoir. The fourth clause of the grant contained the provision that the Redlands Water Company shall bear its share of the expense of main-

taining the Redlands canal, or any addition thereto, or any enlargement thereof, or any canal built in lieu thereof, in the proportion that the amount of water used by it, and for which it has a right of way through said canal, bears to the whole amount of water having a right of way through it. And its fifth clause is as follows:

"It is further understood and agreed that the party of the first part [the Redlands Water Company], by its zanjero, shall have the right to divert water from said canal at any or all points of use thereof; provided, however, that said zanjero shall not divert in all more water than that to which party of the first part [the Redlands Water Company] is or will become entitled."

The Bear Valley Land & Water Company, after acquiring the Redlands canal, extended it by means of a pipe line from a point near the Redlands reservoir westward to Cajon street, in Redlands.

The capital stock of the Bear Valley Land & Water Company was, as has been said, divided into 3,600 shares, of the par value of \$100 each; and in June, 1886, that company resolved to issue to its stockholders 7,200 of what are called "Class A" water certificates,—that is to say, two of such certificates for each share of its stock,—the recipient of each of which to sign, as a part of the same transaction, a certain written contract. Three thousand four hundred and twenty-nine, in the aggregate, of such certificates, are, and have been since February, 1887, held by the petitioners in the present proceeding and their predecessors in interest. With the exception of the names of the respective holders and numbers, each of such certificates is in the following form:

"(Class A. 7,200 certificates. Issue of June 1, 1886.)

"No. ——. Number of certificates, ——.

"Bear Valley Land and Water Company Water Certificate.

"These —— certificates, issued by the Bear Valley Land and Water Company, a corporation, to ——, for —— acres, are guaranteed by said company to entitle the holder hereof to receive a continuous flow of one-seventh of an inch of water to each acre of land to which the same shall be devoted, or multiple thereof, as is designated on the face hereof, for the six summer months in each year, for the contract times beginning under the contracts of this company with the North and South Fork ditches, respectively. The inch mentioned herein is equivalent to a flow of one-fiftieth of a cubic foot per second. The holder of this certificate may elect to accumulate the use of water hereunder in any one or more months of said six months, the aggregate in any one month not to exceed one-fourth of the whole for that year, and the holder is also entitled to his proportion of the six months' winter water accruing under the contracts of the North or South Fork ditches, on which it may be used in the proportion which this issue of certificates and those that may be hereafter issued bears to the whole of such benefits. The point of delivery of water used under this certificate shall be at the points designated in the contracts with the North and South Fork ditches, respectively. This issue or award of water is adopted as a method of distribution and of the use of the same to the company's stockholders, in consideration of the covenants contained in the indorsement hereon; and the interest represented by this certificate shall not become appurtenant to or pass by voluntary act or by operation of law with any land upon which the water represented may be used. A transfer hereof shall only be made by surrender of this certificate to the company, and the reissuance of a new certificate, and upon the signature of the concurrent contract on the records of the company.

"———, President.

"———, Secretary."

"[Seal of said company.]

Indorsement: "The holder of this certificate hereby accepts the same on the following conditions: That this certificate shall and is to be held subject to

and in accordance with the terms of the contract signed by the holder hereof upon its issuance by the company."

The contract mentioned in the indorsement on the certificate to be signed by the holder was signed by each of the petitioners, or their predecessors in interest, and, with the appropriate insertion of names and numbers, is as follows:

"Know all men by these presents, that whereas, the Bear Valley Land and Water Company, a corporation, has this day issued to the undersigned, — certificates of said corporation, being certificate No. —, in consideration of the agreements hereinafter contained, and subject to the conditions hereinafter set forth and contained in said certificate, and the undersigned has received and accepted said water certificates subject to all such agreements and conditions: Now, therefore, we hereby agree that in consideration of the issuance of said water certificates to us by said corporation, and in payment for the water which said certificates entitle us to receive each year from said corporation in accordance with the provisions of said certificate, we will, without notice or demand, pay to said corporation annually hereafter, and within thirty days after the first day of January in each year, the sum of — dollars, being one dollar per year on each of said water certificates, such payment to be made at the office of said corporation, in the city of San Bernardino, state of California. And, if said sum of — dollars be not paid to said corporation in full at the time and in the manner hereinbefore provided, then said certificate No. —, and all covenants and agreements therein contained, and the water certificates therein referred to, shall become and be null and void, and all rights thereunder shall be forfeited, and shall forever cease and determine, and the foregoing contract shall be void. And, whenever said certificate No. — shall be surrendered to and canceled by said corporation, then the foregoing contract shall be void. In witness whereof, we have hereunto set our hands and seals, this seventh day of July, A. D. 1887."

The order of instructions to the receivers herein, of date April 2, 1894, contained the following provision:

"That said receivers be, and they are hereby, authorized to proceed to the collection of all debts due and demands owing to the said Bear Valley Irrigation Company, or payable to said receivers as such; and for such purpose they are hereby authorized and empowered to take all such steps as may be necessary in their judgment, including the power to bring suits, to collect any such debts, dues, or demands, where the same are, in the judgment of said receivers, collectible, and are not paid to them on demand."

And the Bear Valley Irrigation Company having theretofore, to wit, on the 14th day of March, 1893, at a regular meeting of its board of directors, passed this resolution:

"Resolved, that the annual charge for right of way for the flow of water represented by class A of the Bear Valley Land & Water Company certificates from the point of delivery specified in said class A certificates through any of the ditches, canals, and pipe lines of the Bear Valley Irrigation Company in the East San Bernardino valley, except the Green Spot line and the Alessandro pipe line, be fixed at the sum of two dollars per year in addition to the annual charge for rental now reserved in said certificates,"

—the receivers, on the 26th of April, 1894, made a demand, in writing, upon the petitioners in the present proceeding for the additional charge mentioned in the resolution of the board of directors of the defendant corporation of March 14, 1893; the petitioners having, ever since that date, taken the water claimed under the class A certificates through the Redlands canal, and not at the point mentioned in the certificates and concurrent contracts.

Thereafter, to wit, on August 6, 1894, F. P. Morrison, A. G. Hubbard, A. Pfeiffer, S. Pfeiffer, C. A. Tripp, Warner Bros., M. Mattice, George A. Cook, H. M. Barton, Drew & Fairbanks, H. L. Drew, the Redlands, Laguna & Crafton Domestic Water Company, the East Redlands Water Company, the Redlands Water Company, and the Mound City Land & Water Company (the last four named being corporations organized and existing under the laws of California), holders, in the aggregate, of 3,429 of the class A water certificates, filed their petition, praying that the receivers be directed to recall the demand for the aforesaid additional charge of two dollars for each certificate, as fixed by the resolution of the board of directors of the defendant corporation of March 14, 1893, and that the receivers be directed to furnish and supply water to petitioners through the Redlands canal under the class A certificates and concurrent contracts, upon the same terms and conditions as such water had been theretofore furnished and supplied to petitioners and their respective predecessors in interest; namely, for one dollar per annum for each certificate.

In support of the petition, the petitioners allege, in effect, that, notwithstanding the point of delivery was by the certificates and concurrent contracts fixed at the sycamore tree aforesaid, nevertheless, at the request of the Bear Valley Land & Water Company, the petitioners and their predecessors in interest have ever since about the 12th day of February, 1887, received their respective shares of water under class A certificates through the Redlands canal, without let, hindrance, interruption, or objection, or any understanding, express or implied, or demand being made for any compensation or charge, other than that expressed in and provided for in said certificates and said concurrent contracts, until the demand made by the receivers heretofore appointed in the above-entitled action; that the petitioners do now divert, and they and their predecessors in interest have ever since February, 1887, diverted, their respective shares of water under the class A certificates from and at various points along the Redlands canal; that, with the water so supplied and used, about 3,400 acres of land, devoted principally to the growth of citrus and deciduous fruit trees and vineyards, are irrigated, and about 4,000 people supplied for domestic purposes; that petitioners and their predecessors in interest have regularly paid to the defendant corporation and its predecessor in interest the amount specified in the certificates and concurrent contracts; that petitioners and their predecessors in interest, relying upon the request of the Bear Valley Land & Water Company to take their water through the Redlands canal, and that corporation's acts in furnishing it to them without cost or expense other than that provided for in said class A certificates and concurrent contracts, did not construct or procure other aqueducts to convey their said water, and at much outlay made connection with the Redlands canal to receive the same; that the defendant corporation, long prior to the commencement of the present suit, acquired, and still owns and holds, all the property of the Bear Valley Land & Water Company, and has fulfilled all the obligations and

undertakings of that corporation with respect to furnishing and supplying water under and to holders of said class A water certificates as the same had been theretofore supplied and furnished by the Bear Valley Land & Water Company. The receivers filed an answer to the petition, admitting some and denying other of its allegations, and also filed a cross petition, in which is set up the resolution of the board of directors of the defendant corporation of March 14, 1893, and also the order of this court appointing the receivers herein, and their subsequent demand upon the petitioners of payment of the additional charge provided for by the resolution of March 14, 1893, and alleging that at all times since the passage of that resolution the petitioners, with full knowledge of its passage, have taken the water represented by class A certificates through the Redlands canal, and not at the point mentioned in the certificates and concurrent contracts; wherefore the receivers ask, not only that the application of the petitioners be denied, but that they be required to pay for the use of the Redlands canal the additional charge provided for by the resolution of the board of directors of the defendant corporation.

The position of both parties to the controversy is based upon the assumption of the validity of class A certificates; the receivers claiming the right to demand and receive the additional charge imposed by the resolution of the defendant corporation for the conveyance through the Redlands canal and its extension of water represented by them; and the petitioners claiming that the receivers have not that right, for the reasons—First, that the facts of the case estop the defendant corporation from making any such additional charge; and, second, if this be not so, that the payment provided for in the certificates and concurrent contracts, to wit, one dollar per annum for each certificate, was intended to cover all charges for the delivery of water represented by those certificates, irrespective of the point of delivery; and, third, in respect to the Redlands Water Company, that, under the provisions of the conveyance from it to the Bear Valley Land & Water Company, the Redlands Water Company has the right to have the water represented by the class A certificates held by it carried through the Redlands canal without any charge. The court therefore indulges the assumption upon which the respective claims of the parties are based, and proceeds to determine the controversy without considering or deciding any question touching the validity of the certificates themselves.

There is no doubt, I think, that the right asserted by the petitioners constitutes an easement and interest in real property, and is therefore to be governed by the law of the state of California, a provision of which is that an interest in land can be conveyed only by an instrument in writing. But to cases of estoppel in pais the statute of frauds does not apply.

"It has never been held," said the supreme court in *Dickerson v. Colgrove*, 100 U. S. 583, "that the statute of frauds applies to cases of inurement, and it has been conceded that it does not affect cases of dedication. Where is the difference in principle in this respect between those cases and the one

before us? [A case of estoppel in pais.] But here this point cannot arise, because the promise relied upon was in writing. In *City of Cincinnati v. Lessee of White*, 6 Pet. 431; this court, speaking of the dedication there in question, said: 'The law considers it in the nature of an estoppel in pais, which precludes the original owner from revoking such dedication;' and that a grant might have been presumed 'if that had been necessary, and the fee might be considered in abeyance until a competent grantee appeared to receive it, which was as early as the year 1802, when the city was incorporated.' Here there was a grantee capable of taking the fee all the time, from the date of the letter. The common law is reason, dealing by the light of experience with human affairs. One of its merits is that it has the capacity to reach the needs of justice by the shortest paths. The passage of a title by inurement and estoppel is its work without the help of legislation. We think no sound reason can be given why the same thing should not follow in cases of estoppel in pais where land is concerned."

In *Wiseman v. Lucksinger*, 84 N. Y. 41, much relied upon by the receivers, the court of appeals of New York said:

"There are, no doubt, many cases in which courts recognize an equitable right to an easement without a deed; but there will be found in them either an express agreement for an easement, or an acquiescence or consent by conduct which has led to the erecting of permanent works or valuable and lasting improvements, or some other fact which would make the assertion of a legal title operate as a fraud upon the persons setting up the equitable right."

Is the present one of those cases? The proof shows that the petitioners and their predecessors in interest, ever since the issuance to them, respectively, of class A certificates, have taken the water represented by those certificates, not at the point mentioned in them and in the concurrent contracts,—namely, the sycamore tree,—but through the Redlands canal and its extension at the several points most convenient for their respective use. This course of conduct was commenced at the suggestion of the then engineer and general manager of the Bear Valley Land & Water Company, F. E. Brown, after consultation with the president and other directors of the company, and with their verbal consent, and was continued without any manifestation of dissent on the part of the Bear Valley Land & Water Company, or its successor in interest, the Bear Valley Irrigation Company, until the passage by the board of directors of the last-named corporation of the resolution of March 14, 1893,—a period of more than seven years. There was never, however, any record action of the board of directors of either corporation authorizing or consenting to such use of the Redlands canal or its extension by the petitioners or their predecessors in interest, or either of them. The connections made with the Redlands canal and its extension by the petitioners and their predecessors in interest, for the purpose of taking therefrom the water represented by the class A certificates held by them respectively, were made at their own expense, but under the direction and supervision of the engineer and general manager of the company. Some of them were made at different points within the first mile, southerly, of the sycamore tree; some within the second mile; some within the third mile; and many of them at the terminus at Cajon street, which is distant about 3½ miles from the sycamore tree. All of the connections were permanent in charac-

ter, not designed for temporary use, but substantial, costly, and intended to remain for all time. From these respective points of diversion, the petitioners and their predecessors in interest laid, at heavy expense, lines of pipe extending many miles for the conveyance of such water to the respective places of use. The proof shows that to have built such lines of pipe or other conduits to the point known as the "Sycamore Tree" would at the same time have cost considerably more, but that now, by reason of the highly-improved condition of the intervening lands, the procurement of rights of way for pipes or other conduits to that point would be very costly. From the time of the making of the respective connections, the water represented by the class A certificates held by the petitioners and their predecessors in interest has been regularly distributed through them to the respective holders of such certificates by the regularly appointed *zanjero* of the company. The reasons assigned by the witness Brown for his suggestion that the holders of class A certificates take the water represented by them through the Redlands canal and its extension, instead of at the point designated in the certificates and concurrent contracts, is that value would thereby be added to the certificates, and at the same time the company would be benefited by thus keeping the water together for a greater distance, which would prevent loss by evaporation and seepage. During all of this time, Brown was a holder of class A certificates, and otherwise pecuniarily interested in taking the water represented by such certificates from the Redlands canal and its extension, as were also at least two of the other directors of the Bear Valley Land & Water Company.

Do the facts stated estop the defendant corporation from imposing upon the respective petitioners an additional charge of two dollars for each certificate held by them, respectively, for the conveyance of the water represented by such certificates to the respective places of diversion so established? If the party to whom the estoppel is sought to be applied was an individual, it would seem to be clear that he would be estopped.

"The vital principle," said the supreme court in *Dickerson v. Colgrove*, *supra*, "is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked."

In that case the supreme court referred with approval to the case of *Faxton v. Faxton*, 28 Mich. 159, where a mortgagee holding several mortgages prevailed on a son of the deceased to remain on the premises, and support the family, by assuring him that the mortgages should never be enforced. The son supported the family, and the property grew in value under his tillage. After the lapse of several years, the mortgagee proceeded to foreclose. He was

held to be estopped by his assurances, upon which the son had acted. The court there said:

"The complainant may have estopped himself without any positive agreement if he intentionally led the defendants to do or abstain from doing anything involving labor or expenditure to any considerable amount by giving them to understand they should be relieved from the burden of the mortgage. In *Harkness v. Toulmin*, 25 Mich. 80, and *Truesdail v. Ward*, 24 Mich. 117, this principle was applied,—in the former case, to the extent of destroying a chattel mortgage; and in the latter, of forfeiting rights under a land contract, where parties were made to believe they were abandoned. There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect."

In *Flickinger v. Shaw*, 87 Cal. 126, 25 Pac. 268, Shaw agreed that Flickinger and Smith should have the right of way over his land for a ditch, and they agreed to construct the ditch and keep it in repair; the ditch, when completed, to be used by the contracting parties in irrigating their respective tracts of land with water which they were to have in certain proportions. The court said:

"The above facts clothe the transaction with the character of a purchase by one party, and sale by the other, of a right of way for a ditch. The license under which Flickinger and Smith entered was vested in them by a contract of purchase for a valuable consideration. Under this agreement, Flickinger and Smith did survey and construct the ditch, and kept it in repair, and both parties made use of it for the purpose for which it was constructed, viz. the irrigation of their lands. Thus, the agreement between the parties was executed. The license here given to Flickinger and Smith was one for the acquisition of an interest in land by purchase of Shaw, for which they paid by doing what they had agreed to do. After the ditch was constructed, it was used by all parties under the agreement for four or five years. Now, it would be highly inequitable, after the work has been done and money expended by Flickinger and Smith, to allow Shaw to recall his consent, fill the ditch, and cut Flickinger, who has succeeded to all the rights of Smith under the agreement above stated, off from the use of the ditch and the water flowing therein; nor should any such proceeding, in our view, be upheld by a court of justice."

While the court held that an agreement of purchase and sale entered into the transaction there under consideration, it likened the case to one of an executed license, in which there is no agreement of purchase and sale, citing with approval the cases of *Rerick v. Kern*, 14 Serg. & R. 271, *Pope v. Henry*, 24 Vt. 565, and *Swartz v. Swartz*, 4 Pa. St. 358.

The same view was taken by the supreme court of Nevada in the case of *Lee v. McLeod*, 12 Nev. 285, where Judge Hawley, then chief justice of that court, said:

"The principle that expending money or labor in consequence of a license to divert a water course or use a water power in a particular way has the effect of turning such a license into an agreement that will be enforced in equity has been frequently announced by the courts. In all such cases the execution of the parol license supplies the place of a writing, and takes the case out of the statute of frauds,"—citing a number of cases.

Whether the agreement under which the petitioners and their predecessors in interest commenced and continued to use the water



represented by the class A certificates held by them, respectively, through the Redlands canal and its extension, be regarded as an easement, or an executed parol license, the distinction between which, as said by Chancellor Kent, is quite subtle, and at times difficult to discern (3 Kent, Comm. 592), equity will give it effect, because it would be against conscience and a fraud to permit it to be repudiated, unless the relation of the directors of the corporation here sought to be estopped to the petitioners or their predecessors in interest, or the circumstance that there was no formal action of the board of directors of either of the corporations authorizing the agreement, takes the case out of the rule that would be applied were the party against whom the estoppel is set up a private individual. At least three of the seven directors of the corporation verbally consenting to the course of conduct described were, as has been said, holders of class A certificates, or otherwise interested therein. In *Oil Co. v. Marbury*, 91 U. S. 587, Mr. Justice Miller, delivering the unanimous opinion of the supreme court of the United States, said:

"That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and others. *Koehler v. Iron Co.*, 2 Black, 715; *Drury v. Cross*, 7 Wall. 299; *Railroad Co. v. Magnay*, 25 Beav. 586; *Iron Co. v. Sherman*, 30 Barb. 553; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456. The general doctrine, however, in regard to contracts of this class, is not that they are absolutely void, but that they are voidable at the election of the party whose interest has been so represented by the party claiming under it. We say this is the general rule, for there may be cases where such contracts would be void ab initio, as when an agent to sell buys of himself, and by his power of attorney conveys to himself that which he was authorized to sell. But even here acts which amount to a ratification by the principal may validate the sale."

"It is not necessary that an act of ratification be shown on the part of every individual shareholder; but proof of circumstances from which the court or jury can reasonably infer that the act in question was generally known among the shareholders, and was acquiesced in by them, will constitute at least prima facie evidence of ratification. In many cases knowledge may be presumed from circumstances, and assent may be implied from silence or a failure to act. In those cases in which the doctrine of estoppel can be invoked to charge all the shareholders of a corporation with acquiescence in acts which they ought to have known, and which they cannot, in justice, be allowed to repudiate, proof of the facts on which the estoppel is based is sufficient to charge the corporation." 2 Mor. Priv. Corp. § 633, and authorities there cited.

In *Kent v. Mining Co.*, 78 N. Y. 187, Folger, J., delivering the opinion of the court, said:

"Where third parties have dealt with the company, relying in good faith upon the existence of corporate authority to do an act, there it is not needed that there be an express assent thereto on the part of the stockholders to work an equitable estoppel on them. Their conduct may have been such, though negative in character, as to be taken for an acquiescence in the act; and when harm would come to such third parties, if the act were held invalid, the stockholders are estopped from questioning it. We suppose acquiescence or tacit assent to mean the neglect to promptly and actively condemn the unauthorized act, and to seek judicial redress from knowledge of the commit-

tal of it, whereby innocent third parties have been led to put themselves in a position from which they cannot be taken without loss."

In *Underhill v. Santa Barbara, etc., Co.*, 93 Cal. 300, 28 Pac. 1049, the supreme court of California held that:

"Acts of the directors in violation of a by-law may be ratified by the shareholders, and, generally, by the same number of shareholders that would be necessary to enact them. Such ratification need not be formally made in a meeting of the stockholders, but may be presumed from the circumstances of the case, such as long acquiescence in acts beneficial to the corporation, with knowledge of all the material facts."

In *Reuter v. Telegraph Co.*, 6 El. & Bl. 341, by the deed of settlement of the corporation, which was formed under a royal charter, the board of directors were invested with a general authority to conduct the affairs of the company; all contracts above a certain value were to be signed by at least three individual directors, or sealed with the seal of the company, under the authority of a special meeting. The company was sued upon a contract above the prescribed value, which had been given by the chairman verbally. Upon an agreed statement of facts, the court of queen's bench held that the contract executed by the chairman without authority had been rendered binding upon the company by the subsequent acquiescence of the board of directors. The same rule was applied in *Beecher v. Mill Co.*, 45 Mich. 103, 7 N. W. 695, and in *Bank v. Averell*, 96 N. Y. 467. The application of the doctrines of ratification and estoppel depends in each case upon its particular circumstances. "The equity of the case must be determined. It is necessary to consider the character of the act with which it is sought to charge the corporation, the importance of the act, and the degree of publicity which was given to it. The good faith or bad faith of the parties, and their business relations, are also important considerations." 2 Mor. Priv. Corp. § 631a; *Thomas v. Railway Co.*, 1 McCrary, 392.<sup>1</sup> In the case at bar none of the acts relied upon as constituting the estoppel were concealed. On the contrary, they were of such a character that they must have been known to every one having an interest in the respective companies not willfully blind to them. There is nothing in the case to show that the privileges accorded by the directors to the petitioners and their predecessors in interest were injurious to the respective corporations, or either of them, but there is evidence tending to show that some benefit was derived by the corporations by keeping the waters together for the longer distance, thus preventing to some extent loss by evaporation and seepage. The acts of the petitioners and their predecessors in interest in accepting the privileges accorded by the directors involved large expenditures of money, publicly made, permanent in character, and so used that every one taking any, even the slightest, interest in the affairs of the corporations, must have been apprised of the facts; for the evidence shows that for more than seven years the regularly appointed *zanjero* of the respective corporations regularly distributed to the petitioners

<sup>1</sup> 2 Fed. 877.

and their predecessors in interest, through their said connections so established with the Redlands canal and its extension, the water represented by the class A certificates held by them respectively. Good faith and fair dealing require that those who have made such large expenditures in acceptance of the privileges accorded them, and have been so long in the open and undisturbed enjoyment of them, should be protected against any additional burden sought to be imposed by those who have not only stood by and acquiesced therein, but who have, through their regularly appointed *zanjero*, actively ratified and continued the privileges in question.

The views above expressed render it unnecessary to decide the other points made by the petitioners. An order will be entered directing the receivers to recall the demand upon the petitioners for payment of the additional charge provided for by the resolution of the defendant corporation of March 14, 1893.

---

POLLARD et al. v. REARDON.

REARDON v. POLLARD et al.

(Circuit Court of Appeals, First Circuit. January 18, 1895.)

Nos. 79 and 80.

1. **EQUITABLE ESTOPPEL—TRANSFER OF BILL OF LADING PERMITTED BY MORTGAGEE OF GOODS.**

M., as security on the renewal of his note held by P., made and delivered to P. a bill of sale of certain hides to arrive from a foreign port. Afterwards, in consideration of the indorsement by R. of another note, the proceeds of which went to M., M. gave to R., who had no notice of the bill of sale to P., a memorandum of sale of the same hides, agreeing therein to deliver the bill of lading on receipt by him, and subsequently indorsed and delivered it to R. The note indorsed by R. was renewed when due, and the renewed note was protested, and paid by R. before the arrival of the hides. P. never demanded the bill of lading, but claimed the hides on their arrival. *Held*, that P. was estopped by presumed assent to the issue of the bill of lading to M., emphasized by laches in applying for it, and P.'s right could not prevail against R.'s title under the bill of lading.

2. **NEGOTIABLE INSTRUMENTS—BILL OF LADING.**

A bill of lading in the usual form is a negotiable instrument, even though not in the same sense as promissory notes or bills of exchange, and carries on its face, in the words "and assigns," authority to dispose of it, and like authority when indorsed in blank, by which the person who voluntarily puts it out or permits it to be put out is estopped, as against one who innocently advances value thereon, if one of the two must suffer.

3. **SAME—BONA FIDE PURCHASERS—PRESENT CONSIDERATION—ADVANCES ON BILL OF LADING TO BE DELIVERED.**

Advances made on the security of a memorandum of sale of goods to arrive, which contains a stipulation that the bill of lading shall be delivered when it arrives, constitute a present consideration for the transfer; the delivery of the bill of lading on its arrival, in connection with the prior stipulation, constituting in equity but one transaction.

4. **EQUITY—JURISDICTION—RECOVERY OF POSSESSION OF GOODS IN CUSTODY OF COLLECTOR.**

Imported goods, in the custody of the collector, being, under Rev. St. § 934, irrepleviable, although subject to the orders and decrees of the

courts of the United States having appropriate jurisdiction, a bill in equity may be maintained to obtain possession of them.

**5 COSTS ON APPEAL—EFFECT OF REVERSAL ON RIGHTS OF PARTY NOT APPEALING.**

On a bill to obtain possession of goods in the custody of a collector, to which he is made a defendant, and properly makes a several defense, but, by reason of a stipulation between the parties in interest, takes no part in an appeal from a decree for complainants, he is entitled, on reversal of the decree, to costs in the court below, but not to costs in the appellate court.

**Appeals from the Circuit Court of the United States for the District of Massachusetts.**

This was a suit by Reuben T. Pollard and others against Leverett Saltonstall, collector of the port of Boston, and Edmund Reardon, for the foreclosure of a chattel mortgage and an injunction. The circuit court rendered a decree for complainants. 56 Fed. 861. Defendant Reardon and complainants separately appealed from the decree.

In August, 1888, one N. B. Mansfield made a bill of sale to Pollard, Pettus & Co., of New York, of a quantity of hides then on the coast of Africa, and loaded, or about to be loaded, on a vessel for shipment to said Mansfield. The bill of sale was given as security for the renewal of a note of Mansfield's for \$10,500, held by Pollard, Pettus & Co. In October, 1888, in consideration of the indorsement by one Edmund Reardon of a note for \$8,000, Mansfield gave to Reardon a memorandum of sale of the hides, agreeing to deliver the bill of lading when received. In November, 1888, the bill of lading was received by Mansfield, and by him indorsed and delivered to Reardon. The note indorsed by Reardon was once renewed, and before the arrival of the hides the renewal note was protested, and paid by Reardon. On the 8th of April, 1889, the vessel carrying the hides arrived, and on the 16th of April a permit was issued to Reardon by the collector of customs to land the hides. April 17th, Pollard, Pettus & Co. demanded the hides from the collector, and immediately afterwards brought this suit to foreclose the chattel mortgage evidenced by their bill of sale, and to enjoin the delivery of the hides to Reardon. At the time of the institution of the suit there remained due on the note of Mansfield to Pollard, Pettus & Co. \$3,334.30, but they claimed that the hides were conveyed to them as security also for a balance due to them from Mansfield on general account. The court found in their favor as to the balance due on the note only, and this they assigned as error.

Charles K. Cobb, for Pollard and others.

Lewis S. Dabney, for Reardon.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. The effect to be given to the negotiation of the bill of lading in this case does not seem to have been brought to the attention of the circuit court as it has been to ours. Bills of lading are not negotiable instruments in the full sense that promissory notes are, yet they are justly styled negotiable. Among the reasons for this are that they are well-recognized commercial instruments, that when indorsed in blank they carry title by mere delivery from hand to hand, and that the community gives credit in reliance on what appears on the face of them. Pollard v. Vinton, 105 U. S. 7, 8; Friedlander v. Railway Co., 130 U. S. 416, 424, 9 Sup. Ct. 570; Pease v. Gloahec, L. R. 1 P. C. 219, 227; 4 Daniel, Neg. v. 65f.no.8—54

Inst. (4th Ed.) § 1727. They have become by custom and necessity peculiarly subject to the rules stated by Lord Herschell in *Bank v. Simmons* [1892] App. Cas. 201, 215, as follows:

"The general rule of the law is that, where a person has obtained the property of another from one who is dealing with it without the authority of the true owner, no title is acquired as against that owner, even though full value be given, and the property be taken in the belief that an unquestionable title thereto is being obtained, unless the person taking it can show that the true owner has so acted as to mislead him into the belief that the person dealing with the property had authority to do so. If this can be shown, a good title is acquired by personal estoppel against the true owner."

The peculiar form and phraseology of ordinary bills of lading, and the generally known reliance placed upon them and credit given them in commercial communities, render the principles of these expressions especially applicable to them; and common honesty, in the light of modern business and financial methods, throws a special burden on those who put them out. It is true, as said by the supreme court in the cases cited, that they are as so much cotton, grain, or corn, and that, as no sale of such articles, when lost or stolen, can divest ownership, the same is true as to sales of their lost or stolen symbols. In mere cases of theft or loss this is a clear rule; yet when there is no theft or loss, but a voluntary intrusting to an agent or other person, though for a special purpose, with no notice on the face of a limited right, the fact is then to be considered that there is an ostensible authorization found in the word "assigns," appearing in the usual bill of lading, and in the one at bar, which is neither found nor implied in a mere change or delivery of possession of the articles of which bills of lading are the symbols. The same may be said of a bill of lading which has been indorsed in blank; as, by analogy to other commercial instruments of a negotiable character, such an indorsement apparently authorizes the holder to fill up the blank at his option. The application of the rules of estoppel to bills of lading like this at bar, appearing on their faces to be transferable in the light of the views and expressions which we have cited, would seem to be in harmony with legal principles. Nevertheless, the state of the authorities on this topic is not satisfactory. It must be admitted that the ordinary deposit of title papers does not enable the person holding them to make a title to personal property beyond what he himself possesses. The cases on this point are numerous. A marked one is *Johnson v. Credit Lyonnais Co.* (decided in 1877), 3 C. P. Div. 32, which touched the negotiability of certain dock warrants. Chief Justice Cockburn delivered the opinion, and said (page 40) that, at common law, the leaving in the vendor the possession of goods bought, or of the documents of title, would not estop the vendee in case of a fraudulent sale or pledge by the party with whom the goods or documents were left. It is evident, however, that, as the chief justice concurred in *Rumball v. Bank*, 2 Q. B. Div. 194, he had in view only the ordinary principle touching such matters, which may be distinguished from cases involving bills of lading negotiable in form.

Numerous cases may be found where it has been held that a factor who holds a bill of lading for sale cannot pledge; but in such cases either it appeared that there were grounds for charging the pledgee with knowledge of the factorship, or the decisions were made before the modern development of the doctrine of estoppel, or without giving it full consideration. The later English text-books, while laying down in general terms the proposition that a bill of lading is not negotiable in the full sense in which promissory notes are, do not seem to have come to the precise question upon which we must pass. *Carv. Carr. by Sea* (2d Ed.; published in 1892) p. 490, lays down the ordinary rule that possession of the bill of lading is only equivalent to that of the goods themselves; but the precise proposition in question here is not considered. The same may be said as to *Benj. Sales* (6th Ed.; published in 1892) p. 845. *Scrutt. Charter Parties* (3d Ed.; published in 1893) is no more definite; although on page 157 the author says that "the lawful holder of a bill of lading, in whom the property in the goods is vested, may, by indorsement, transfer a right greater than he himself has, for he transfers his position under the contract evidenced in the bill of lading." *Bank v. Henderson*, L. R. 5 P. C. 501, is directly in point in favor of Reardon, if the transaction did in fact raise a trust attaching to the bill of lading, as the court assumed it did. Sir Barnes Peacock cites with apparent approval (page 512) from the judgment in *Rodger v. The Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393, the following:

"The general rule, so clearly stated and explained by Lord St. Leonards, is that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This, as a general rule, was not disputed; but it was contended that the case of a bill of lading is exceptional, and must be dealt with on special grounds. Doubtless the holder of an indorsed bill of lading may, in the course of commercial dealing, transfer a greater right than he himself has. The exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorized possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest."

None of the decisions of the supreme court is in point. In some of them the rule is recognized—so frequently stated—that a factor who holds a bill of lading for sale cannot pledge, but we do not find that that court has ever said that advances made to a factor holding a clean bill of lading by one not chargeable with knowledge of the factorship will not be protected. In *Conard v. Insurance Co.*, 1 Pet. 385, the following appears on page 445:

"By the well-settled principles of commercial law the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods; and by his indorsements of the bill of lading to a bona fide purchaser for a valuable consideration, without notice of any adverse interest, the latter becomes, as against the world, the owner of the goods. This is the result of the principle that bills of lading are transferable by indorsement, and thus may pass the property. It matters not whether the consignee in such case be the buyer of the goods or the factor or agent of the owner. His transfer, in such a case, is equally capable of divesting the property of the owner and vesting it in the indorsee of the bill of lading. And, strictly speak-

ing, no person but such consignee can, by an indorsement of the bill of lading, pass the legal title to the goods."

It is true that these expressions were not strictly in point. Nevertheless, they must be accepted as the unreserved opinion of the great jurist, Judge Story, who uttered them.

It may be claimed that the various factors acts, now law in several states and in England, constitute, by implication, legislative declarations that the holder of a bill of lading cannot vest a title better than his own. But these acts relate to a multitude of matters. It must be admitted that legislation was desirable to remove doubts, and settle the law touching questions of the class under discussion; and many statutes, modern as well as ancient, have, after all, been found to be only declaratory of the common law. The transactions in issue in this case related to merchandise on the coast of Africa, about to be shipped on the high seas, and were between residents of Massachusetts and residents of New York. They were, therefore, not directly controlled by legislation all of which is local, nor can this court be of necessity indirectly governed by any implications arising therefrom.

On the whole, the legal principles applicable seem clear, and, if the case involves any obscurity, we think it is because those principles have not been freely stated or applied. In the developments of commerce and commercial credits the bill of lading has come to represent the property, but with greater facility of negotiation, transfer, and delivery than the property itself. It is a negotiable instrument, even though not in the same sense as promissory notes or bills of exchange. It carries on its face, in the words "and assigns," an authority to dispose of it, and, as we have seen, a like authority when indorsed in blank, by which the person who voluntarily puts it out, or permits it to be put out, ought to be estopped. And it has become so universal and necessary a factor in mercantile credits that the law should make good what the bill of lading thus holds out. There is every reason found in the law of equitable estoppel and in sound public policy for holding, and no injustice is involved in holding, that, if one of two must suffer, it should be he who voluntarily puts out of his hands an assignable bill of lading, rather than he who innocently advances value thereon.

When Pollard, Pettus & Co. accepted from Mansfield a bill of sale of the hides in question, they knew that in the regular course of business a clean bill of lading for them would issue to him, clothing him with the customary indicia of absolute ownership. They took the chances arising from this. They must stand as though they assented to it, and they can claim no right against any one who dealt with Mansfield in good faith relying upon it. Their presumed assent to the issue of the bill of lading to Mansfield is emphasized by their laches in applying for it. Whatever may be the nature of their right, it cannot prevail against Reardon's title under the bill of lading.

The law of stoppage in transitu admits the right of the purchaser of the cargo to stop it at any intermediate point, and transfer it by an actual delivery of it. Where the delivery is of the bill of

lading, the point settled is that it is of the same effect as an actual delivery of the cargo. Therefore cases touching stoppage in transitu are considered to relate rather to the question of the effect of the negotiation of the bill of lading than to that of the apparent authority of the person holding it.

There is no question touching Reardon's bona fides. That his advances constituted a present consideration for value is sustained by *Leask v. Scott*, 2 Q. B. Div. 376. This case seems to be now regarded in England as settled law. When Reardon first made his advances he did it with a stipulation that the bill of lading should be delivered to him as soon as it arrived. Consequently the delivery of it to him on arrival, in connection with the prior stipulation, constituted in equity but one transaction. Moreover, while Mansfield was still apparently solvent, Reardon renewed his advances on the strength of it.

A question of jurisdiction has been suggested. It is, we think, without force. At the time the complainants below demanded the goods from the collector they had not in fact been delivered from his custody. Therefore, under the provisions of section 934 of the Revised Statutes, they were irrepleviable, although subject to the orders and decrees of the courts of the United States having appropriate jurisdiction. There was no form of action at common law which would give complainants possession of them. A bill in equity was the only, and therefore an appropriate, method of proceeding therefor.

The bill in this case does not pray relief by the way of redeeming from Reardon, but merely demands possession of the goods, on the ground that the claim of Pollard, Pettus & Co., the complainants below, is prior to that of Reardon. Inasmuch as we find that Reardon has a prior claim, and a prior right of possession, no relief can be granted under this bill. Since it was filed, a stipulation was entered into between the parties in interest, by virtue of which the goods were delivered to Reardon without prejudice to the controversy involved in this suit. Therefore no further relief is asked for against the collector, and, on our conclusions, the complainants below were never entitled to any relief against him. By reason of the stipulation the collector had no occasion to take any share in this appeal, nor has he done so. He is therefore not entitled to any costs in this court. He, however, made a several defense in the circuit court, and properly did so.

The decree of the circuit court is reversed, and the case remanded to that court, with directions to enter a decree dismissing the bill, with full several costs in that court for Saltonstall, and with full several costs in this court and in that court for Reardon.

---

MERGENTHALER LINOTYPE CO. v. RIDDER et al

(Circuit Court, S. D. New York. January 31, 1895.)

**1. CORPORATIONS—LIABILITY OF OFFICERS FOR INFRINGEMENT OF PATENTS.**

Individual officers and directors of a corporation which has infringed a patent cannot be ordered to account for the profits of such infringement.



**2. SAME.**

Whether such individual officers and directors can, in any case, be enjoined from infringing,—quaere; but where the acts of such officers and directors have been all in their official, not their individual, capacities, and there is no obstacle in the way of obtaining full relief against the corporation, and at the time of suit such officers and directors have resigned their positions, an injunction against them will be refused.

Betts, Hyde & Betts, for complainant.

Edmund Wetmore, C. J. Canda, and F. E. Canda, for defendants.

**TOWNSEND**, District Judge. This is a suit against the Monoline Composing Company, a corporation organized under the laws of West Virginia, and against certain individuals, charged with being the managers and controllers of said company, and with doing business under its name. The bill alleges that all the defendants, "acting, combining, and conspiring together, have jointly and severally infringed the patents in suit," and prays for an injunction and an accounting as to all and each of them. Herman Ridder has appeared and answered. Charles J. Canda and Ferdinand E. Canda have appeared and filed a plea. Neither the defendant corporation nor any of the other defendants have appeared, or are within the jurisdiction of the court.

The questions herein presented are raised by the following allegations of the plea, viz.:

"That they, nor either of them, have ever personally made, used, or sold, or caused to be made, used, or sold, any of the machines constructed or operated in accordance with the specification or claims of any of the letters patent set forth in the bill of complaint in infringement of said letters patent, or have offered or threatened to do so."

The plea further alleges that the infringing machines were made by said nonresident defendant company, and that said defendant Charles J. Canda was formerly a director and president, and said Ferdinand E. Canda was formerly a director and secretary, of said corporation; and that early in the year 1894 they resigned their positions in said company, and are not now officers, directors, or agents thereof; and that "all their acts in relation to said machines were done solely in their official capacity as directors and officers."

The decisions, as to the individual liability of the officers and directors of corporations for infringing acts, are somewhat conflicting. The liability, at least to be enjoined, has been asserted in *Goodyear v. Phelps*, 3 Blatchf. 91, Fed. Cas. No. 5,581; *Poppenhusen v. Falke*, 4 Blatchf. 493, Fed. Cas. No. 11,279; *Bliss v. Haight*, 7 Blatchf. 7, Fed. Cas. No. 1,548; *Maltby v. Bobo*, 14 Blatchf. 53, Fed. Cas. No. 8,998; *Supply Co. v. McCreedy*, 17 Blatchf. 291, Fed. Cas. No. 295; *Stamping Co. v. Quinby*, 5 Ban. & A. 275, Fed. Cas. No. 12,240a; *National Car-Brake Shoe Co. v. Terre Haute Car & Manuf'g Co.*, 19 Fed. 514; *Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. 123; *Cleveland Forge & Bolt Co. v. United States Rolling-Stock Co.*, 41 Fed. 476; *Armstrong v. Soap Works*, 53 Fed. 124; *Fishel v. Lueckel*, Id. 499; *Cahoone Barnet Manuf'g Co. v. Rubber & Celluloid Harness Co.*, 45 Fed. 582; *Edison Electric Light Co. v. Packard Electric Co.*, 61 Fed. 1002. That officers of a corporation,

as such, are either not liable for damages for infringement in an action at law, or will not be enjoined or ordered to account in equity, has been held in *Jones v. Osgood*, 6 Blatchf. 435, Fed. Cas. No. 7,487; *Nickel Co. v. Worthington*, 13 Fed. 392; *Howard v. Plow-Works*, 35 Fed. 743; *Boston Woven Hose Co. v. Star Rubber Co.*, 40 Fed. 167. In *Ambler v. Choteau*, 107 U. S. 589, 1 Sup. Ct. 556, Mr. Chief Justice Waite says:

"If an account of profits is wanted, and an injunction against the further use of the patented inventions under the transfers from Whipple & Dickerson, then the suit should have been against the Missouri corporation in its corporate capacity, and not against a part only of its stockholders and directors individually."

An examination of all the cases cited by counsel shows that in none of those cited by complainant was the defendant held liable to render an accounting. In *Poppenhusen v. Falke*, supra; *Bliss v. Haight*, supra; *Maltby v. Bobo*, supra; *Supply Co. v. McCready*, supra; *Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co.*, supra; *Estes v. Worthington*, 30 Fed. 465; *Featherstone v. Cycle Co.*, 53 Fed. 110; *Fishel v. Lueckel*, supra,—the defendants had personally infringed, and were joint tort feorsors. In *Consolidated Safety-Valve Co. v. Ashton Valve Co.*, 26 Fed. 319; *Cleveland Forge & Bolt Co. v. U. S. Rolling-Stock Co.*, supra; and *Armstrong v. Soap Works*, supra,—the question of liability was raised by a demurrer, when it should have been presented by a plea.

The case of *Edison Electric Light Co. v. Packard Electric Co.*, supra, seems to be the one chiefly relied on to support the contention of complainant. The question was presented on final hearing under an allegation of fraud, charging that the defendant corporation and certain individual defendants had organized a nonresident corporation with a nominal capital, and were carrying on the business of manufacturing and selling infringing lamps for their own personal benefit and for the benefit of said defendant corporation. The nonresident corporation was not sued, but service was made upon said individual defendants as its officers and agents. The prayer was simply for an injunction. The court says:

"If the complainants now prayed for full relief as against them [the officers of the defendant corporation], and asked for an accounting for profits and damages against the officers, agents, and stockholders, without service upon the corporation, and that was now the question under consideration, the case would present greater difficulties. Where the corporation is a defendant duly served, its officers and stockholders cannot shield themselves from liability for damages behind their corporations."

The evidence showed flagrant acts of infringement. This case is clearly distinguishable from the one at bar.

In *Supply Co. v. McCready*, supra, cited by complainant, the court found that individuals owning infringing ties were employing the officers of a steamship company as their agents and servants in promoting and effecting the sale thereof; that said officers refused to disclose the names of said infringers; and that the plaintiff was therefore remediless, unless an injunction should be granted.

Of the cases cited by defendant, *Nickel Co. v. Worthington*, supra, was an action at law; in *Howard v. Plow-Works*, supra, the corpora-

tion was served and enjoined and ordered to account; in *Boston Woven Hose Co. v. Star Rubber Co.*, supra, the bill against the individual defendant was dismissed on the ground that an injunction against the defendant corporation, which had been served, would sufficiently protect complainant; and in *Kane v. Cracker & Candy Co.*, 44 Fed. 287, the corporation was served.

In this case the bill describes the individual defendants as persons who are the managers and controllers of, and do business under the name of, the Monoline Composing Company, but the charge of infringement is personal. The plea denies said personal charge, and alleges that all the acts of said defendants in relation to said alleged infringement were done solely in their official capacity. The defendant corporation is located in West Virginia, but is doing business in this circuit. It has not been served with process. It does not appear that the corporation is insolvent, or that there is any obstacle in the way of obtaining full relief against it. In these circumstances, the individual defendants cannot be ordered to account. The cases cited are not decisive as to their liability to be enjoined. But the application of the principles stated to the facts appearing by the pleadings herein has satisfied me that sufficient grounds have not been shown for granting such an injunction. A decree against said corporation here or in its place of residence would be binding upon its officers and agents, and would sufficiently protect the rights of complainants. As these individual defendants have never personally infringed upon the rights of complainant, but only as managers or controllers of said defendant corporation, and as they are no longer its officers or agents, I think the court will be justified in assuming that they do not intend to infringe, and may, therefore, in its discretion, withhold the writ. The plea is sustained.

---

ROBINSON v. CITY OF WILMINGTON et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 107.

1. EQUITY—INJUNCTION AGAINST COLLECTION OF TAXES.

Certain shares of the stock of a bank were irregularly returned for taxation in the name of the bank instead of in the names of the individual stockholders. *Held*, where the statutes of the state provided an adequate remedy for the correction of the error, that there was no ground for the interposition of the circuit court in equity to enjoin the collection of the taxes from the bank.

2. SAME.

Courts of equity of the United States will not interfere by injunction with the exercise of the taxing power of the states, for mere irregularity or illegality, without some special circumstances bringing the case under some recognized head of equity jurisdiction.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

This was a suit by W. S. O'B. Robinson, receiver of the First National Bank of Wilmington, N. C., against the city of Wilmington

and William A. Willson, to enjoin the collection of certain taxes. The circuit court dismissed the bill. Complainant appeals.

E. K. Bryan, for appellant.

Thomas W. Strange, for appellees.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

BRAWLEY, District Judge. The appellant, as receiver of the First National Bank of Wilmington, N. C., sought to enjoin the appellees, the city of Wilmington and its collector of taxes, from enforcing the collection of a tax assessed upon certain shares of bank stock alleged to have been illegally listed. It appears that the capital stock of the bank consisted of 2,500 shares, of the par value of \$100 each, and that 1,096 of these shares, valued at \$76,720, the property of persons residing in the city of Wilmington, were returned by the cashier and listed by the tax lister in said city for taxation in the name of the bank. By the law of North Carolina (Pub Acts 1891, c. 326, § 42), these shares should have been listed in the names of the individual shareholders, and the taxes assessed thereon should have been paid by each respective shareholder at the place of his domicile. It is provided by the same statute (Id. c. 326, § 86) that, if there is any error in the assessment roll in the name of the person, the name may be changed, and the error corrected in the manner therein prescribed. It is further provided (Id. c. 326, § 78) that in every case where a person claims that any tax or any part thereof is, for any reason, invalid, he may pay the same, and within 30 days may demand repayment thereof; and, if the same is not repaid in 90 days, he may sue for its recovery, and recover judgment against the city, town, or county imposing the tax for the full amount paid, with interest, etc. Assuming that it was illegal to list these shares for taxation in the name of the bank in solido instead of in the names of the individual stockholders to whom they belonged, it would seem that the revenue laws of the state of North Carolina provide a sufficient system of corrective justice in respect to taxes illegally imposed in appeals to the executive department of the government, and, if satisfaction is not thus obtained, the party aggrieved has a remedy provided for the recovery of the tax paid by suit. For obvious reasons, courts of equity are reluctant to interfere with the taxing power of the states in the course of its orderly administration. They were not intended to furnish the corrective for every injury or abuse of power which may be committed by the officers of a state government, and so long as the laws prescribing the methods of assessment and subjects of taxation do not entrench upon the legitimate authority of the United States, or violate any rights recognized or secured by its constitution and laws, courts of equity of the United States will not interpose between the state and its citizens, unless a case of equitable cognizance is presented. The record in this case does not disclose the grounds upon which the court below acted in refusing the injunction and dismissing the bill. They will probably be found in those general

principles of equity jurisprudence which govern alike the courts of the state and of the United States. The collection of taxes is a legal proceeding to enforce the payment of a debt due the public, and, like proceedings at law upon a private claim, equity will only interpose to prevent injustice by the unfair use of legal process when the law provides no adequate remedy for such abuse. The levy of taxes not being a judicial function, courts have no power to make new assessments, or to direct them to be made, or to apportion the taxes when collected; and, inasmuch as the experience of ages has demonstrated that collection has to be enforced by summary and stringent measures, other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice. Accordingly, under our theory and system of government, the officers who assess and collect, and the manner in which they shall exercise their functions, pertain exclusively to the legislative and executive departments. However irregular, unjust, onerous, or oppressive these proceedings may seem to be, there must be some special circumstances bringing the case under some recognized head of equity jurisdiction before the preventive remedy by injunction can be invoked. Irregularity or illegality alone constitutes no ground for such interposition. Equity cannot attempt to prevent, any more than it will redress, all wrongs. It could not assume this power without disastrous consequences to the state, for there would be no stopping point short of enjoining all taxes whenever any irregularity had intervened. There may be cases where the particular circumstances or peculiar hardships would justify an exception, but the general rule and fundamental principle is that a court of equity is not a court of errors to review the acts of public officers in the assessment and collection of taxes, and where a particular manner is provided by law, or a particular tribunal designated, for the settlement and decision of errors or irregularities in behalf of persons dissatisfied with a tax, they must avail themselves of the legal remedy thus prescribed, and not be allowed to waive such relief, and seek in equity to enjoin the collection of the tax. *High, Inj.* 493; *State Railroad Tax Cases*, 92 U. S. 613; *Kirkland v. Hotchkiss*, 100 U. S. 497; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646; *In re Tyler*, 149 U. S. 188, 13 Sup. Ct. 785; *Dows v. Chicago*, 11 Wall. 108. Our attention has not been brought to any well-considered case where a court of equity has interfered by injunction to prevent the collection of a tax, unless the circumstances have brought it within some of the recognized foundations of equitable jurisdiction, which are substantially these: Where the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, in case of real estate, throw a cloud upon the title. The case before us does not come within these exceptions. All that can be said of it is that the officer to whose judgment the law confided the listing of property for taxation has committed an error of judgment in listing as the property of the bank, for taxation in the city of Wilmington, what should have been listed as the property of the shareholders in the same place, and, even if the court could properly substitute its judgment for that of the officer specially charged with

that duty, it would not do so, where there was a tribunal expressly created for the correction of his irregularities and mistakes. In *Cummings v. Bank*, 101 U. S. 153, it was asserted that the tax was illegal, was not collectible from either the stockholders or the bank, and, although there were other grounds of equitable cognizance, it was held that the court might interfere to prevent a multiplicity of suits, for if the bank paid the tax, and deducted it from each shareholder's dividends, the shareholders would have the right to recover from the bank. The facts of this case do not bring it within that ruling, for it is not contended here that the tax on the shares is illegal, but simply that the shares ought to have been listed in the names of the shareholders, and not in the name of the bank, as was done by the cashier; and it is admitted that the tax upon the shares held by citizens of Wilmington was not illegal. It appearing that the complainant had an adequate remedy at law, and it not appearing that there are any of those circumstances which bring this case within the well-established lines which mark the jurisdiction of equity, it is our opinion that the decree of the circuit court dismissing the bill was correct, and should be affirmed; and it is so ordered.

---

KITTEL v. AUGUSTA, T. & G. R. CO. et al.

(Circuit Court, S. D. New York. January 31, 1895.)

1. CREDITORS' BILL—SUFFICIENCY OF ALLEGATION OF FRAUD.

A creditors' bill alleged that plaintiff was a judgment creditor of the A. Ry. Co.; that one C. was a director of the company, and owner of practically all its stock; that the railway company, before the entry of plaintiff's judgment, suffered a judgment by default to be entered against it in favor of C. for a pretended claim; that C. knew of plaintiff's claim; that no debt was due from the railway company to C.; that C. procured certain real and personal property of the railway company to be levied on, under his judgment, and conveyed through third parties to another railway company, which he organized, and of which he was president and chief owner; and that all these acts were done by the railway company and C. with the intent to defraud plaintiff. *Held*, that the bill sufficiently alleged fraud on the part of defendants.

2. SAME—MARSHAL'S RETURN ON EXECUTION.

The bill further alleged that the marshal had made return to the execution on plaintiff's judgment, after search, "that there are no goods and chattels, belonging to the A. Ry. Co., subject to levy, within the district of F." The laws of the state within which the district lay provided that execution could be levied on real property, equities of redemption, and stock in corporations, as well as on goods and chattels. *Held*, that the allegations of the bill failed to show the return of an execution unsatisfied.

3. SAME—EXHAUSTION OF REMEDY AT LAW.

The bill did not allege that the defendant corporation was insolvent, nor that, at the time of the suit and execution, it had no property, nor that the land conveyed was all the land owned by it, nor that the marshal made any attempt to find or levy on lands, equities of redemption, or stocks. *Held* that, in the absence of these averments, it did not appear that plaintiff had exhausted his remedies at law.

This was a creditors' bill by Joseph J. Kittel against the Augusta, Tallahassee & Gulf Railroad Company, William Clark, and others. Defendants demurred to the bill.

**Hoaley, Hasbrouck & Schloeder, for complainant.**  
**C. B. Meyer, for defendants.**

**TOWNSEND, District Judge.** Demurrer to a creditors' bill. The bill alleges that complainant is a judgment creditor of the defendant the Augusta, Tallahassee & Gulf Railroad Company; that, during the acts herein complained of, the defendant William Clark was a director of said defendant corporation, and the owner of practically all its stock; that, prior to the entry of said judgment, said corporation, being the owner of certain real and personal property, suffered a judgment by default to be entered against it in favor of said defendant Clark, for a pretended claim; that he, as director of said corporation, knew of complainant's debt; and that said judgment was collusively and fraudulently entered against the rights of complainant, with a view to defeating such right as he might acquire by virtue of a judgment. The bill further alleges execution, levy, and sale of said property, under said judgment, for \$100,000, to one William Clark, trustee, and certain associates, acting wholly in the interest of the defendant Clark and as his agents, with a view to securing a title to said property through said collusion, free of the debts due by said defendant corporation; the receipt of the \$100,000 by said Clark; the organization by him of the Carrabelle, Tallahassee & Georgia Railroad Company, of which he became president, a director, and the practical owner; the transfer of said property to the said latter corporation, and its knowledge of said infirmity of title; and that all of said transactions were fraudulently procured and done by said defendants for the purpose of covering up said property, and with the design and intention of defrauding complainant and other creditors of their debts; and that said defendant the Augusta, Tallahassee & Gulf Railroad Company was not indebted to said defendant Clark in said sum of \$432,228.42, or in any like sum. The bill prays that said judgment and proceedings thereunder be vacated, or that said amount of \$100,000 be declared the property of said the Augusta, Tallahassee & Gulf Railroad Company, and subject to the payment of complainant's claim, and for an injunction, the appointment of a receiver, and for general relief.

Nine causes of demurrer are assigned. The points chiefly pressed thereunder by counsel are the following:

"It does not appear by the bill of complaint that either of the defendants has been guilty of any fraud or collusion or any unlawful act." "The suit being in the nature of a creditors' bill, the complainant, before he is entitled to the interposition of a court of equity, must show he has exhausted his remedy at law."

In support of the first point, counsel claims that the allegations of fraud and collusion in the bill are mere conclusions of law, not supported by allegations of fact. If this is so, the bill is demurrable. *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476; *Preston v. Smith*, 26 Fed. 884. Irrespective of the qualifying words, "fraudulently and collusively," the facts admitted by the demurrer show that a director and virtual owner of one railway corporation, by means of a judgment in his favor for an amount not due from said corporation,

has transferred its property to another corporation, of which he was the president and virtual owner, in order to secure to himself a preference over other creditors, and for the purpose of covering up said property, and defrauding the complainant of the collection of his debt, and with the design and intention of cheating and defrauding the complainant and other creditors. Whatever may have been the view in some of the state courts, it is settled by repeated decisions of the federal courts that directors of corporations are trustees, not only for the stockholders, but for the creditors, and that they cannot so dispose of the corporate property for their individual benefit as to obtain a preference over general creditors. *Walser v. Seligman*, 13 Fed. 415; *Consolidated Tank Line Co. v. Kansas City Varnish Co.*, 45 Fed. 7; *Farmers' Loan & Trust Co. v. San Diego St. Car Co.*, Id. 518; *Drury v. Cross*, 7 Wall. 299. It further appears that said sale covers all the construction plant, tools, and construction material belonging to said corporation. In such circumstances, a creditor cannot dis sever from the franchise property essential to its useful existence. *Gue v. Canal Co.*, 24 How. 257; *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.*, 13 Fed. 516.

The statement herein of the specific acts complained of, coupled with the allegation that they were done with intent to defraud, is sufficient, under the cases cited by counsel on each side. There is a clear distinction between the allegation that an act was fraudulently done and the allegation that it was done with intent to defraud. The former is treated as a conclusion of law; the latter as a question of fact. *Bank v. Reed* (Com. Pl. N. Y.) 12 N. Y. Supp. 920, 27 Abb. N. C. 5, and note; *Drury v. Cross*, supra; *Kain v. Larkin* (N. Y. App.) 30 N. E. 105; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Garrett v. Plow Co.*, 70 Iowa, 697, 29 N. W. 395.

In support of the second point, respondent claims that the bill does not show either that the execution was returned unsatisfied, or that it could not have been satisfied. The return of the marshal, as alleged in the bill, was as follows:

"Received the within writ of execution on the 18th day of March, 1893, and, after making search, I make return that there are no goods and chattels belonging to the Augusta, Tallahassee & Gulf Railroad Company subject to levy within the district of Florida."

The first question is whether this return shows an execution unsatisfied. The cases on this subject generally hold that there should be a return of "nulla bona." Upon such return to a fieri facias, the judgment creditor might bring a bill, under the English chancery practice, against the defendant for a discovery of goods or personal effects. *Trust Co. v. Earle*, 110 U. S. 710, 714, 4 Sup. Ct. 226.

United States equity rule 90 provides as follows:

"In all cases where the rules prescribed by this court or by the circuit court do not apply, the practice of the circuit court shall be regulated by the present practice of the high court of chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice."

In this case the creditor seeks to reach both real and personal effects of defendant. If it be assumed that the return, "No goods



and chattels subject to levy," is the equivalent of *nulla bona*, the question arises whether a return sufficient as to personality, under the English chancery practice, is sufficient in this court. Section 1190 of the Statutes of Florida (Revision 1892), provides that "lands and tenements, goods and chattels, equities of redemption in real and personal property, and stock in corporation shall be subject to levy and sale under execution." In these circumstances, if an unsatisfied execution is a condition precedent to the maintenance of a creditors' bill, in this case, the English rule cannot reasonably be applied consistently with the local circumstances and local conveniences of the United States circuit court for the Northern district of Florida. Said court having commanded said marshal to levy upon the "goods, chattels, equities of redemption, lands and tenements," the return should show that no such property could be found upon which such levy could be made. *McElwain v. Willis*, 9 Wend. 548. The return of "no goods and chattels" does not show that other property could not have been found to satisfy the execution. *In re Remington*, 7 Wis. 643. I think the allegations of the bill fail to show a compliance with the requirements as to a return of an unsatisfied execution.

The further question, whether a return of the execution unsatisfied is essential to the maintenance of the bill, is one as to which the authorities are in conflict. The general rule is to the effect that, before such a suit can be brought to reach choses in action and personal property, a return of *nulla bona* must have been made upon the execution. 3 Pom. Eq. Jur. § 1415, note, and cases cited; *Beck v. Burdett*, 1 Paige, 305. When real property, which would be subject to levy if it stood in the debtor's name, has been fraudulently conveyed, it is necessary, in order to clear the title, to take out execution, but not to have the writ returned unsatisfied. In such a case the creditor does not acquire a lien, strictly speaking, by the judgment alone, but by virtue of the execution founded thereon he acquires a right to obtain possession, which is in the nature of a specific lien, attaching to, or an interest in, the property, or of a trust in his favor, by means of which he may remove the fraudulent or inequitable obstruction. *Scott v. Neely*, 140 U. S. 106, 11 Sup. Ct. 712; *Neate v. Duke of Marlborough*, 3 Mylne & C. 407. As a levy in a suit at law would be unavailing, the ground of the equitable jurisdiction is merely to aid the legal right by removing the obstruction. *Case v. Beauregard*, 101 U. S. 688; *Trust Co. v. Earle*, supra; *Crippen v. Hudson*, 13 N. Y. 161; *Fogg v. Railroad Co.*, 17 Fed. 871; *U. S. v. Ingate*, 48 Fed. 251; 4 Am. & Eng. Enc. Law, 275; *McElwain v. Willis*, supra; *Beck v. Burdett*, supra; *Geery v. Geery*, 63 N. Y. 252. In such cases the bill, coming in aid of the execution, enables the creditor to obtain a full price for the property. *Jones v. Green*, 1 Wall. 330; *Skinner v. Stuart*, 13 Abb. Pr. 442. When legal assets of the debtor have been fraudulently transferred, the foundation of the equitable jurisdiction is the specific right or equity in the property. This jurisdiction attaches, in cases of fraud, in aid of the legal right. *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977; *Scott v. Neely*, supra. In such cases it is sufficient if the execu-

tion upon the judgment is either unsatisfied, or, after action brought in its aid, that it be outstanding. *Skinner v. Stuart*, supra; *Beck v. Burdett*, supra. The return of an unsatisfied execution is necessary in cases where it is sought to reach choses in action, avails of the property fraudulently conveyed, or equitable assets, or where there is a statutory requirement to that effect. *Case v. Beauregard*, supra; *Terry v. Anderson*, 95 U. S. 628; *Van Weel v. Winston*, 115 U. S. 245, 6 Sup. Ct. 22; *Cates v. Allen*, supra; *Adsit v. Butler*, 87 N. Y. 587; *Geery v. Geery*, supra; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Tube Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165. It is only where the remedy at law has been exhausted that a creditor acquires a right to follow the avails of property of a debtor in the hands of his trustee. *Walser v. Seligman*, supra. The questions involved herein, and the previous decisions thereon, are considered and discussed in the opinion of the supreme court of the United States in *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127. In this case, so far as the bill seeks to reach the fund of \$100,000, it should allege an unsatisfied execution. *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397. Such return, however, is not a condition precedent to the maintenance of this suit nor to the grant of other relief. But, in order to invoke the aid of a court of equity, it must appear that the fraudulent obstruction prevents the judgment creditor from obtaining satisfaction of his claim. "The foundation upon which these and many other similar cases rest, is that the judgment and fruitless executions are not necessary to show that the creditor has no adequate legal remedy." A judgment and fruitless execution are merely matters of evidence to show that the creditor is remediless at law. *Case v. Beauregard*, supra. The rule is a familiar one that a court of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must show, therefore, that he has done all he could do at law to obtain his rights. *Adsit v. Butler*, supra, and cases cited; 4 Am. & Eng. Enc. Law, 575, and cases cited; *Dunlevy v. Tallmadge*, supra; *Geery v. Geery*, supra; *Jones v. Green*, supra. In the present case the bill neither alleges the insolvency of the defendant, nor that at the date of the suit or execution he had no property. It does not appear that the land conveyed by said corporation was all the land owned by it, nor that the marshal made any attempt to find or levy on any lands, equities of redemption, or stock, as commanded in said writ. The absence of these averments is fatal. It does not appear that said conveyances have prevented the satisfaction of the judgment. *Crippen v. Hudson*, supra; *McElwain v. Willis*, supra. The demurrer is sustained, with leave to amend within 20 days after the entry of the order.

## HULSE et al. v. BONSAACK MACH. CO.

## BONSAACK MACH. CO. v. HULSE et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 108.

## 1. UNREASONABLE CONTRACT—PUBLIC POLICY.

The B. Co., which was engaged in constructing, operating, and selling machines for making cigarettes, entered into a written contract with H., by which it employed him at a salary of \$50 per month, to be afterwards increased, to set up and operate its machines, and by which it was agreed that H. should do all in his power to promote the interests of the company, and that in case he could make any improvement in the machines, either while in the company's employ or at any time thereafter, the same should be for the exclusive use of the company. The last provision was stated to H. to be a condition precedent to the making of any contract, the company having previously suffered from its employes making improvements and selling them to rivals. *Held*, that the contract was not unreasonable or unconscionable, nor contrary to public policy.

## 2. SAME—CONSIDERATION.

*Held*, further, that the contract was an entire one, and neither it nor any part of it was without consideration.

Appeal from the Circuit Court of the United States for the Western District of Virginia.

This was a suit by the Bonsack Machine Company against W. A. Hulse and R. H. Wright to enjoin the assignment of a patent. Upon the hearing in the circuit court, an injunction was granted, and the cause was referred to a master, to ascertain what would be proper compensation to be awarded to defendants under an agreement by plaintiff to make such compensation (57 Fed. 519). Upon the coming in of the report, a final decree was entered, awarding \$8,126.36. Both parties appeal.

These are cross appeals from the circuit court of the United States for the Western district of Virginia. The Bonsack Machine Company is a corporation whose business it is to construct, operate on royalties, lease, and sell machines for the manufacture of cigarettes, in this and many other countries. Its principal machine is known as the "Bonsack machine." By perfecting it, and procuring and purchasing patents connected with it, the company has acquired and is doing a large business. In the course of its business the company engages many persons to operate its machines. In several instances persons so employed discovered improvements in working them, and, without disclosing the discovery, took out patents, which they used or sold in competition with the company. To avoid this in the future, the company adopted a rule by which it required all persons entering its employment to agree to give the company the benefit of any improvement made while in the employment of the company, or at any time afterwards. Wright, one of the defendants, was a large stockholder in the company, and its general manager, with an interest in its transactions outside of this country. Hulse had been working at his trade as a mechanic, realizing between four and five hundred dollars a year. On or about 19th July, 1886, he applied for employment in the Bonsack Company. In his interview with the president of the Bonsack Company, at which his application was granted, he entered into a written contract, the provisions of which were explained to him, especially that relating to any improvements which he might make in cigarette machines. Of that provision he expressed his approval. The contract will be set out hereafter. Having thus been engaged, he served the company at an increasing salary, beginning at \$50 per month, then \$60, again \$75, and afterwards \$85 per month. In July, 1889, while employed by the company in

Montreal, his health failed, and he ceased to work with it. In the fall he applied to the company for work, and the president of the company got him a place under Wright, who was engaged in the introduction and sale of the Bonsack machines in Oriental countries. Under the agreement between Wright and the company, all the business expenses attending his management were charged against the profits of the business before the net profit was divided. Hulse received from \$100 to \$125 per month and expenses. Being so engaged, introducing, operating, and selling Bonsack machines under Wright, Hulse, while in China, saw a French machine, which put him upon the idea of an improvement in the Bonsack machine, by which a crimping device could be substituted for paste in the process of making cigarettes by machinery, and made a model or first design of it. On his return to this country he communicated to the company the fact that he saw an opportunity for an improvement. Thereupon he was furnished by the company with a suitable room, power, and materials to continue his experiments, and to perfect his idea. While so employed, however, he did not draw any salary from the company. The experiments continued some three or four months. On 19th March, 1892, Hulse, with Wright, to whom he assigned a half of his invention, wrote to the company offering to sell to it the device and the patents which Hulse expected to obtain for the improvement for \$100,000. To this letter they received a reply refusing to purchase, the company claiming and insisting on its rights under the contract with Hulse, and declaring that it was the purpose of the company not only to pay Hulse for services rendered, but also to pay him what the company regard liberal for his improvement if it should prove to be valuable to the company. After the receipt of this letter, Hulse and Wright did not insist upon their offer, but Wright, in writing to the secretary of the company, said: "We will push forward the crimping device as fast as possible, under the assurance of your board as to your liberality in case we make a success of it." Hulse went on with his experiments, and very soon afterwards tried to sell the improvement to a rival company. Thereupon a bill for an injunction was filed in the state court of Virginia, and a temporary injunction was granted, restraining Hulse and Wright from assigning the improvement or any patent therefor. The cause was removed into the United States court, and a motion to dissolve the injunction was refused, but the injunction bond was increased from \$10,000 to \$50,000. The case coming on for final hearing, the injunction was made perpetual, and a reference was ordered to inquire what would be a liberal compensation to Hulse and Wright for their services and expenses in connection with perfecting the device and securing patents therefor. The master reported that the expenses of Hulse and Wright should be paid by the Bonsack Company, and that each of them be paid at the rate of \$5,000 per annum for the time they were engaged on this improvement,—in all \$8,126.36. The report was confirmed. The improvements, by final decree, were declared to be the property of the Bonsack Company. Hulse and Wright were ordered to convey to the Bonsack Machine Company all the interest they have in these improvements, or any letters patent for the same; all expenses to these ends to be borne by the Bonsack Company. The injunction was made perpetual. Both parties appealed, the complainant because of the amount awarded to Hulse and Wright, the defendants because of the decision on the merits and the small amount of the award. The case was heard in this court on the errors assigned.

A. H. Burroughs and Samuel A. Duncan, for plaintiff.

F. H. Busbee and George H. Graham, for defendants.

Before SIMONTON, Circuit Judge, and MORRIS and BRAWLEY, District Judges.

SIMONTON, Circuit Judge (after stating the facts). The contract between the Bonsack Machine Company and Hulse is in these words and figures:

"That the said company has this day employed the said Hulse to set up and operate its cigarette machines at a salary of \$50 for the first month, and

\$65 per month thereafter, with such advance of salary, up to not exceeding \$75 per month, as the services of the said Hulse may justify. It is agreed that the said Hulse will serve the company wherever desired, the company to pay his railroad fares whenever traveling at the request of the company. No abatement will be made for loss of time because machines are not kept running, nor any extra payment for extra hours. The said Hulse agrees to do all in his power to promote the interests of the said company, and in case he can make any improvement in cigarette machines, whether the same be made while in the employment of the said company or at any time thereafter, the same shall be for the exclusive use of the said company. And it is agreed that in case the said Hulse be not able to serve the said company efficiently, or shall in any way neglect his duty, the company may stop his services at any time, paying up to such time; but, in case the said Hulse desires to quit the said company, he shall give sixty days' notice thereof."

After this contract was made, and upon the offer of Wright and Hulse to sell the improvement to the company, the following correspondence ensued:

"We herewith inclose you a copy of the contract between this company and Mr. Hulse. Without waiving any of our rights under the said contract, but insisting and relying on the same, we will say that it is our purpose not only to pay Mr. Hulse for actual services rendered, but also to pay him what we regard as liberal for his improvement, provided it proves valuable to our company by reason of its being perfected, and letters patent be obtained covering the same, which are of proper scope and valid. As to the value of the supposed improvement which Mr. Hulse has made we do not know, nor do we know to what extent the device may infringe other patents. It is our purpose to investigate these matters. We very much hope that the devices will meet Mr. Hulse's expectations, and that they do not infringe any existing patents.

"Very truly yours,

D. B. Strouse."

Two days later (March 21, 1892), Wright, having meanwhile conferred with the inventor, Hulse, and speaking for Hulse as well as for himself, wrote to the secretary of the Bonsack Company, saying, among other things:

"I wish it distinctly understood that we will push forward the crimping device as fast as possible, under the assurance of your board as to your liberality in the matter, if we make a success of it."

The questions made in the assignments of error are these: (1) What was the contract between the company and Hulse? Is it divisible, consisting of independent covenants? And is it, or any part of it, without consideration? (2) Is it an unconscionable or unreasonable contract? (3) Is it void as against public policy? (4) Is the amount reported by the master a just and reasonable compensation?

The contract: It is a contract of employment made after an explanation of its terms by one party and the approval of them by the other. No question is made here impugning the bona fides of the contract. The consideration moving from the company is the employment of the services of Hulse at a progressive salary, with no abatement for loss of time and no extra payment for extra hours, all railroad fares of Hulse when traveling for the company to be paid. In consideration of these stipulations, Hulse is to serve the company wherever desired, agrees to do all in his power to promote the interests of the company, and in case he can make any improvements in cigarette machines, either while in the employ of the company or

at any time thereafter, such improvements are to be for the exclusive use of the company. This last provision was stated to him as a condition precedent to his employment, was approved and consented to by him. Here we have a contract of hiring at stipulated prices, and a contract of service, with one detail of the service inserted to prevent any misunderstanding. It would seem to be an indivisible contract. The stipulation claimed to be an independent covenant, directed to any improvements made by him in cigarette machines, was the very stipulation which secured the contract on the part of the company to engage and pay Hulse. The consideration on the part of the company moves to all the parts of the contract. The contract was one of employment. The company was to do certain things. In return, Hulse was to do certain things,—set up and operate the cigarette machines, and promote the interests of the company, and, to do this, give them the benefit of improvements in cigarette machines in case he made any. Can it be said that, if he set up and operated the machines, he had exhausted the consideration of his contract, and that he could antagonize the interests of the company whenever he pleased, his agreement to promote its interests being nudum pactum? For similar reasons, it cannot be said that this agreement, or any part of it, is without consideration. In the absence of fraud, mistake, illegality, or oppression, and where no relations of trust and confidence exist between the parties, courts cannot inquire into the inadequacy of the consideration of a contract, or set up their own opinions respecting that which parties in good faith on both sides have agreed upon. "If there is one thing more than another that public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into fully and voluntarily, shall be held good, and shall be enforced in a court of justice." *Registering Co. v. Sampson*, L. R. 19 Eq. 465. Some consideration is requisite to support a contract, but the sufficiency of the consideration cannot be inquired into. 1 Sedg. Dam. 455.

Is this contract unreasonable or unconscionable? The Bonsack Machine Company owned valuable patented machines, employed in the manufacture of cigarettes. Comparatively the invention was in its infancy, and the machinery was known to be difficult of operation, and open to improvement. Any one entering into the employment of the company had full opportunity of learning the merits of the machines, and, by constant and daily use, could see where the machine was defective, and where improvement was needed. If any improvement suggested itself to his mind, he could, by using the machine and the time and material of the company, experiment upon it, and ascertain its value. The improvement would be his own idea. But it owed its suggestion and origin, its progressive development and perfection, to the business, the practical working, the opportunity afforded by the company. When, therefore, the company, taught by costly experience, determined to protect itself from the discovery of improvements by its own servants, it did a natural and reasonable thing; and, when it protected itself by a covenant in advance of any employment with those seeking its serv-

ice, it did a fair thing. Nor was that part of the contract which put in the same category improvements made while in the employment of the company and those made at any time thereafter unconscionable or unreasonable. Without this safeguard, the contract on this point could be easily evaded, and be made valueless. It will be observed that Hulse did not bind himself to study and seek out improvements in this machine, and, when discovered, to give them to the company, as other employes, who were witnesses in the record, did. His contract was in effect that if, in his experience with the machines, derived in the service of the company, he saw or was led to see improvements, they were to inure to the benefit of the company. And his inventive genius or power of observation could only belong to the company when applied to cigarette machines; all other fields of invention were open to him. The contract does not appear unreasonable. Nor can it be said, in the light of this record, with respect to the subject-matter of this suit, that the action of the complainant is unconscionable. The argument is that for a certain monthly stipend, worth no more than the daily services rendered, the complainant seeks to secure any discovery or invention in cigarette machines Hulse may make in his whole life. But this is answered by what took place. Hulse, fearing this, or having had it suggested to him, sought to be absolved from his contract; that is, sought to secure the improvement for himself and his partner, and not for the company, and demanded \$100,000 from the company for it. The company, insisting on its rights, nevertheless, declared its intention to pay him what it regarded a liberal reward for the improvement, provided it had a value. With this Hulse receded from his demand, and went on with the work, relying on this declaration. We may treat this declaration simply as the purpose of the company to deal liberally with Hulse if his scheme was a success, and not to hold him or themselves to the letter of the bond. If so, it cannot be said, so far as the subject-matter of this suit is concerned, that Hulse has cause of complaint. His services were recognized, and, if successful, would be liberally rewarded, notwithstanding the terms of the contract. Or we may treat this declaration as a modification of the contract. If so, then it cannot be said to be unconscionable, for it satisfied Hulse as well as Wright, who seems to be a business man keenly alive to his own interest.

Is the contract void as against public policy? Does it injure the public? Here we have the case of an ingenious man, without opportunity of developing his talent, and struggling under difficulties, enabled by this contract to secure employment in a large and prosperous corporation, where he could give his inventive faculties full play. He in this way was afforded every opportunity of discovering and removing defects in cigarette machines. He secured this employment by signing this contract. He could not have obtained it if it had been understood that this contract had no validity. Then, in all human probability, the public would have lost the benefit of his discovery. In this point of view, a contract of this character cannot be said to be against public policy. Sir George Jessel, in discussing the subject, holds that not only is there no rule of

public policy against such a contract as this before us, but that public policy is with it. *Registering Co. v. Sampson*, L. R. 19 Eq. 466. It has been urged with learning and ability that this contract is void as against public policy, because in restraint of trade. It would extend this opinion to an unreasonable length if we attempted to follow the long line of authorities on this subject found in the English Reports from the Year Books to the present time. The true test is that made by Tindal, C. J., in *Horner v. Graves*, 7 Bing. 735: "Is the restraint such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interests of the public?" Or, to put it as it is put in *Ammunition Co. v. Nordenfelt* [1893] 1 Ch. 630, and in *Match Co. v. Roerber*, 106 N. Y. 473, 13 N. E. 419: Is it, in view of all the circumstances of the case, reasonable? We have seen the reason for the adoption of this form of contract by the company. It was to protect it from improvements discovered by its own servants, under its pay, in cigarette machines. The company lets them into an intimate knowledge of its cigarette machines, affords them the opportunity of discovering any needed improvements in them, gives them at hand the means of testing any improvements which may suggest themselves. Naturally it seeks to protect itself from an abuse of these results. The protection sought is a fair one for the interests of the company. Does this protection interfere with the interests of the public? "Sales of secret processes are not within the principle or the mischief of restraints of trade at all. By the very transaction in such cases, the public gains on the one side what is lost on the other, and, unless such a bargain was treated as outside the doctrine of general restraint of trade, there could be no sale of secret processes of manufacture." Bowen, L. J., in *Ammunition Co. v. Nordenfelt*, supra. In *Morse, etc., Co. v. Morse*, 103 Mass. 73, the court refused to extend the doctrine of restraint of trade to a covenant in an assignment of a patent by an inventor "to use his best efforts to invent improvements in the process, and to transfer them to the buyer; to do no act which may injure the buyer or the business; and at no time to aid, assist, or encourage in any manner any competition against the same." Speaking of this doctrine, the court says: "It has never been extended to a business protected by a patent. Nor does it extend to a business which is a secret, and not known to the public, because the public has no right in the secret." This is not literally an agreement in restraint of trade. It is simply a contract, which, by analogy, can be likened to one, and the analogy should not be pushed beyond the reason for it. There is no presumption that such a contract is void. The presumption is in favor of the competency of the parties to make the contract, and the burden is upon the party who alleges that it is unreasonable or against public policy. In the most recent cases the validity of contracts in partial restraint of trade is tested, not by any inflexible rule, but by their reasonableness when considered in connection with the protection necessary for the particular business and the modern methods of conducting the enterprise. The contract in this case has reference, not to all inventions which Hulse might discover, but only to improvements



in cigarette machines; and the question is not whether a court of equity would compel specific performance if Hulse had conceived the invention after he had severed his relations with the company, and at a time when it did not result directly from the opportunities of his employment, but whether the court should do so in this case, where the invention was conceived while he was in the company's service, and perfected with its direct assistance, and in a case where Wright, the other party interested with him, was an agent and business manager of a department of the company's business. The case presents circumstances and elements calling for the exercise of this equitable remedy. We concur in the conclusion reached by the circuit judge in his opinion in this record:

"The public, in so far as questions relating to public policy are concerned, has no interest in this matter. Should the claim of the Bonsack Machine Company fail, the public would have no right to use the improvement. The device would then belong to Hulse, would be his secret, protected by patent, and guarded from the public use by provisions of law. The restraint provided for in the contract does not interfere with any interest of the public, and it only gives a fair protection to the party in whose favor it is given, for which proper compensation was stipulated for the party making it."

The last assignment of error is the amount found by the master, and allowed by the court. The question was, what compensation should, under the circumstances, be allowed? The Bonsack Company had declared that the compensation would be liberal. The deserving party was Hulse, and the compensation was really his. Wright deserved nothing. He was only a speculator, seeking share of Hulse's reward. Hulse voluntarily, or for considerations which he considered adequate, agreed to divide with him. When, therefore, the master awarded the gross sum of \$8,126.36, this was his finding of what would be a liberal compensation for Hulse's service in and about the improvement. We see no error in this of which either party can rightly complain.

It is ordered that the decree of the circuit court be affirmed in all respects, each party paying its own costs in this court.

---

#### PLAYFORD v. LOCKARD.

(Circuit Court, E. D. Pennsylvania. January 15, 1895.)

No. 15.

#### EQUITY PRACTICE—PLEA TO JURISDICTION—INTERROGATORIES.

To a bill for an accounting, propounding interrogatories to defendant as to the amounts received and paid by him, defendant filed a plea, supported by answer, averring that the court had no jurisdiction, because the amount in dispute was less than \$2,000. *Held*, that the issue of fact thus presented should be determined before proceeding further with the litigation, and defendant should be required to answer the interrogatories, other questions being reserved meantime.

This was a bill in equity brought by George Playford, a citizen of the state of Ohio, against William Lockard, a citizen of Pennsylvania, resident in the city of Philadelphia.

The bill averred that on September 1, 1880, the complainant was seised in his demesne as of fee of a certain lot or piece of ground, with the tenement thereon erected, situated in the said city of Philadelphia, and particularly described in the bill; that on or about that date the complainant agreed verbally with said defendant to allow him to collect the rent arising from said property, and after paying the taxes, water rent, and interest upon incumbrances, as also the sum of \$50 to the said defendant, he (the said defendant) should pay over to the said complainant the remainder of the said rent, profit, and income; that, in pursuance of said agreement, the said defendant was still collecting the said rents and income of said property, but whether he had paid the said taxes, water rent, and interest the complainant professed ignorance, and could not set forth. The bill further averred that the said defendant had refused to pay over the said residue and remainder over and above the said expenses; that the amount of said residue and remainder was not known to the complainant, but he averred that he believed and was informed that it was above the sum of \$2,000. The bill prayed for an accounting, and for a writ of injunction restraining the defendant from further violating the rights of the complainant in the premises. To the end that the defendant should make full disclosure and discovery of the matters aforesaid (an answer under oath being expressly waived), the following interrogatories were propounded: (1) Whether he has received any rents, profits, or income from or arising from the premises aforesaid, and, if yea, how much, and the dates and amounts of such receipts. (2) What amounts he has paid for taxes lawfully assessed against said premises, if any, since the 1st day of September, 1880. (3) What amounts he has paid for rent due for the use of water on said premises, and how much since the 1st day of September, 1880. (4) What amounts, if any, he has paid for or on account of interest on incumbrances of the within described premises. State the amounts paid and dates of payment in detail. (5) What amount of net income from the said premises has been received by him since September 1, 1880. To this bill the defendant filed a plea, averring that the court had no jurisdiction over the subject-matter, because the amount in dispute was less than \$2,000, and an answer, admitting that the complainant was the owner of the said premises, but prior to January 1, 1879, defendant denied that he ever acted as agent for the purposes mentioned in the bill, and averred that in November, 1878, he purchased the said premises from the complainant, and has since been in possession as owner, and that complainant has no interest therein, and never previously claimed any. The answer further averred that this bill was really an ejectment bill, and that complainant has a remedy at law; that the value of the property is not \$2,000, and hence the court had no jurisdiction; it was assessed for taxation at \$800, and was mortgaged for \$800, and rented for \$12 a month; that the receipts have been less than \$2,000; and that the expenditure was \$900.

Harvey & Hoffman and Mark Wilks-Collet, for complainant.  
Bradbury Bedell, for defendant.

DALLAS, Circuit Judge. The bill in this case, which prays for an accounting by the defendant, alleges upon information and belief, the fact being peculiarly within the knowledge of the defendant, that the amount in controversy (the balance claimed) exceeds the sum of \$2,000. The defendant, by plea, asserts the contrary. This plea, if true, is a good one. It challenges the jurisdiction of the court. The plaintiff, however, is entitled to have the issue of fact thus presented determined; and it is manifest that this should be done, if possible, before the litigation is further proceeded with. The burden is upon the plaintiff, and one means by which he may meet it—perhaps the only one in this case—is by asserting his right to complete discovery from the defendant with respect thereto.

This he has done by filing five specific interrogatories, all of which are plainly pertinent to the averment of the plea; but the defendant, though he has filed an answer in support of his plea, has refused to reply to any of the interrogatories. I think he should be required to do so, and that all other questions should be reserved pending his compliance with that requirement. Accordingly, January 15, 1895, it is ordered that: (1) The defendant shall, within 10 days from this date, answer each and all of the interrogatories contained in the bill. (2) All other matters are reserved until the coming in of the said answers, with leave to either party to then move as he may be advised.

---

PLATT v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court, E. D. Pennsylvania. October 23, 1894.)

No. 1.

1. RAILROAD—RECEIVERS—AGREEMENT FOR PLAN OF REORGANIZATION—WHEN ALLOWED.

The court will approve the petition of the receivers of a railroad company asking for leave to enter into an agreement for partial readjustment of the affairs of the company, when it appears that such agreement will put the stockholders and creditors of the company under no constraint as to the acceptance or rejection of a related plan of reorganization, nor will approval or disapproval of the proposed plan be implied in the order of the court.

2. PLAN OF REORGANIZATION—COMMISSION ON ADVANCES.

Where a syndicate proposes to effect a plan of reorganization of a railway company which is in the hands of receivers by the advancement of funds for the purchase of overdue coupons and interest, the court will, under the circumstances surrounding this case, grant permission to the receivers to pay the said syndicate  $2\frac{1}{2}$  per cent. commission upon the money so advanced in case the said plan become effective.

3. RECEIVERSHIP—TERMINATION OF.

A court of equity will regard with satisfaction any legitimate effort to terminate a receivership of a railroad corporation which has existed for two years. The appointment of receivers is a temporary remedy, and, in the event of the parties interested failing to provide a means for their discharge within a reasonable time, a court of equity will, of its own volition, take into consideration the question of a dissolution of the receivership.

This was a petition of the receivers of the Philadelphia & Reading Railroad Company and the Philadelphia & Reading Coal & Iron Company, together with the Philadelphia & Reading Railroad Company, for authority to enter into an agreement for the partial readjustment of the affairs of the Philadelphia & Reading Railroad and Coal & Iron Companies, and to make the payments therein provided if the plan be carried into effect. The petition was referred to George L. Crawford, Esq., as special master, whose report follows, containing the terms of the said agreement and his comments thereon, with a recommendation that the prayer of the petition should be granted:

After the hearing of the argument upon the said petition, after due advertisement, had begun on October 15, 1894, before the court, its then pre-

occupation with jury trials caused it to refer that hearing to me, and the parties appearing thereupon adjourned to my office, 608 Chestnut street, Philadelphia, October 15, 1894, 12 m., for that purpose, whereat then appeared C. Stuart Patterson, Esq., for Mr. Platt; Samuel Dickson, Esq., for the Philadelphia & Reading Coal & Iron Company and the Philadelphia & Reading Railroad Company, and the receivers; Messrs. Sulzberger, Johnson, Carey & Reeves, of counsel for the reorganization committee of Mr. Olcott; John R. Dos Passos and Charles B. McMichael, Esqs., for the Fitzgerald committee, intervening with petition on behalf of Mr. Whitney, a general mortgage bondholder; Nathan Bijur, Esq., for the Hartshorne committee; Francis I. Gowen, Esq., for the Lehigh Valley Railroad Company; John B. Gleason, Esq., for George L. Rogers, a first preference income bondholder, intervening by petition,—and when and where the argument upon said petition was proceeded with. Mr. Dos Passos then presented the intervening petition hereto annexed, marked "Exhibit B." He also called upon the counsel for the receivers to produce, and they produced, the resolution of the Philadelphia & Reading Railroad Company touching the proposed plan, a copy whereof is hereto annexed, marked "Exhibit C." A copy of the proposed plan, in the form of an agreement between the general mortgage bondholders, income mortgage bondholders, and stockholders, and their committee of readjustment, and a copy of the proposed agreement between that committee and the petitioners, are annexed to the said petition as a part thereof.

The present receivers have been appointed upon a class bill for foreclosure, filed by a holder of third preference income bonds of the Philadelphia & Reading Railroad and Coal & Iron Companies. They have outstanding prior general mortgage bonds, amounting to \$44,491,188.77, bearing 4 per cent. interest, maturing semiannually, January and July 1st, which for the past 18 months is in arrear and unpaid. The receivers, under an order made July 6, 1893, authorizing them to issue receivers' certificates, have issued them to the amount of \$3,640,000. The Philadelphia & Reading Railroad Company also owe other general, well-secured indebtedness to the amount of \$3,843,000, and further indebtedness, with interest, aggregating \$7,533,000 for necessary equipment, for which a large part of the value thereof has been paid, leaving a valuable equity of the company therein over the said debt therefor. The receivers, upon the payment of the said secured general indebtedness, will have \$10,000,000 of 5 per cent. collateral trust gold bonds of the Philadelphia & Reading Railroad Company, secured by stocks and bonds of its associated companies, which are a valuable and necessary part of its system, to dispose of for payment of the said classes of indebtedness, which, by reason of priority of liens, or value of securities pledged therefor, are entitled to a preference in the disposition of the proceeds of the said collateral trust bonds, over other indebtedness of the company.

Some of the said general mortgage bondholders have combined to enforce foreclosure of their mortgage, under due legal proceedings. The said plan of readjustment proposes, in substance: (1) The formation of a committee for readjustment to carry out the plan, fix the time to be given for its approval by the parties in interest, with the board of managers of the railroad company, to determine whether a sufficient amount of income bondholders and stockholders have assented thereto to make it effective, or to declare it abandoned, and to determine the form of the writings and do the acts requisite to carry it into effect if practicable. (2) That the general mortgage bondholders shall sell to the committee 10 coupons or interest on their bonds, accruing from July 1, 1893, to January 1, 1898, both inclusive, the committee if they find the plan to become effective, to abandon foreclosure proceedings, unless default should occur in payment of the interest on said bonds, other than the interest already in default, or in payment of the purchased coupons or interest and interest thereon, as provided by the plan, or in payment of the interest accruing after January 1, 1898. (3) That the income bondholders shall purchase to the amount of 10 per cent. of their holdings said 5 per cent. collateral trust gold bonds at par, paying therefor when required by the committee, and depositing their bonds with the committee as security therefor, or immediately paying said 10 per cent.

purchase money, and in either case receiving in exchange a proper negotiable receipt for said trust bonds when ready for delivery; or pay 3 per cent. of their holdings without receiving any of said trust bonds. (4) That the stockholders shall contribute 10 per cent. of the par of their stock in purchase of that amount of said collateral trust bonds at par, or \$1.50 per share, without receiving any of said trust bonds, their stock to be assigned to a trustee as registered owner, and they receiving a certificate from the trustee for their equitable interest, said trustee to vote upon the said stock for one-half of the board of managers and president, as directed by resolution of a meeting of the general mortgage bondholders, and for the other half of the board as directed by resolution of a meeting of the holders of the assenting trust certificates, until the coupons and interest of the general mortgage bondholders purchased by the committee be paid, after which the trustee shall vote, until payment of the principal of the general mortgage bonds, for one-third of the board, as directed by the meeting of the general mortgage bondholders, for another third by the income mortgage bondholders, and the remaining third of the board and the president by the holders of the assenting trust certificates. (5) That, if the plan be abandoned, and foreclosure take place, the committee shall, on reorganization by them after sale, recognize the income mortgage bondholders and stockholders assenting to the plan, or, at the option of the committee, return them their securities and amounts paid thereon.

The proposed agreement between the said committee and the receivers and the Philadelphia & Reading Railroad Company recites that the committee, to insure the carrying of the plan into effect, has organized a syndicate to advance the money to purchase the said accrued coupons and interest on the general mortgage bonds at par from such holders thereof as prefer to receive the cash therefor, and a second syndicate to purchase said collateral trust bonds not taken by the assenting income bondholders and stockholders at 70 per cent. of their par value, provided that a guaranty commission of  $2\frac{1}{2}$  per cent. be paid to each of said syndicates, and provides: (1) That the first-mentioned syndicate shall buy the said coupons and interest maturing on the general mortgage bonds for 5 years from July 1, 1893, inclusive, with the accrued interest thereon, and hold them for 10 years from the date of purchase, upon condition that the holders of the accompanying bonds shall sign the bondholders' agreement of May 7, 1894 (providing for foreclosure), and present their bonds to be stamped under the terms of the said readjustment agreement. (2) That the receivers and railroad company shall pay the interest accrued on the coupons and interest in default, and thereafter semiannually on the par of the purchased coupons and interest, at the rate of 6 per cent. per annum. (3) That the Philadelphia & Reading Railroad Company, and, if the plan be duly declared effective, the receivers, shall pay the said  $2\frac{1}{2}$  per cent. commission upon the amount underwritten for the purchase of the said coupons and interest. (4) The purchasers shall hold them with all their rights, except of foreclosure, unless default occur under this agreement, or under the general mortgage, other than what has already occurred, or sufficient of the junior security holders shall not consent to the readjustment agreement, to make it effective in the judgment of the committee and board. (5) That the receivers and railroad company shall devote its surplus earnings to retire the said purchased coupons and interest at the rate of 105 and accrued interest, within 10 years from the date of the purchase. (6) That if sufficient bondholders and stockholders shall assent to the plan to make it effective in the judgment of the committee and board, without foreclosure, the railroad company shall sell and deliver its collateral trust bonds not subscribed for as aforesaid at 70 per cent. to the second-mentioned syndicate, and pay it a guaranty commission of  $2\frac{1}{2}$  per cent. upon said \$10,000,000 collateral trust bonds, and shall apply all sums received from the syndicate and income bondholders and stockholders to the payment of the receivers' certificates and the secured floating debt, and the balance to the reduction of the equipment notes and car trusts. (7) If the plan of readjustment should not become effective, the railroad company shall repay to the said committee their expenses incurred in putting forth and advertising the plan.

Mr. Gowen, on behalf of the Lehigh Valley Railroad Company, desired

to have on the record simply that it had a large claim against the Philadelphia & Reading Railroad Company and receivers, not provided for by the plan, and that the Lehigh Valley Railroad Company did not wish to interfere with its consummation.

Mr. Gleason submitted that the proposed payment of commissions was in violation of the provisions of the income mortgages, limiting the subjects to which the earnings of the company were to be appropriated; but upon Mr. Dickson stating that the board would not declare the scheme effective unless a sufficient number of income mortgage bondholders and stockholders should agree, so as to substantially realize \$9,750,000 from the collateral trust bonds, Mr. Gleason stated that, if convinced of this, he would withdraw his objections.

The only further opposition, after full advertisement of the application had, was from Mr. Bijur, representing the Hartshorne committee, Mrs. Hetty Green, and Mr. Isaac L. Rice; and Messrs. Dos Passos and Charles B. McMichael, representing the Fitzgerald committee; and Messrs. Kissan, Whitney & Co., general mortgage bondholders. It did not appear what extent of interests were represented by these committees.

Messrs. Bijur and Dos Passos submitted: (1) That the petition asked the court to approve of what was substantially a plan of reorganization, and not of administration, making the receivers its partisans, with power to enforce assent from parties in interest, and the granting of the prayer of the petition would be misunderstood by the press and by Englishmen, under whose system such reorganizations are approved by their courts and made obligatory. (2) That the court has no jurisdiction or power to authorize the receivers to become parties to any plan of reorganization, particularly if opposed, and the right of a single minority security holder must be considered as much as those of the majority, referring to the master's fourteenth report, filed April 1, 1885, in the Kelsey Case; Central Trust Co. v. Wabash, etc., R. Co., 25 Fed. 70; an opinion of Mr. Justice Jackson in the United States circuit court of Georgia in the case of Clark v. Railroad Co., 66 Fed. 16, rendered May 26, 1893; Chable v. Construction Co. 59 Fed. 846; and Judge Lacombe's opinion in Fowler v. Mortgage Co. (Oct. 2, 1894) 64 Fed. 279. (3) That the plan requires the assenting general mortgage bondholders to sign the Olcott committee's agreement of May 7, 1894, providing for foreclosure, which committee has thus far been unable to obtain the consent of sufficient holders for that purpose, and which will thus obtain sufficient, if the plan should not become effective. (4) That the plan does not provide in advance for its success. (5) That it still leaves the companies in the hands of the receivers, subject to large unadjusted claims. (6) That it is insufficient, and default will again occur at the end of the five-years extension, when the company will be depleted of assets. (7) That the receivers would have had means for payment of the general mortgage coupons and interest if they had not been improperly diverted therefrom. (8) That it affects liens not before the court, and charter rights not within its jurisdiction. (9) That the provisions for payment of commissions impair the obligation of the income mortgages, which limits the appropriations of earnings to other objects. (10) That the proposed price for the purchase of general mortgage coupons and interest and collateral trust bonds by the syndicates is inadequate. (11) That the provisions for the voting trust are illegal, referring to Ohio & M. Ry. Co. v. State (Ohio Sup.) 32 N. E. 933. (12) That the court should first have a full accounting and statement of the companies' affairs. (13) That the Philadelphia & Reading Railroad Company does not need the authority of the court to make the agreements proposed by it. Mr. Bijur also argued that a foreclosure would be disastrous to the interests of the income mortgage bondholders and stockholders, while Mr. Dos Passos argued that the receivers' duty was to aid in winding up their trust, and having the property sold under foreclosure, as soon as possible.

This scheme, if successful, offers in substance to the receivers and the railroad company, for payment of the said claims of pressing indebtedness, the use of nearly \$19,000,000, in the \$9,000,000 from the five-years extension of the coupons and interest upon the general mortgage bonds, and \$10,000,000 from the collateral trust bonds and income mortgage bondholders and stockholders upon the receivers and the company paying 6 per cent. interest upon those extended coupons and interest for five years from July, 1893, and 2½ per cent. commissions upon the amount of the general mortgage

coupons and interest thus extended, which the holders thereof will require the syndicate to take, and 2½ per cent. commission upon the amount of the collateral trust bonds; the success of the scheme requiring, and being contingent upon, the assent of sufficient of the security holders and stockholders to make it effective in the judgment of the committee and board of managers. In any event, whether of success of the scheme, or of foreclosure, because of the priority of the lien of the coupons and interest of the general mortgage bonds, and the receivers' certificates and the salvage of the securities pledged for the secured indebtedness and of the equipment, the debts which are proposed to be paid out of the said moneys to be raised would be payable out of the proceeds of the collateral trust bonds and their security, in preference to the income mortgage bondholders, unsecured general indebtedness, and stockholders. The coupons of the general mortgage bonds carry 6 per cent. interest from their maturity. Too small a part of those bonds are registered to warrant a discrimination against the small amount of interest thereon, which will not carry interest from maturity. The counsel for the receivers state that the equipment and the other well-secured obligations proposed to be paid also carry 6 per cent. interest. The collateral trust bonds proposed to be sold carry 5 per cent. interest. No substantial offer of better prices for the assets proposed to be sold in this plan was made, much less in the mode required by courts from parties opposing the consummation of judicial sales, in security for a substantial better price. The scheme, to be successful, will require from the syndicates and the security holders and stockholders substantially \$9,750,000 from the collateral trust bonds and \$10,000,000 from the funded general mortgage interest. It seems that the commissions provided for in the plan are not unreasonable in comparison with those which the present receivers have been authorized to pay in the following instances, to wit:

November 24, 1893:

Speyer & Co.—Loan of \$3,000,000—Action of Receivers in payment of following commissions, etc., ratified:

April 24, 1893.....	\$30,000
July 3, 1893.....	15,000
November 25, 1893.....	6,000
October 3, 1893.....	62,500
January 3, 1894.....	25,000
April 3, 1894.....	25,000

January 23, 1894:

Tug International—Payment of 4½ per cent. commission to Philadelphia Warehouse Company for advance of \$63,000 for three years—to be refunded monthly.

January 27, 1894:

Philadelphia and Frankford Railroad Company—Issue of \$250,000 bonds. Payment of \$450 to Guarantee Trust Company for services as trustee, etc., and also commission of \$5,000 to Pennsylvania Warehouse Company for purchasing unsettled claims amounting to \$85,000.

March 2, 1894:

Steam Tug and New Barges—Advance of \$380,000 for five years to be refunded in monthly payments, commission of 5 per cent.

March 5, 1894:

Coal Trust Certificates—Loan of \$5,000,000 for ten years—negotiated at 97½ per cent.

It is not probable that under a foreclosure the collateral trust bonds or their security would produce more. It is the duty of the receivers appointed upon a bill of an income mortgage bondholder to pay or provide for the interest upon the general mortgage bonds, to avoid foreclosure under it. An investigation of the causes of the existing fact that the receivers have not the means to pay the present default upon the general mortgage interest, or the said other pressing indebtedness, will not aid the consideration of the present duty of the court and receivers, in the existing condition of those debts. So far as the petition asks action by the court and for authority to the receivers and company, it is entirely for the administration of certain assets in the receivers' hands for the payment of certain pressing debts, and that authority is to be contingent upon the subsequent approval of the

security holders and stockholders, all the parties in interest. That that administrative authority is asked thus contingently, and involves a partial adjustment of the affairs of the company, and a pro tanto reorganization, in aid of a complete reorganization, with a discharge of the receivers, when the remaining outstanding debts shall be thereafter the more easily settled, does not impair the jurisdiction or power of the court in these administrative functions. As was similarly said by the master in his nineteenth report in the case of *Kelsey v. P. & R. R. Co.*, made April 1, 1885, if there were no other obstacle than the doubt as to the success of the plan, the receivers might be properly, in advance, authorized to consummate it, if it should prove effective. If the plan involved a complete reorganization and a discharge of the receivers, the authority asked for could await the consummation of the plan, but it is because the receivers are to continue that the plan becomes only one of administration, so far as the action of the court is concerned. The authority asked for is the same in character which was granted by Judge McKennan in *Central R. R. Co. v. Lehigh & W. Coal Co.*, in the circuit court of the Western district of Pennsylvania, in its order of April 2, 1877, and September 7, 1878,<sup>1</sup> and which was given in the present case March 5, 1894, upon the twenty-ninth report of the master,<sup>2</sup> authorizing the issue of \$5,000,000 6 per cent. certificates upon the security of the coal and coal accounts. Even looking at the plan in the aspect of reorganization, while it is the duty of the court and the receivers to be strictly impartial between rival committees, plans, and interests, and therefore in *Chable v. Construction Co.*, 59 Fed. 846 (which was a stockholder's motion for an order on the receivers to permit him to inspect the company's books, to obtain material to convince other stockholders that they should oppose a proposed plan of reorganization which the receivers had commended, and who refused the inspection because the object of the petitioner was to defeat the plan), Judge Lacombe said in reference to that condition of things: "The theory of a receivership such as this is that the court takes possession of the assets of the corporation with the intention of distributing them equitably among all entitled to receive, without exposing creditors and stockholders alike to the heavy sacrifices which would be likely to occur should the property, as an entirety, be broken up and sold, bit by bit, as the result of a ruinous race of diligence between creditors. Having the securities in its possession, the court retains them until they can be properly marshaled, the claims of all ascertained, the property converted into money, and the same distributed equitably according to the rights of all parties. Frequently, before this termination of the proceeding is reached, some plan of reorganization, satisfactory to nearly all interested, and abundantly protecting the full legal and equitable rights of those not entering into it, is perfected, and the receivership terminates by a sale of the property to some new corporation, or to some committee organized under such plan." "Whether there shall be a new organization formed of stockholders, bondholders, or creditors, with what respective interests, and upon what terms, is one that shall be left for the determination of the interested, without interference in any way by the court or its officers. The court in these cases is a harbor of refuge, not a repair shop. It will hold the property of the corporation safe from outside attacks, and in proper cases will keep its business going, so that whatever value there may be in the business, qua business, may be preserved for all concerned; but it will not undertake, either itself or by its officers, to reorganize the old corporation, or to create a new one, or to solicit subscribers to some syndicate of prospective purchasers. If rival and discordant interests between the parties interested in the property produce conflicting

<sup>1</sup>These were orders made by the late Judge McKennan in the course of reorganization proceedings in the case of the *Lehigh & Wilkesbarre Coal Company*, of which no report has ever been published. By the order of April 2, 1877, the receivers were authorized to negotiate settlements with creditors having preferred claims, subject to the approval of the master. By the order of September 7, 1878, the receivers were authorized to make a composition with the *Central Railroad of New Jersey*, as its principal creditor, and to negotiate settlements with other creditors, with a view to the settlement and adjustment of the affairs of the company.

<sup>2</sup>Upon the entry of this decree, Isaac L. Rice made application to set aside the orders, and for leave to file a plea, demurrer, and answer, also to file nunc pro tunc exceptions to this report, which application was refused. He thereupon applied to the supreme court of the United States for leave to file a petition for a writ of prohibition and a writ of mandamus. The supreme court permitted briefs to be filed for and against the motion to file, and subsequently denied leave to file the petitions. *In re Rice*, 155 U. S. 396, 15 Sun. Ct. 149.



plans upon which they cannot agree, it is the receivers' duty to stand absolutely neutral between all, giving to no one any preference or advantage over the other, and according equal facilities to every stockholder, whether he holds a single share or ten thousand. And if the persons interested cannot within a reasonable time provide a purchaser, or competing purchasers of the property, the court will sell it, upon such advertisement at such time, and upon such terms of sale, as courts usually adopt to secure competition and a fair price." And in *Clark v. Railroad Co.*, Judge Jackson, and in *Fowler v. Mortgage Co.*, Judge Lacombe, are stated to have used similar language, although I have not had the opportunity of learning the questions and their conditions involved in those cases. And in the *Kelsey Case*, the master, April 1, 1885, upon the receivers' petition for authority to pay a coupon upon the convertible adjustment scrip of the railroad company, *inter alia* to help a scheme of reorganization, finding that the authority was not justified as an act of administration, added: "Neither am I satisfied that it is within the province of the court to intervene for the advancement of the negotiations of the party in interest for an amicable arrangement of the affairs of the corporations. As has been said by the court (opinion in matter of fourteenth report): 'A reasonable time should be afforded to the creditors and stockholders of the railroad company to mature a plan for the adjustment of its indebtedness.' But I think that in maturing any such plan they must be left to act for themselves, upon the situation as it exists, and that the court cannot be expected by directions to the receivers to assist them or to advance the views of any portion of them." Yet in *Central Trust Co. v. Wabash, etc., R. Co.*, 25 Fed. 70, where, pending a receivership under foreclosure proceedings upon a railroad mortgage, the bondholders had formed a scheme of reorganization upon foreclosure and sale, and incurred expenses of advertising, etc., and the mortgage trustee petitioned the court for an order upon the objecting receivers to pay those expenses, they having no surplus funds for the purpose, Judge Brewer orally denied the application for that reason, stating also that there was no certainty that the scheme would be carried out, but adding that, if there were any surplus moneys in the hands of the receivers, perhaps there would be no impropriety in their advancing it; and in *Pollitz v. Trust Co.*, 53 Fed. 210, the court confirmed a plan of reorganization which was made effective against a minority opposition. And a court of equity in foreclosure proceedings upon railroad mortgages, in view of the number and variety of persons and interests to be affected, and their probable sacrifice without combination for their protection, will facilitate combinations and schemes of reorganization to the end that a small minority of interests shall not enforce unreasonable and inequitable concessions from the majority, or the majority crush out or subject to disadvantage the rights of the minority. See *Sage v. Railroad Co.*, 99 U. S. 334; *Carey v. Railroad Co.*, 45 Fed. 438; *Robinson v. Railroad Co.*, 28 Fed. 340; *Cook, Stocks & S.* (3d Ed.) § 886. The rights of a single minority security or stockholder are therefore not necessarily the same, whether in minority or majority, in view of those different relations.

Under the present petition there is no question of rival plans of organization. There is no other pending scheme to avoid the impending foreclosure. So far from the receivers acting, or this petition asking for authority, otherwise than with strict impartiality to the several interests involved, the refusal of the prayer of the petition would aid its opponents in depriving the whole body of the rest of the security holders and stockholders of the opportunity of approving and consummating the scheme, and the receivers have proceeded as follows, to wit: The Olcott committee having issued a circular to the security holders, stating: "The undersigned, at the request of a large amount of the above-mentioned bonds, have consented to act as a committee to take steps to procure the payment of the interest upon the bonds in cash, to resist any attempt to increase the principal of the mortgage debt, and, if necessary, to accomplish these objects, to have the mortgage foreclosed, and to prepare a plan for the reorganization of the property;" and the Fitzgerald committee, a circular stating: "No one interested in the property can claim further delay or leniency from you. It is not proper that the property should remain in the hands of receivers indefinitely, and the committee is advised that the court having jurisdiction must soon intervene, and compel the adjustment of its affairs. If the receivers cannot pay the coupons upon the general mortgage bonds, you should take the property covered by the mort-

gage, which is believed to be fully ample to satisfy your claims; and the committee advises that it is the interest of the bondholders to forthwith demand an enforcement of their rights under the mortgage,"—the receivers, May 3, 1894, issued a circular, found at page 9 of "Exhibit A" hereto, to the stock and bondholders of the company, apprising them of the situation respecting the pending foreclosure, and stating: "But it should be distinctly understood that it is essential to the efficient and successful conduct of the business of the two companies that sufficient funds should be ultimately supplied in some way to protect the floating debt and equipment, as well as to pay the general mortgage interest. In the securing of this amount the receivers and management will unite with any body of creditors or shareholders to the best of their ability, and will cheerfully give the benefit of their assistance in any effort to make the burden of providing for it as light as possible." There being also two organized bodies representing income mortgage bondholders, of which Mr. Mertens and Mr. Hartshorne were respectively chairmen, the receivers, on May 7, 1894, wrote them as follows: "The receivers of the Philadelphia and Reading Railroad Company, as the more immediate representatives of the third preference income bondholders, at whose suit they were appointed, and the management, as the representatives of the stockholders, have felt it their duty to do all in their power to pay or arrange for the interest upon the prior mortgages of the company; and with this view they have communicated, from time to time, with the holders and representatives of the holders of the general mortgage bonds, in order to secure their assent to the funding, or sale of their coupons, so as to avert the institution of foreclosure proceedings, and the imposition of any assessment upon the security holders represented by you. You are aware, however, that the two New York committees of general mortgage bondholders have declined to recommend the concession asked for, and have called for the deposit of the bonds, with a view to foreclosure. In view of this action, the undersigned beg to tender to your committee the assurance that they understand it to be their duty to give to your committee any assistance in their power, in the way of information, suggestion, or otherwise, and generally to co-operate, if requested, with your committee, and any other income mortgage bondholders or stockholders, in devising means to protect their interests. To avoid misapprehension, however, it should be added that they also understand that it is equally their duty to give like information to the holders of the general mortgage bonds and their representatives; and that the receivers, at least, are not called upon, or entitled to regard themselves as in any sense parties to any litigation that may be instituted. As the representatives of the corporation, the management will, of course, endeavor by all proper methods to protect the interests of the stockholders." And at the present hearing, Mr. Welsh, on behalf of the receivers, stated that if they could get from any responsible body any proposition that they believe to be for the benefit of the property, they would apply to the court to have it carried out. That the granting of the prayer of the petition may be misunderstood by the parties in interest, who are alone concerned, is not probable, and, if it were, that fact, or that they will thereby authorize the Olcott committee to foreclosure, should the plan prove unsuccessful, I do not think should prevent the action of the court otherwise proper. That the plan disposes of a large amount of assets, I do not think makes it unadvisable, as it also disposes of a commercially equal amount of indebtedness, which would, in any event, absorb the proceeds of those, or an equal amount of other assets. I do not think that any lien not before the court or charter rights will be affected without the consent of those interested, unless of a very small minority, whose rights would be necessarily entirely protected in the usual manner in such cases. I think that the provisions for commissions are only an element of the net price to be obtained for the assets to be disposed of, and do not impair the obligations of the income mortgages. I do not think that the provisions for the voting trust are a ground for objection to the granting of the prayer of the petition. Such a voting trust was held valid in the fully-considered case of *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 South. 723, and *Ervin v. Railroad Co.*, reported in 7 Ry. & Corp. Law J. 87,<sup>1</sup> fully quoted with approval in *Beech, Priv. Corp.* § 306, and notes, decided in 1890 in the court of common pleas No. 2 of Philadel-

<sup>1</sup>The same case is reported as *Shelmerdine v. Welsh*, in 20 Phila. 199.

phia county, in which the opinion was given by Judge Hare, and Judges Fell and Pennypacker concurred, in which the plaintiff sought that court, as a court of equity by injunction, to prevent the voting trustees from casting the vote of the stock of the persons creating that trust; which case was approved by the supreme court in *Com. v. Dalzell* (Pa. Sup.) 25 Atl. 535, which case decided that the act of May 7, 1889 (P. L. 102), on this question, is merely declaratory of the prior law. See, also, *Burgess v. Seligman*, 107 U. S. 29, 2 Sup. Ct. 10. The bondholders, if they do not wish the benefit of the voting trust, can decline it. Non constat that any shareholder will object, and, if he should, the question will then arise, while the provisions of the general mortgage would enable its beneficiaries, through their trustee, on default, to take possession of and manage the property. I do not think that a full accounting, or a statement of all the affairs of the company, is necessary for the proper consideration of the questions involved in this petition. The Philadelphia & Reading Railroad Company is, of course, a proper party to the present petition, in view of its rights to be affected and obligations to be created, and of the injunction issued against it when the receivers were appointed.

Thomas Hart, Jr., and Samuel Dickson, for receivers.

Nathan Bijur, for Isaac L. Rice.

Hetty H. R. Green and Mr. Hartshorne, for committee.

DALLAS, Circuit Judge. At the time which had been appointed for hearing this petition, several counsel appeared on behalf of parties interested, but, owing to a change which the court had been constrained to make in the order of its general business, the discussion of this particular matter, though commenced, could not then be concluded. To avoid delay, and in supposed relief of counsel, some of whom were not residents of Philadelphia, I suggested to them that the petition might be referred to the special master, and that their arguments in the master's office could be stenographically reported; and I added that, if this course were adopted, those arguments would be considered on the coming in of the master's report, as if they had been made in court. This suggestion was accepted by all the counsel present, and thereupon the order of reference was made, and the master's report, including the arguments at length, has now been filed. Under these circumstances, I do not feel at liberty to comply with the request for a further hearing, which has been made in a letter addressed to me by one of the counsel who was a party to the arrangement I have mentioned. The case presented by the petition, and the contentions of those who oppose the granting of its prayer, must now be decided.

I have considered this application with more than ordinary care, for, with regard to some of the principles which counsel have invoked against it, as well as to the magnitude of the interests to be affected, it is one of especial importance; but full investigation and mature reflection leave me in no doubt as to the correctness of the conclusion reached by the master. To what he has submitted in support of that conclusion nothing need be added, but with respect to one subject, which has been urgently pressed upon my attention, a few words will be said to avoid all possibility of misunderstanding. The order now to be made does not approve the proposed plan of reorganization, nor is either approval or disapproval

thereof to be implied from it. The question of the wisdom and expediency of adopting any such scheme is for solution and determination by the persons interested, and no attempt to coerce their judgment or control their action should be made, either by the court or the receivers. But nothing of that sort is involved in the authority now asked and given. It imposes no constraint, but leaves those who have the right to accept or to reject the plan referred to, wholly free to do the one or the other as they may see fit. It sanctions the raising of money by rightful means, upon reasonable terms, and for proper objects; and it is not a valid ground of objection to it that it also renders feasible, in case of its due acceptance, the only reorganization project which is known to exist. The receivers should not enlist, on either side, in conflicts among those interested in the property they have in charge, but the neutrality which it is their duty to observe is not departed from by facilitating any plan which may be proposed for the general benefit, provided that to all alike, and with regard to every plan advanced in good faith, the same facilities be indifferently accorded; and the court, while it will not pass upon the comparative merits of rival schemes of reorganization, will regard with satisfaction any and every legitimate effort to terminate this receivership. It has now continued for nearly two years, and it will not be allowed to continue indefinitely. The appointment of receivers is an extraordinary remedy, and should be a temporary one. It is a beneficent one in many cases, but any unnecessary and futile protraction of the period of legal custody is, in any case, a grave abuse and a great evil. This is not said with reference to any particular plan of reorganization, but because I deem the present occasion a proper one for making it distinctly understood that if the parties in interest do not, within a reasonable time, devise some means for ending this receivership, the court will seriously consider whether it should not be dissolved. The order recommended by the master will be entered as the decree of the court.

(October 29, 1894.)

Since the foregoing was written and delivered to the clerk of the court, my attention has been called to certain exceptions on behalf of Henry H. Whitney, which I am informed had been filed about 30 minutes earlier. The points they present have been, in my opinion, sufficiently considered, and rightly disposed of; and it is to be noted that the learned counsel by whom they are interposed appeared and were heard before the master under the arrangement I have already fully stated, and all the arguments returned with the report have been carefully read and considered. Therefore these exceptions are dismissed.

#### Forty-Third Report of the Master.

And now, to wit, October 29, 1894, it is ordered that the Philadelphia & Reading Railroad Company and the receivers be, and they are hereby, authorized to enter into the agreements annexed to their petition filed September 25, 1894, respecting the plan for

the partial readjustment of the company's affairs, and, in case the plan be carried into effect, to make the payments therein stipulated for.

---

FARMERS' LOAN & TRUST CO. OF NEW YORK v. FOREST PARK & C.  
R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. January 2, 1895.)

No. 115.

RAILROADS—MECHANICS' LIENS—FORECLOSURE—REDEMPTION BY MORTGAGEE—ESTOPPEL.

The stockholders of a railroad company whose bonded debt of \$50,000 equaled its authorized capital (the limit placed on such indebtedness by Gen. R. R. Law Mo., Rev. St. 1879, § 765) passed a resolution that the capital be increased to \$1,000,000, and that the bonded indebtedness be increased to \$700,000. Though Rev. St. 1879, § 729, provides that, on the stock of a corporation being increased, the date and amount thereof shall be certified to the secretary of state, and section 708 provides that no increase of stock shall be valid till the corporation pays a certain tax into the state treasury, and Const. Mo. art. 10, § 21, declares that no corporation shall increase its stock without first paying such tax, the certificate was not filed or the tax paid till five years after the resolution, and three years after the railroad company had been divested of title to the road under foreclosure of mechanics' liens, and after the purchaser at foreclosure sale had in good faith expended \$2,300,000 in extending and improving the road. No claim in the meantime was set up on account of the bonds under the mortgage given to secure them, and recorded before foreclosure of the lien, though all persons interested in the mortgage knew of the work being done on the road. The bonds were not placed for disposal in the hands of the persons designated in the resolution, and the road got the benefit of no proceeds therefrom. *Held* that, all the parties who handled the bonds having notice of all these facts, the mortgagee was estopped to claim, against the purchaser at foreclosure of the lien, the right of a junior mortgagee to redeem, though not made a party to the foreclosure. A court of chancery will not disturb the title to millions of dollars' worth of property acquired in good faith, at the suit of one who sets up a doubtful equity acquired with full notice for a few dollars for speculative purposes.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

Suit by the Farmers' Loan & Trust Company of New York against the Forest Park & Central Railroad Company and others to foreclose a mortgage. Decree for defendants. Complainant appeals.

Frederick N. Judson and Warwick Hough filed brief for appellant.

John C. Orrick (Horton Pope was with him on the brief), for appellees.

Before BREWER, Circuit Justice, and CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge. This suit was begun on the 13th day of October, 1887, by the Farmers' Loan & Trust Company of New York, appellant, against the Forest Park & Central Railroad Company, the St. Louis, Kansas City & Colorado Railroad Company, and others, to foreclose a mortgage executed by the Forest

Park & Central Railroad Company to the appellant. The suit was instituted by the appellant, who was trustee in the mortgage, at the request of J. K. O. Sherwood, the holder of 79 of the bonds mentioned in the mortgage. The following is a brief summary of the facts giving rise to the suit: On October 2, 1877, the Forest Park & Central Railroad Company, hereafter called the "Park Company," was incorporated under the general law for the formation of railroad companies in Missouri, for the purpose of building a railroad from Union avenue, between the north line of Forest park and the Olive Street road, to some point on Academy lane, in Central township, St. Louis county, Mo.; the length of the road to be six miles, and the capital stock \$50,000. On the 7th of November, 1881, there was filed in the office of the secretary of state an amendment to this charter, authorizing this company to extend its line from Academy lane, westwardly across the north end of Creve Coeur Lake, to a point on the Missouri river, a distance of about twelve miles, and to extend its line from its then eastern terminus, in an easterly direction, a distance of about four miles, to the tracks of the Union Depot, in St. Louis. On April 27, 1880, the Park Company exhausted its power to mortgage its property by executing a mortgage for \$50,000, the full amount of its capital stock, to secure that amount of its first mortgage bonds. On March 31, 1882, the stockholders passed the following resolution on the subject of the increase of the capital stock of the company:

"Resolved (1) that the capital stock of the Forest Park and Central R. R. Company shall be increased to one million dollars; and resolved (2) that the bonded indebtedness of said company shall be increased to seven hundred thousand dollars, but subject to the understanding and condition that said stock and bonds shall, when issued, be placed in the hands of W. Speed Stevens, Booneville, Mo., and L. M. Losson, of New York City, to hold and control for the interest of the parties interested in said road, with power to name the trustees for the bonds, and shall not otherwise be issued. The board of directors and proper officers of the railroad company are authorized to issue said stock and bonds in the manner aforesaid."

No other steps were then taken to make this increase of stock effectual. The date and amount of the increase was not certified to the secretary of state, as required by section 729 of the Revised Statutes of Missouri, and the tax required by section 708 to be paid into the state treasury before any increase in the capital stock of a corporation "shall be valid and effectual" was not paid. The record shows no meeting of the stockholders subsequent to the passage of this resolution. On the 9th day of January, 1883, the Park Company, by John F. Hume, its president, executed a mortgage to the appellant to secure an issue of 700 of its mortgage bonds, for the sum of \$1,000 each, "all dated the 1st day of March, 1882." This mortgage not proving satisfactory, another mortgage for like purposes and similarly conditioned was executed and acknowledged on the 18th day of August, 1883, by William W. Walker, as president of the company, and filed for record on the 19th day of September, 1883. On the 23d day of February, 1883, the Park Company entered into a contract with the same William W. Walker for the construction of 23 miles of its road, agreeing to

pay him therefor \$700,000 in first mortgage bonds, and \$1,000,000 of the full-paid stock of the company. At the date of its execution, Walker assigned this contract to the Missouri & Kansas Railroad Construction Company of Colorado, hereafter called the "Construction Company." The Construction Company sublet the work, or a part of it, to subcontractors. The estimates of the work performed and materials furnished by these subcontractors—and no other work was done by the Construction Company—amounted to something over \$30,000. There was paid on these estimates only the sum of \$2,245.34. The subcontractors filed mechanics' liens on the property, and in February and April, 1884, judgments were rendered, establishing these liens for sums aggregating \$38,277.20, and decreeing the sale of the property to satisfy the same. The Park Company alone was made a defendant in these suits. Under processes issued upon these judgments, the road was duly sold to Dyer & Garland, and afterwards, by mesne conveyances, the title passed in 1884 to the St. Louis, Kansas City & Colorado Railroad Company, hereafter called the "Colorado Company." After its purchase of the property, the Colorado Company completed the road from Clayton, west to Creve Coeur Lake, in July, 1886, a distance of 16 miles, and by 1887 had extended it to Union, Franklin county, a further distance of 40 miles. The cost to the Colorado Company of constructing the road—excluding the cost of the right of way—from Clayton to Union was \$2,300,000, all of which was expended between June, 1884, and July, 1887. The Park Company and all parties having any interest in the mortgage in suit knew that the Colorado Company was constructing and extending the road as stated, but set up no claim under the mortgage until after the road had been completed, and not then until the amendment to the charter had been filed in the office of the secretary of state and the fees required by law on the increased capital stock paid. Two hundred bonds only were certified and issued under the mortgage in suit, and they were delivered on the order of Walker, as president of the Park Company, to John F. Hume and Nathan Frank. Hume became a director of the Park Company March 31, 1882, and has continued to be such, and was the president of the company from March 31, 1882, until January 7, 1883, when he was succeeded in that office by Walker. Nathan Frank was "the financial agent of the Forest Park & Central Railroad Company, and of the Missouri & Kansas Railroad Construction Company." There seems to have been no market for the bonds mentioned in the mortgage in suit except at merely nominal figures; and the Park Company, being unable to raise the funds to pay the contractor or subcontractors for the work done, which amounted to less than \$40,000, abandoned the enterprise. The 200 bonds which were issued were required, by the resolution of the stockholders which provided for the increase of the capital stock of the company, to "be placed in the hands of W. Speed Stevens, of Booneville, Mo., and L. M. Losson, of New York City, to hold and control for the interest of the parties interested in said road, with power to name the trustees for such bonds, and shall not otherwise be issued."

This requirement of the resolution was not observed. Without tracing in detail the facts connected with the issue and disposition of these 200 bonds, the evidence in the record satisfies us that all of the parties who handled these bonds, including the owner of the 79 bonds, at whose request this foreclosure suit was instituted, had full knowledge of all the foregoing facts at and before the time they acquired the bonds. The bonds were in the hands or subject to the order and control of the officers and directors of the Park Company, and were traded and trafficked in by them and others associated with them as doubtful and depreciated securities, the prices at which they were taken not being more than 10 or 20 per cent. of their par value. Twenty cents on the dollar was paid for the bonds held by Mr. Sherwood, at whose request, as the holder of 79 bonds, this suit was instituted. Before purchasing, in 1887, at this price, 43 of the 79 bonds which he holds, Mr. Sherwood made it a condition of the purchase that Mr. Hume should file in the office of the secretary of state of Missouri the amendment to the charter of the Park Company, increasing the capital stock of the company to one million of dollars, and should pay the tax required by the law of Missouri in such cases. Thereupon Mr. Hume hunted up Mr. Walker, the former president of the Park Company, and under date of July 26, 1887, procured his signature to a paper certifying to the amendment of the charter made at the stockholders meeting on the 31st of March, 1882, increasing the capital stock of the company; and on the 27th of July, 1887, Mr. Hume filed the certificate in the office of the secretary of state, and on the same day paid to the treasurer of state \$475, the tax on the increase of the capital stock. It is conceded that the mechanics' liens were prior in time and equity to the mortgage in suit. The contention of the appellant is that the mortgage constitutes a valid lien on the property junior to the mechanics' liens, and that the mortgagee, not having been made a party to the suits to foreclose the mechanics' liens, has the right to redeem the property from the purchasers at the sale under the mechanics' lien judgments.

The court is not called upon to consider the validity of the mortgage so far as it concerns the Park Company, or the liability of that company for the money which it received for the bonds that were issued. The question is whether, upon the facts of the case, the appellant is equitably entitled to redeem the property from the purchaser at the sale under the mechanics' lien judgments. The general railroad law of the state of Missouri (section 765) declares that the entire amount of the bonded indebtedness of a "corporation shall never exceed the amount of its authorized capital." Under this statute the Park Company exhausted its power to mortgage its property and franchises under its charter when it executed the mortgage for \$50,000, which was the full amount of its authorized capital stock. It was undoubtedly competent for the company to increase its capital stock. The mode of doing this is clearly pointed out by the constitution and statutes of the state. Section 727, c. 21, Rev. St. Mo., provides that a corporation may



increase its capital stock with the consent of the persons holding the larger amount in value of the stock, obtained at a meeting of the shareholders called for that purpose in the manner prescribed by the statute; and section 729 provides that, "upon the stock of any corporation being increased as hereinbefore provided, the date and amount of such increase of stock shall be certified by the proper corporate officers of such corporation to the secretary of state, who shall preserve and record said certificate in his office." Section 21 of article 10 of the constitution of Missouri declares, among other things, that no corporation "shall increase its capital stock without first paying into the treasury five dollars for every ten thousand dollars' increase"; and section 708 of the Revised Statutes of Missouri of 1879 provides that "no increase of the capital stock of any such corporation shall be valid or effectual until such corporation, company or association, shall have paid into the state treasury five dollars for every ten thousand dollars or less of such increase in the capital stock of said corporation or association." It will be observed that, to effect a valid increase of the capital stock of a corporation, the statute requires three things to be done: First, an affirmative vote of a majority in value of the stockholders; second, that the date and amount of such increase of stock shall be certified by the proper officers of the corporation to the secretary of state; and, third, the payment into the state treasury of \$5 for every \$10,000 of increase in the capital stock. The constitution and statute make a compliance with the last requirement a condition precedent to a valid increase of the capital stock; the constitution declaring that no corporation "shall increase its capital stock without first paying" the required sum into the state treasury, and the statute declaring that no increase of the capital stock "shall be valid or effectual until" such payment shall be made. When the mortgage in suit was executed, in September, 1883, the resolution to increase the capital stock of the company had not become "valid or effectual"; the required certificate of the increase of the capital stock had not been filed with the secretary of state; and the required tax had not been paid into the state treasury. The public records disclosed the fact that the Park Company had no authority to execute the mortgage in suit; and these public records spoke the truth, for no amendment to the charter increasing the capital stock had been filed, and no tax paid at that time. The appellees and their grantors had a right to rely upon the public records. The facts disclosed by them were presumptively true. But there is in this case more than the legal presumption that the public records spoke the truth. The evidence shows that the public records disclosed the exact truth with regard to the legal status of this corporation.

More than five years elapsed between the date of the passage of the stockholders' resolution to increase the capital stock of the company and the filing of the certificate of the same and the payment of the tax required to make such increase effectual. In the meantime the mechanics' liens had been foreclosed, and the mortgagor, the Park Company, divested of its title to the property.

Three years after the Park Company had been divested of its title to the property, and after the Colorado Company had in good faith expended over \$2,300,000 in the extension, construction, and improvement of the road, an effort is made to give a retroactive effect to the mortgage in suit against the Colorado Company, by then filing the required certificate and paying the tax which was indispensable to give validity and effect to the mortgage against the Colorado Company. This suit is instituted by the appellant, upon the request of the holder of 79 of the bonds mentioned in the mortgage, who had full knowledge of all of the facts, and who paid scarcely more than a nominal price for the bonds. It was obvious to the public, as well as to those parties having an interest in the Park Company as creditors or otherwise, that the bonds mentioned in the mortgage in suit had not been negotiated, and the proceeds applied to the payment of the debts of the company and the construction of its road; for the aggregate amount of the mechanics' liens was less than \$40,000, and it is incredible that these liens would not have been discharged had the company perfected the mortgage in suit, and placed upon the market the bonds therein mentioned. If that had been done, the mechanics' liens could have been easily satisfied. The reason it was not done is apparent. Everything goes to show that the company abandoned the scheme to increase its capital stock and extend its road. While the Park Company was not legally dissolved, it ceased to be a going concern; its stockholders held no meetings; its directors did not meet, and its officers left the state; and for five years and more the company gave no sign of life, and this has been its condition continuously to this date. Up to the bringing of this suit, the appellant asserted no right under the mortgage, and no bondholder made any claim, though it is clear that whoever held the bonds must have had full knowledge of all the facts. It was only after the purchaser of the property at the sale under the mechanics' liens had extended and completed the road at a cost of nearly two and one-half millions of dollars that any attempt was made to give force and effect to the mortgage in suit against the Colorado Company; and this was done at the request of the holder of only 79 bonds, who had full knowledge of all the facts, and who paid a comparatively small sum for his holdings. Upon these facts, it is clear that this bondholder has no equity to disturb the title of the Colorado Company, whatever may be his legal or equitable rights against the Park Company itself, as to which we express no opinion. The claim now set up by the appellant against the Colorado Company is plainly an afterthought, and purely speculative. A court of chancery will not disturb the title to millions of dollars' worth of property, acquired in good faith, at the suit of one who sets up a doubtful equity, acquired with full notice, for a few dollars, for speculative purposes. Upon the facts of the case, the appellant is estopped from claiming the rights of a junior mortgagee against the Colorado Company. The decree of the circuit court is affirmed.

## MILLIKEN v. BARROW.

## BARROW v. MILLIKEN.

(Circuit Court, E. D. Louisiana. January 28, 1895.)

Nos. 12,325 and 12,220.

1. CLAIMS AGAINST THE UNITED STATES—ASSIGNMENT—SECTION 3477, REV. ST.  
The provisions of section 3477, Rev. St., prohibiting and making void transfers of any claim against the United States, before the allowance of such claim, apply only to claims existing, at the time of the transfer, in the form of a right to demand money from the United States, and not to cases where, at the very inception of a transaction out of which a claim against the United States may arise, one party assigns to another the contingent profits he hopes to make, but which do not then exist, and can only be secured by the loan of the assignee's money to the assignor.

2. SAME.

B., a sugar planter, in March, 1892, in order to secure advances to be made by one M., gave to M. a mortgage on his plantation, which also contained a clause assigning and pledging to the mortgagee any and all bounties which should be allowed B. by the government of the United States, pursuant to the act of congress of October 1, 1890, upon sugar made by B. during that year, agreeing to indorse and deliver to the mortgagee all warrants and checks received for such bounty. No sugar had then been raised or bounty earned, but, subsequently, claims for bounty for the year 1892 were allowed by the government and paid. M. claimed the amount of such bounty, to be applied on his mortgage, and the syndic of B.'s estate, appointed in insolvency proceedings, claimed that the same should be paid to him for the benefit of B.'s general creditors. *Held*, that the prohibition of assignment of claims against the United States, contained in section 3477, Rev. St., did not apply, the case not being within the mischief of the statute, and that M. was entitled to receive and retain the proceeds of the bounty to the extent of the balance remaining due upon his mortgage for advances in 1892.

These were two causes heard together as an equity cause, under a stipulation of the parties, the first being an action at law by Richard Milliken against Cordelius J. Barrow to recover a balance of account, and the second a suit in equity by Alexander D. Barrow, syndic of the estate of C. J. Barrow, against said Richard Milliken to enjoin proceedings in the former suit.

The material portions of the agreed statement of facts are substantially as follows:

It is hereby agreed between the plaintiff and the defendant, through their undersigned counsel, that a jury in this case shall be waived and the case shall be tried before the court on the following statement of facts, and documents annexed and made part of the statement of facts.

C. J. Barrow was a sugar planter residing and doing business in the parish of West Baton Rouge. Richard Milliken is a commission merchant residing and doing business in the city of New Orleans. Milliken had made advances to Barrow to make the crop of the year 1890, and at the close of the crop year, on the 18th day of February, 1891, Barrow was indebted to Milliken in a balance of \$6,081.81. On the 2d of March, 1891, the parties appeared before Edgar Grima, a notary public, and executed two notes, secured by a mortgage on Barrow's plantation; the first note, for \$6,081.81, being for the balance then due to Milliken, and the second, for \$11,918.19, being intended to cover advances that might be made by Milliken to Barrow to make crops upon his plantation in the year 1891. At the close of the year 1891, to wit, on March 10, 1892, there was a balance due Milliken on the whole indebtedness, inclusive of the note of \$6,081.81, and interest

thereon, of \$20,305.41, and against this balance there remained outstanding and uncollected claims against the United States, for bounty on sugar produced by Barrow during the year 1891, of \$5,494.58. On March 14, 1892, Barrow and Milliken appeared before Edgar Grima, notary public, and Barrow executed his note for \$15,000, and secured the same by a mortgage upon the property therein described, and agreed to all the stipulations therein contained, including the following: "Now, to secure the faithful performance of each and all of the foregoing obligations, the reimbursement and payment of all costs, charges, expenses, and commissions aforesaid, said mortgagor does by these presents further specially mortgage and hypothecate the hereinbefore described plantation, and all appurtenances thereof, unto and in favor of said mortgagee, and all holders of said note, and does hereby transfer, assign, and pledge unto said mortgagee, and all holders of said note, any and all bounties which shall or may be allowed to said mortgagor by the government of the United States on the sugar made on said plantation during the present year, 189—; hereby agreeing to deliver, properly assigned and indorsed, to said mortgagee all and every certificate and other evidence of claim against the United States for such bounty, and any and all drafts or checks given for said bounty."

The object of the execution of this note and mortgage was to cover advances to be made by Milliken for the making of the sugar crop on his plantation, mortgaged in the act, for the year 1892. The amount of such advances, made in the interval between March 10, 1892, and January 21, 1893, exclusive of interest, was the sum of \$18,142.55; and the amount credited to Barrow during such period, exclusive of interest, was the sum of \$21,485.62. Of this sum of \$21,485.62, \$5,518.53 thereof was composed of sugar-bounty checks for sugar bounty granted by the United States government to Barrow for making sugar on the said plantation during the year 1891, which checks were collected at various dates in the months of March, April, and May, 1892, leaving the amount of the proceeds of the crop for the year 1892 to be the sum of \$15,967.09, without interest. The accounts between the parties were kept on the books of Richard Milliken. The court is to consider these accounts, and the facts therein stated, and the inferences to be drawn therefrom, as fully as if the same were set forth in this statement of facts. It appears by these accounts that on the 21st of January, 1893, there appeared to be a balance due by Barrow to Milliken, on all of the transactions aforesaid, of \$18,492.78, and as security for this balance Milliken held in his possession the three mortgage notes described in the foregoing acts of mortgage. On the 31st of January, 1893, Richard Milliken filed executory proceedings in the United States circuit court for the Eastern district of Louisiana against Cordelius J. Barrow. On February 6, 1893, Richard Milliken filed a motion in said cause in the following terms, to wit: "On motion of plaintiff herein, through his counsel, Semmes & Legendre, and on suggesting to the court that the sum of twenty-nine thousand eight hundred and ten  $86/100$  dollars was erroneously claimed of the defendant under the petition filed in this cause; that the mortgage claims due by defendant to plaintiff on the day this suit was brought amounted to eighteen thousand four hundred and ninety-two  $78/100$  dollars, with eight per cent. interest from January 8, 1893; and on further suggesting to the court that plaintiff wishes to enter a discontinuance of his suit, and a remittitur of his demand, in so far as the same exceeds the sum of eighteen thousand four hundred and ninety-two  $78/100$  dollars, costs and attorney's fees exclusive, which are not waived,—it is ordered by the court that this suit be discontinued to the extent of eleven thousand three hundred and eighteen  $15/100$  dollars, and that it be maintained in full force and effect for eighteen thousand four hundred and ninety-two  $78/100$  dollars, with interest, costs, and attorney's fees." The proceedings in this cause were subsequently stayed by an injunction issued at the suit of the plaintiff in this present cause, the syndic of Cordelius J. Barrow.

On the 26th of January, 1893, C. J. Barrow presented to the judge of the Fourteenth judicial district court for the parish of West Baton Rouge, the place of his domicile, a petition, under the insolvent laws of the state of Louisiana, for the surrender of his property, and the court on that day en-

tered an order accepting the surrender. This petition was filed in the clerk's office on the following day, the 27th of January. On the 31st of January, 1893, Alexander D. Barrow, plaintiff in this cause, was appointed provisional syndic of the estate of C. J. Barrow, and he was subsequently, at a meeting of the creditors, appointed syndic. During the years 1891 and 1892 the said C. J. Barrow duly qualified himself as a sugar producer and manufacturer under the provisions of an act of congress of date October 1, 1890, and thereby, as such sugar producer, became entitled, upon compliance with the rules and regulations of the treasury department of the United States, to receive sugar bounty, for which sugar bounty, in due time, checks were issued to the order of C. J. Barrow, and those checks were forwarded to C. J. Barrow at New Orleans, to the care of Richard Milliken. For the crops of the year 1892 the following checks were forwarded: On March 14, 1893, a check for \$1,624.61; on March 13, 1893, a check for \$1,838.60; on May 19, 1893, a check for \$23.90; on April 11, 1893, a check for \$2,689.38. These bounty checks are now in the possession of the defendant in this cause, Richard Milliken, and amount in the aggregate to the sum of \$6,176.51. The insolvent, C. J. Barrow, has never indorsed the same. In his schedule of assets filed with his petition in January, 1893, C. J. Barrow did not set forth these bounty checks. Proceedings were taken by the syndic, Alexander D. Barrow, in the insolvency proceedings against C. J. Barrow, to compel the surrender of these checks. Said proceedings were terminated by a judgment in favor of the syndic, perpetually enjoining and restraining the said Barrow from collecting any of the said treasury checks, and from indorsing the drafts in blank to any other person than the syndic of the insolvent estate, and directing the said Barrow to surrender the said treasury drafts to his creditors as part of his assets, properly indorsed in favor of the syndic of his estate, to be distributed among his creditors according to law. It is admitted that Richard Milliken was no party to this judgment in the state court. It is further admitted that no imputation of payments has ever been made by the said Milliken under the two notarial contracts aforesaid, further than appears as a matter of law from the manner in which the account current, above annexed and referred to, was kept upon his books, and as appears as a matter of law on the face of the pleadings and papers in the executory proceedings against C. J. Barrow.

Semmes & Legendre, for Richard Milliken.

Farrar, Jonas & Kruttschnitt, for Alexander D. Barrow, syndic.

PARLANGE, District Judge. By agreement of parties, the two above-entitled causes have been consolidated, and are to be tried as an equity cause, under the style of "Richard Milliken v. Alexander D. Barrow, Syndic, No. 12,325." The jury has been waived in writing in the case at law, and the parties have stipulated that the whole matter shall be tried by the judge on the agreed statement of facts. By a notarial act of mortgage, executed on March 14, 1892, C. J. Barrow declared himself to be indebted to Richard Milliken in the sum of \$15,000, amount of loan which Barrow obtained from Milliken to enable him to work and cultivate, during the year 1892, the sugar plantation described in the act. The clause in said act on which the complainant, Milliken, relies to obtain the relief which he prays for, is as follows:

"Now, to secure the faithful performance of each and all of the foregoing obligations, the reimbursement and payment of all costs, charges, expenses, and commissions aforesaid, said mortgagor does by these presents further specially mortgage and hypothecate the hereinbefore described plantation, and all appurtenances thereof, unto and in favor of said mortgagee, and all holders of said note, and does hereby transfer, assign, and pledge unto said mortgagee, and all holders of said note, any and all bounties which shall or

may be allowed to said mortgagor by the government of the United States on the sugar made on said plantation during the present year, 189-; hereby agreeing to deliver, properly assigned and indorsed, to said mortgagee, all and every certificate and other evidence of claim against the United States for such bounty, and any and all drafts or checks given for said bounty."

Section 3477, Rev. St. U. S., reads as follows:

"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration thereof, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuance of a warrant for the payment thereof. Such transfers, assignments and powers of attorney, must recite the warrant for payment and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer at the time of the acknowledgment, read and fully explained the transfer, assignment or warrant of attorney, to the person acknowledging the same."

The defendant contends that section 3477, Rev. St., is an insuperable obstacle in the way of the complainant, and that the agreement between Barrow and Milliken, concerning the sugar bounty, was the assignment of a claim upon the United States, within the prohibition of section 3477, Rev. St. The complainant contends that while the agreement may be null under the statute cited, as between the parties and the government, it is binding as between the parties themselves; citing, in support of this proposition, *Bailey v. U. S.*, 109 U. S. 437, 3 Sup. Ct. 272; *Goodman v. Niblack*, 102 U. S. 556. I have carefully considered the decisions interpreting section 3477, Rev. St.: *Trist v. Child*, 21 Wall. 446; *U. S. v. Gillis*, 95 U. S. 407; *Spofford v. Kirk*, 97 U. S. 484; *Erwin v. U. S.*, 97 U. S. 394; *McKnight v. U. S.*, 98 U. S. 179; *Goodman v. Niblack*, 102 U. S. 556; *Bailey v. U. S.*, 109 U. S. 432, 3 Sup. Ct. 272; *St. Paul & D. R. Co. v. U. S.*, 112 U. S. 733, 5 Sup. Ct. 366; *Trust Co. v. Shepherd*, 127 U. S. 494, 8 Sup. Ct. 1250; *Butler v. Goreley*, 146 U. S. 313, 13 Sup. Ct. 84; *Lopez v. U. S. (Court of Claims)* 35 Int. Rev. Rec. 31; *Howes v. U. S. (Court of Claims)* 35 Int. Rev. Rec. 55.

It results clearly, from the decisions just cited, that section 3477, Rev. St., prohibits the voluntary assignment of claims upon the United States; but that the devolution of claims, by operation of law, to heirs, devisees, assignees in bankruptcy, and assignees or syndics under state insolvent laws, is not within the prohibition. It is also clear that powers of attorney to collect claims upon the United States, and voluntary assignments of such claims, are revocable at will, prior to the payment of the claims by the government. If the real question in this case were whether Barrow could make an irrevocable and enforceable assignment of a claim upon the United States, before the allowance of the same, the claim being in esse at the time of the assignment, the case would have to go against the complainant. The supreme court, in *Spofford v. Kirk*, 97 U. S. 489, discussing the same contention which is now made here by the complainant, to wit, that the agreement was null quoad the government, but valid as between the parties, said:

"It is hard to see how a transfer of a debt can be of no force, as between the transferee and the debtor, and yet effective, as between the creditor and his assignee, to transmit an ownership of the debt or create a lien. \* \* \* We cannot see, when the statute declares that all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, \* \* \* shall be absolutely null and void, that they are only partially null and void, and that they are valid and effective as between the parties thereto, and only invalid when set up against the government."

It is settled by the highest authority that the sole object of the statute is to protect the government, not the claimant. *Goodman v. Niblack*, 102 U. S. 560; *Bailey v. U. S.*, 109 U. S. 439, 3 Sup. Ct. 272. Section 3477, Rev. St., is the act of February 26, 1853, carried into the Revised Statutes. Its title, which should be noticed, is "An act to prevent frauds upon the treasury of the United States." The statute would utterly fail in its sole object, if powers of attorney and assignments were irrevocable and enforceable by the courts. It is settled that they are revocable and unenforceable. *Spofford v. Kirk*, 97 U. S. 489; *Bailey v. U. S.*, 109 U. S. 439, 3 Sup. Ct. 272; *Lopez v. U. S.* (Court of Claims), above cited. In *Bailey v. U. S.*, relied upon by complainant, where a party was allowed a large sum by the government, and the same was paid to an agent of the claimant under a power of attorney which the claimant had executed before the allowance, but which he had permitted to remain unrevoked after the allowance, and the claimant sued the government to make it pay the claim a second time, it was simply held that the claimant was estopped. By not revoking the power of attorney which he had granted before the allowance, and permitting it to remain in force, the claimant gave it the same effect as a power of attorney executed after the allowance.

In my opinion, the pivotal point in this case is one which has not been raised. The real and decisive question is whether when, in March, 1892, Barrow, hoping and expecting to raise a crop of sugar cane, and to make sugar therefrom at the end of the year, assigned to Milliken the government bounties which he hoped to earn at the end of the year, there was then, at the time of the execution of the assignment, a claim in esse upon the United States, the assignment of which is stricken with nullity by section 3477, Rev. St., and whether such a transaction is within the evils intended to be remedied by the statute. One of the controlling canons in the interpretation of statutes is that the meaning of the law can be ascertained by the mischiefs which the law was enacted to remedy. If the mischiefs are ascertained, and a case arises which is not within those mischiefs, it is beyond dispute that the case is outside the operation of the law. We have clear and positive authority as to the mischiefs intended to be prevented by the act of February 26, 1853 (section 3477, Rev. St.). In *Goodman v. Niblack*, 102 U. S. 560, the supreme court, referring to its previous declaration on the subject in *Spofford v. Kirk*, 97 U. S. 489, said that these mischiefs are mainly two: (1) The danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a

stranger to the original transaction. (2) That, by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences, in prosecuting the claim before the departments, the courts, or the congress, as desperate cases, when the reward is contingent on success, so often suggest. In *Spofford v. Kirk*, the supreme court had said that the greater of the two evils was the possible combination of interests and influences in the prosecution of claims which might have no real foundation. The statement of the mischiefs intended to be remedied is again made in *Bailey v. U. S.*, 109 U. S. 438, 3 Sup. Ct. 272. There is a noticeable reiteration in the language of the supreme court with regard to the introduction of a party "who was a stranger to the original transaction," and the transfer of a claim to one or more persons "not originally interested in it."

In my opinion, it is clear that the transaction now under consideration comes under neither class of evils formulated by the supreme court. The transaction could not embarrass the government accountants, for it was never contemplated that Milliken should ever present any claim to the government as part owner or as assignee. The stipulation was that after the warrants were issued, that is to say, after the government was virtually done with the matter, Barrow was to indorse the warrants to Milliken. This could embarrass or involve the government accountants in no manner whatever. As to the second evil, which the supreme court says is the greater of the two, congress enacts a public statute to promote the production of sugar by the offer of a fixed public bounty, the payment of which is provided for in advance by regulations which are to apply to all who may earn the bounty. A person desiring to avail himself of the offer, but having no money to engage upon the enterprise, goes to another, and, upon obtaining from him the requisite means, assigns to him, as security for reimbursement, the bounty which he hopes to earn. Can this transaction be said to be the transferring or parceling of an existing debt against the United States to a stranger to the original transaction or to one not originally interested in it? Can it be said that such a transaction, entered into for the purpose of doing a thing which the government wishes to be done and encourages by the offer of its bounty, is one of the dangerous bargains from which the act of 1853, as its main object, intended to protect the departments, the congress, and the courts? In my opinion, it undoubtedly is not such a bargain. If a man without means, wishing to endeavor to earn the sugar bounty, goes to another who has the necessary resources, and enters into a partnership with him to carry on the enterprise, no one would claim that the transaction was in any manner obnoxious to section 3477, Rev. St. What different principle arises, if, instead of entering into such a partnership, one should borrow from another the necessary funds to carry out a lawful purpose, which the government encourages by the offer of a public bounty? See *Calder v. Henderson*, 4 C. C. A. 584, 54 Fed. 806. In my judgment, there is an obvious difference between a case where an existing debt against the



government is transferred to a stranger to the transaction, and another case where, at the very inception and origin of the transaction, one party assigns to another the contingent profits he hopes to make from a lawful enterprise, promoted by government aid, the carrying on of which enterprise being only made possible by the loan of the assignee's money to the assignor. In March, 1892, did Barrow have "a claim upon the United States," within the intendment of section 3477, Rev. St.? He might never have made a single hog-head or pound of sugar. What he had in March, 1892, was the hope of making sugar, and thereby earning the bounty at the end of the year. I make the following extract from the syllabus in the case of *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870:

"A., having contracted with the United States to furnish supplies of wood and hay, \* \* \* entered into partnership with B. and C. for the purpose of executing the contract. A. was to furnish half the capital, B. and C. one-fourth each, and profits and losses were to be divided on that basis; but, in fact, the capital was furnished by B. and C. A. delivered the wood according to contract, but failed to deliver the hay, and, payment being refused, he brought suit to recover the contract price of the wood. In this suit B. and C. each was a witness on behalf of A., and each testified that he had 'no interest, direct or indirect, in the claim,' except as creditor of A., holding his note. Pending the suit, A. became bankrupt, and then died. His administratrix was admitted to prosecute the suit, but, before entry of final judgment, his assignee in bankruptcy was substituted in his place. Final judgment was then rendered in favor of the assignee, and the amount of the judgment was paid to him. B. and C., as surviving partners, then filed a bill in equity against the assignee and the attorneys to recover their shares in the partnership property. Held, that the interests of B. and C. in the partnership were not affected by the fact that the contract under which they claimed was not made and attested by witnesses after the issue of a warrant for payment, as required by Rev. St. § 3477; that they were not affected by the provisions of section 3737, Rev. St.; that a transfer of a contract with the United States shall cause an annulment of the contract so far as the United States are concerned."

In that case the supreme court said:

"What is a 'claim against the United States' is well understood. It is a right to demand money from the United States. Peck acquired no claim, in any sense, until after he had made and performed, wholly or in part, his contract with the United States. Section 3477, it is clear, only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment or may be prosecuted in the court of claims. The section simply forbids the assignment of such claims before their allowance."

It is therefore perfectly clear that in March, 1892, Barrow had no "claim upon the United States," within the intendment and prohibition of section 3477, Rev. St.

I reiterate that the act of 1853 was not intended to protect claimants. There is nothing contained in it which was intended to assist a claimant in resisting the enforcement of his contracts. When, as in *Spofford v. Kirk*, the court refused to compel the claimant to carry out his agreement, it was only because this had to be done in order to give the government the protection which was the sole object of the enactment of the statute. Natural justice plainly requires that such an agreement as the one under consideration should be enforced, unless there be some special prohibition. I find that

no such prohibition exists in this case. Doubtless Barrow would in good faith have carried out the agreement, and this case would never have arisen but for the fact of his supervening insolvency. In *Ellett v. Butt*, 1 Woods, 218, Fed. Cas. No. 4,384, cited by complainant's counsel, the court cited Justice Story's language in *Mitchell v. Winslow*, 2 Story, 631, Fed. Cas. No. 9,673:

"It seems to me a clear result of all the authorities that whenever the parties, by their contract, intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then in esse or not, it attaches as a lien in equity or charge upon particular property as soon as the assignor or contractor acquires a title thereto," etc.

*Ellett v. Butt* was affirmed in 19 Wall. 544.

The Civil Code of Louisiana says:

"Art. 2450. A sale is sometimes made of a thing to come; as of what shall accrue from an estate, of animals yet unborn, or such like other things, although not yet existing.

"Art. 2451. It also happens sometimes that an uncertain hope is sold; as the fisher sells a haul of his net before he throws it; and although he should catch nothing, the sale still exists, because it was the hope that was sold, together with the right to have what might be caught."

A hope or expectation of gain or profit in some enterprise may form the object of a contract of sale. *Slidell v. McCoy's Ex'r*, 15 La. 340; *Dobard v. Bayhi*, 36 La. Ann. 136. That equity, in the absence of a special prohibition, will enforce such an agreement as the one under consideration, is perfectly clear. See *Spofford v. Kirk*, 97 U. S. 488, where the question was passed upon. In *Re Clarke*, 36 Ch. Div. 354, cited by complainant's counsel, *Bowen, L. J.*, quoted approvingly the language of the court in *Holroyd v. Marshall*, 10 H. L. Cas. 191, as follows:

"If a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court of equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired."

See, also, *Tailby's Case*, 13 App. Cas. 534, cited by complainant's counsel.

But, notwithstanding my views of the law as above expressed, it does not follow that the complainant is entitled to all the relief he prays for. The bounty warrants in dispute amount to \$6,176.49. The amount for which Barrow remained indebted to Milliken for the crop of 1892 is less than the amount of the checks. The assignment of the eventual bounty was clearly and expressly made to secure the payment of the advances for 1892, and no reasonable implication arising in this case could extend it to the securing of any antecedent indebtedness of Barrow to Milliken. Nor is it contended that it should be so extended. But in the act of mortgage of March 14, 1892, a clause is contained giving the complainant the right to apply the proceeds of sale of the crop of 1892 to any indebtedness which might then be due to the complainant by Barrow on open account; it being stipulated that such imputation would not lessen or

impair the indebtedness evidenced by the act of mortgage of March 14, 1892. At the time of the execution of this act, Barrow was already indebted to Milliken for advances made prior to March 14, 1892. The contention is that Milliken had the right, under the clause just mentioned, to take the proceeds of the crop of 1892, and apply them to the indebtedness antecedent to the act of mortgage of March 14, 1892. The result would be to leave this act of mortgage in force for an amount sufficient to cover all the bounty warrants in dispute. It is clear that, in order to sustain this contention, it must appear that the complainant made the imputation. It is not claimed that there was any express imputation, and the matter is submitted on the inferences to be drawn from the manner in which the accounts between complainant and Barrow were kept. I find the inferences to be strongly against complainant's contention on this point. Those accounts contain no indication whatever of any intention to make a special imputation. The indebtedness, from the inception of the transactions between complainant and Barrow, long prior to the mortgage of March 14, 1892, is treated as one continuous indebtedness. The account begins with a charge for balance of account on February 18, 1891,—evidently the balance for the advances of 1890. Another balance is drawn on March 9, 1892, and a note appears at the foot of the account that the uncollected bounty claims (for 1891), when collected, "are to be credited to this account." The balance drawn March 9, 1892, is charged on March 10, 1892, being the total indebtedness on all antecedent transactions to that date. To this balance are added, on the debit side, all the advances of 1892. On the credit side, appear the entries for the proceeds of the sale of the crop of 1892, without any indication of an intention to make a special imputation of the amounts. A final balance is drawn on January 21, 1893, which is the whole amount due by Barrow on all the transactions. At the foot of the last account, appears a note that the bounty claims for 1892 (the warrants for which are in dispute in this case) "will be credited to this account when received." Under such circumstances, it is perfectly clear that there was no special imputation. When complainant simply entered on the credit side of his account the proceeds of the crop of 1892, there being then on the debit side both the old and the new debts, it certainly cannot be said that the credit went to one debt rather than to the other. When it is the debtor of several debts who makes a payment and wishes to impute it, the law says that he must state the imputation, or else the law makes the imputation for him. If, as in this case, he yields to his creditor his right to impute, the creditor must state the imputation. In this case the creditor has not done so. On the contrary, the inference is irresistible that he never intended to make, and that he did not make, a special imputation. The matter is clearly one in which the imputation must be made by law. "When a factor who has made advances to a planter, and who has a mortgage upon his plantation to secure an antecedent debt, receives the crop of the planter, the proceeds of the crop must be imputed to the payment of the advances, before any part of the crop may be applied to any other obligation." Richard-

son v. Dinkgrave, 26 La. Ann. 658; Given v. Alexander, 25 La. Ann. 71; Jackson v. Lemle, 35 La. Ann. 857. "As appears from the mortgage, the advances were made to defendant in his planting operations, and were specially secured by a privilege on his crops, etc. As heretofore held, the proceeds of the crop were imputable to the privilege, and not the mortgage." Flower v. O'Bannon, 43 La. Ann. 1046, 10 South. 376. Counsel will prepare a decree in favor of the complainant, in accordance with the views herein expressed, and submit the same to the consideration of the court.

---

ANDREWS et al. v. MILLER et al.

(Circuit Court of Appeals, First Circuit. February 2, 1895.)

No. 109.

**CONTRACTS—INTERPRETATION.**

Plaintiffs and defendants entered into a contract by which plaintiffs agreed to load on a barge at the port of B. 1,600 tons of ice, for which the defendants agreed to pay them \$2.50 per ton on draft at one day's sight, guarantying this amount to plaintiffs at all events. Defendants were also to transport the ice to New York, and pay the cost of transportation and discharging at New York, and were to sell the ice for the best price obtainable, and pay plaintiffs one-half the net profit, after deducting from the selling price the \$2.50 per ton, and the expense of transportation and sale. The ice was to remain the property of plaintiffs until sold and paid for. Upon the arrival of the ice at New York, the price being depressed, defendants requested plaintiff to defer drawing for the amount of the payment at \$2.50 per ton, which they did for a few days, but then notified defendants that they wanted the contract performed, and drew a draft for the amount due, which was protested for nonacceptance, and later for nonpayment. Plaintiffs' agent demanded the ice from the master of the barge, but he refused to deliver it, unless indemnified against any claim of defendants, who had notified him not to deliver. The owner of the barge libeled plaintiffs' agent for the amount due for charter of the barge which defendants had agreed to pay, and plaintiffs' agent libeled the barge for damage which the ice, when unloaded, was found to have suffered by the escape of steam, and, after setting off the amounts allowed on the two libels, plaintiffs were obliged to pay \$746.83. They also paid for towage of the barge at New York, costs of protest, care of and weighing the ice, and expenses of sale of the ice, which they sold for the best price obtainable, realizing only a small amount. *Held*, that the contract was not one of sale, but a special contract, by which defendants undertook, in consideration of plaintiffs' shipment of the ice, to pay them \$2.50 per ton before the ice should pass out of their control, and that, defendants having failed to perform their part, without fault on plaintiffs' part, plaintiffs were entitled to take and dispose of the ice, and to recover the agreed amount at \$2.50 per ton, together with the expenses they had been obliged to pay at New York, less the amount realized from the sale of the ice.

In Error to the Circuit Court of the United States for the District of Maine.

This was an action brought by William L. Miller, Charles H. Bartlett, William E. Baxter, and Everett T. Nealey, partners as Treat's Falls Ice Company, against Wallace C. Andrews, Thomas R. McNeal, Carroll L. Riker, and John F. Huckel, partners as C. L. Riker, for the sum of \$5,282.58, due upon a certain contract in writing. The action was brought in the supreme judicial court of the state of Maine. The defendants, being citizens of the state

of New York, had the case removed to the circuit court, where they appeared and pleaded. The cause was submitted to the court, trial by jury being waived. The court found the facts, and the conclusions of law thereon, as follows:

The facts found are:

(1) The plaintiffs were engaged in the business of cutting, storing, and selling ice at Bangor, Me.

(2) The defendants were dealing in ice in New York.

(3) On the 12th day of August, 1890, the parties entered into a written agreement, as follows:

"First. The parties of the first part [the plaintiffs] agree to load at the port of said Bangor, at some dock having at least twelve feet of water at low tide, sixteen hundred (1,600) tons of good merchantable ice, cut on the Penobscot river, on board the barge Saugerties, now on the way to said Bangor.

"Second. The parties of the second part [the defendants] agree to tow said barge, when loaded as aforesaid, with all reasonable speed to the port of New York, and there sell the said cargo for the best price obtainable.

"Third. The parties of the second part agree to pay a draft, on one day's sight, drawn on them by the parties of the first part, for the amount of said cargo, at two and fifty one-hundredths dollars per ton as weighed in said Bangor by a sworn weigher, a certificate of the weight of said cargo to be attached to said draft, together with the bill of lading, and said two and fifty one-hundredths dollars per ton is guaranteed to the parties of the first part by the parties of the second part, and is to be paid to them in any event, except in case of loss of said barge or its cargo, as provided in sect. 9. From the proceeds of the sale of said cargo in New York the parties of the second part are to have one and fifty one-hundredths dollars per ton freight, one half the cost of towing in and out of the Penobscot river, and the cost of discharging said cargo.

"Fourth. The parties of the first part agree to load from two hundred to two hundred and fifty tons per day, and for every ton over two hundred and fifty tons which they average the parties of the second part agree to make a reduction of twenty cents per ton from the freight.

"Fifth. The parties of the second part agree to advance all necessary expenses incurred after said cargo leaves the port of Bangor.

"Sixth. Said cargo is to remain the property of the parties of the first part until sold and paid for.

"Seventh. The net profits of said cargo, assuming two and fifty one-hundredths dollars per ton, weighed as aforesaid, as the basis of cost on board said barge at Bangor, are to be equally divided between the parties of the first and second parts.

"Eighth. Immediately after the sale of said cargo, the parties of the second part agree to furnish the parties of the first part with a detailed statement of the receipts and expenses of said cargo, together with a check for their share of the net profits.

"Ninth. In the event of the loss of said barge or its cargo, or the loss of the ice in the ice houses of the parties of the first part in said Bangor, this contract shall at once terminate and become void, and the two and fifty one-hundredths dollars per ton paid as aforesaid is to be returned to the parties of the second part."

Afterwards, by mutual agreement in writing of the parties, this contract was so modified that the quantity of ice to be shipped was changed to 1,638<sup>10</sup>/<sub>80</sub> tons, instead of 1,600 tons, but in all other respects was continued unchanged. Pursuant to this agreement, at Bangor, 1,638<sup>10</sup>/<sub>80</sub> tons of good merchantable ice, cut on the Penobscot river, was shipped by the plaintiffs on board the Saugerties, which was under charter to the defendants at \$50 per day. The barge, with this cargo on board, left Bangor August 30th, and arrived near New York September 5th. On the 28th of August, the market price of ice at New York being then depressed, Riker, one of the defendants, who took the active management of this business, wrote to the plaintiffs, requesting them not to draw at one day's sight, with the bill of lading, for the amount of the shipment according to the contract, and promised to pay the amount before he unloaded the cargo. To this, reply was made that one of

the plaintiffs would see Riker in New York. September 5th Mr. Bartlett, one of the plaintiffs, was in New York, and had several interviews with Riker and one of his partners, without referring to any draft. On the 12th of September, the ice in the meantime having remained on board the barge unsold, Bartlett told Riker he wanted the contract performed, and on the 13th gave notice that he had determined to draw; on the 15th a draft at one day's sight was drawn on Riker by Bartlett in the name of his company for \$4,000, to which was attached the weigher's certificate and the captain's copy of the bill of lading. Bartlett had left the other copies of the bill of lading at Bangor, and had obtained the captain's copy for the express purpose of attaching it to the draft. This draft was duly protested for nonacceptance, and again, on the 19th, for nonpayment. No arrangement having been reached by the parties, the plaintiffs, by Bartlett, executed a bill of sale of the ice to one Smith, and indorsed and delivered to him the captain's copy of the bill of lading that had been attached to the draft, but this transfer was merely for the convenience of the plaintiffs in the transaction of subsequent business in regard to the ice in New York. As between Smith and the plaintiffs, no sale of the cargo was intended. It was only a convenient method of appointing and authorizing an agent to manage the cargo for them. On the day that he received this bill of sale, and the bill of lading attached to it, Smith demanded of the owner and captain of the barge, under these documents, a delivery of the cargo. They refused to make such delivery unless they were indemnified against any claim of Riker and partners, who notified the owner not to deliver the ice to Smith, and that he would do so at his peril. Smith libeled the barge in the United States district court in the Southern district of New York for the nondelivery of the cargo. The owner of the barge libeled Smith for the amount due under the charter. When the ice was finally discharged from the barge, it was found to have been damaged and wasted by the escape of steam into the cargo, and was generally in bad condition, and Smith libeled the barge for this damage and waste. All these libels were heard and disposed of in the same court. The first was dismissed as prematurely brought; on the second, the sum of \$2,500 and costs was decreed due for the use of the barge for 57 days from August 30th, during which time the ice was on board, less 7 days for which the barge was held responsible; and on the third, damages for injury of the cargo by the fault of the barge by suffering steam to escape into it, in the sum of \$1,900 and costs, were decreed to the libellant, and the amount was ordered to be set off against the amount of the decree of the second libel. The difference between the two decrees was \$746.83, and was paid to the owners of the barge by these plaintiffs, through Smith, the nominal party in the libels. The plaintiffs also paid bills of the attorneys for services, and \$35 for towage of the barge at New York; \$1.98, costs of protest of their draft; \$105 for care of and weighing out the cargo; and \$53.53, expenses of sale and commissions. After considerable delay, and after Riker, when, on the 24th of September, another copy of the bill of lading having been received, withdrew his objection to delivery of the ice, the owners of the barge consented that the cargo should be delivered to Smith, who was only the agent of the plaintiffs, upon his promise to pay \$50 a day for the use of the barge. The plaintiffs, through Smith, negotiated a sale of the ice at \$3.50 per ton, but, after the discharge of 80 tons, it was found to be damaged and in bad condition, and the acceptance of more was refused. The 80 tons delivered have not been paid for at any price. Failing to find purchasers for the remainder at private sale, the plaintiffs advertised and sold it at public auction. It brought \$288.95, at 65 cents per ton. The plaintiffs and Smith, their agent, used all proper efforts to avoid loss on the sale, and to protect all interests. The defendants utterly failed to advance the freight and other expenses of the cargo, or to pay the guaranteed price. They took no effective steps to find purchasers, or to provide for the protection and disposal of the ice. After all negotiations for carrying out the contract or for adjusting the business had failed, and when the cargo, from its nature, was wasting and shrinking in value, they interposed further delay by forbidding the barge to deliver it to the owners. The plaintiffs, when they had finally gained control of the ice, made all reasonable efforts to sell it to the best advantage, and so far as possible to protect against loss all parties interested.

## Conclusions.

The contract between these parties cannot be treated as a sale. In some aspects it was like a shipment on joint account, with special terms. If it be regarded as a partnership in a particular adventure, those conditions of the copartnership by which the defendants were to secure to the plaintiffs at least \$2.50 per ton at in-take weight for the ice shipped, and were themselves to bear all losses, must be regarded. It is better to treat it as a special contract, according to its terms, by which the defendants undertook, in consideration that the plaintiffs would ship the ice, to return to them, free of any expense, \$2.50 per ton, before the property should pass out of the control and custody of the shippers. This action proceeds on that view, and is for damages for the breach of such a contract. Whatever view be taken of the nature of the contract, the same result will be reached. The defendants have wholly failed to perform their part of it. They have not been prevented by any wrong on the part of the plaintiffs. The loss of the plaintiffs from the defendants' breach is the same and the damages suffered by them are the same, under any interpretation of the contract. No act or acts of the plaintiffs can be held as a waiver of its terms. The only question is, what are the damages which plaintiffs should recover?

The 1,638 <sup>19</sup> / <sub>80</sub> tons at \$2.50 amount to.....		\$4,095 59
Of this plaintiffs have received from auction sale the sum of .....	\$288 95	
They are chargeable with value of the 80 tons delivered and accepted, on the private sale, before rejection of rest, amounting to.....	280 00	
		<hr/> 568 95
Leaving a remainder or.....		\$3,526 64
They should also recover cost of protest.....	\$ 1 98	
Towage .....	35 00	
Care of cargo and expense of weighing out.....	105 00	
Excess of decree in favor of barge, for her use.....	746 83	
Commissions and expenses of sale.....	53 53	
		<hr/> 942 34
		<hr/> \$4,468 98

In addition to these items the plaintiffs claim allowance of their counsel fees and expenses of litigation in New York. These expenses were not a result of the defendants' failure to perform their contract, nor did the defendants contract to bear them. The claim for these expenses is disallowed. The plaintiffs are also entitled to interest from the date of the writ.

From this decision of the court, writ of error was allowed to this court.

Arno W. King and Clarence Hale, for plaintiffs in error.

Charles H. Bartlett and Charles F. Woodard, for defendants in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. The plaintiffs in error have not undertaken to show, either to this court or the court below, that the damage to the ice by steam occurred before the arrival of the cargo at New York; nor have they based any defense on any theory of that character, or secured proper findings to enable us to determine the merits of such a defense, if it had been urged on us. Therefore we refrain from passing on any questions of that nature. The prop-

ositions submitted to us arise from the conclusions stated in the court below, as follows:

"The contract between these parties cannot be treated as a sale. In some aspects it was like a shipment on joint account, with special terms. If it be regarded as a partnership in a particular adventure, those conditions of the copartnership by which the defendants were to secure to the plaintiffs at least \$2.50 per ton at in-take weight for the ice shipped, and were themselves to bear all losses, must be regarded. It is better to treat it as a special contract, according to its terms, by which the defendants undertook, in consideration that the plaintiffs would ship the ice, to return to them, free of any expense, \$2.50 per ton, before the property should pass out of the control and custody of the shippers. This action proceeds on that view, and is for damages for the breach of such a contract. Whatever view be taken of the nature of the contract, the same result will be reached. The defendants have wholly failed to perform their part of it. They have not been prevented by any wrong on the part of the plaintiffs. The loss of the plaintiffs from the defendants' breach is the same, and the damages suffered by them are the same, under any interpretation of the contract. No act or acts of the plaintiffs can be held as a waiver of its terms."

We agree to these expressions. Under the circumstances the plaintiffs below were entitled, for their own protection, to make the best of the ice which they could by reasonable efforts, after the defendants below refused to accept it, and they are accountable only for the net proceeds. They have been charged with these by the court below. In attempting to secure the net proceeds, they paid the freight, which the defendants below were holden to pay in any event, and the latter cannot complain that, in the computations of the court below, they were charged with it. The plaintiffs below were charged with the net amount they recovered from the barge for damage to the ice. Therefore, on the principles of law applicable to persons who are compelled to intervene to save property unjustly thrown back on their hands, the plaintiffs below have been credited and debited with the various sums with which they should have been. These principles are so familiar that we do not deem it necessary to elaborate them. The judgment of the circuit court is affirmed.

---

BUTLER et al. v. MACHEN.

(Circuit Court of Appeals, First Circuit. January 17, 1895.)

No. 110.

**TRIAL.—INSTRUCTIONS.—CONSTRUCTION OF CHARGE AS A WHOLE.**

Although disconnected sentences of the charge, if taken alone, would seem to indicate that the jury might substitute their own opinion for the evidence produced at the trial, there is no error if these sentences, when read with the remainder of the charge, would bear no such meaning.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was a suit by Edward C. Machen against Paul Butler and Adelbert Ames, administrators c. t. a. of Benjamin F. Butler, deceased, for the sum of \$17,875. Upon the trial of the case the court, upon the question of proof and preponderance of evidence, charged the jury as follows:



"There are certain rules touching what we call the 'burden of proof,' to which I desire to call your attention. In criminal cases, for a reason which I need not explain to you, the law holds the United States to strict rules as to the burden of proof. But in civil cases, where the issue must be determined one way or the other,—either one party or the other must prevail,—the law requires only what is called a 'preponderance of evidence.' That is to say, if, upon a certain proposition which the plaintiff is bound to prove, or upon a proposition which the defendant is bound to prove, after you weigh all the evidence in the case, you have an opinion in favor of the plaintiff upon the issues which he is bound to prove, or in favor of the defendant upon the issues which he is bound to prove, then you will act upon that opinion, no matter how slight it may be, and no matter how light may be the preponderance—how small may be the preponderance—of evidence in favor of it. Upon the issues which the plaintiff is bound to prove there must be, in order to enable you to find these issues in his favor, a preponderance of evidence in his favor, and so upon the issues which the defendant is bound to prove. I do not know that I can explain what is meant by preponderance of evidence, except that the result of it must be not merely guesswork on your part. It is not sufficient for you to shirk, under cover of the rule of mere preponderance of evidence, by simply guessing; but there must be sufficient evidence in the case—a sufficient preponderance of evidence—to enable you to form an opinion. No matter how doubtful or uncertain you may be as to the correctness of that opinion, if it is an opinion based upon the balancing of all the evidence, no matter how weak, or how doubtful you may be as to its correctness, you are entitled to follow that opinion."

The defendants sued out a writ of error, and assigned this charge as their second assignment of error.

George O. Shattuck and Frank L. Washburn, for plaintiffs in error.  
Anson Maltby, for defendant in error.

Before COLT, Circuit Judge, and NELSON and WEBB, District Judges.

**PER CURIAM.** The first assignment of error having been waived, the only question to be decided is raised by the second assignment of error, which relates to the correctness of the charge to the jury of the court below. It is always likely to mislead, if a single expression in instructions to a jury is separated from its connection, and verbally criticised. In this case, strictly correct instruction as to the rule of preponderance of evidence was given, but the presiding judge went further, and attempted to make that rule more intelligible to the jury. In so doing he made use of expressions which, it is argued, in effect authorized the jurors to substitute their personal opinions in respect to the rights of the litigants for the evidence produced at the trial; and the definitions of "opinion" given by various lexicographers are pressed in argument to show the error of such instruction. We should have no doubt about our duty if we construed the charge to the jury in the same way as the plaintiffs in error. But that construction can only be sustained by disregarding a large and important part of the language of the court in immediate connection with which the expression "opinion" was used. In every sentence the jury was, in effect, and almost in terms, told that they were to be controlled by the preponderance of evidence. Read together, the only fair and reasonable interpretation is that, in reaching their final conclusion and verdict, they must be governed by

the preponderance of evidence, if they found in it any preponderance. There is no such uncertainty in the charge of the court as warrants the theory that the jury may have been misled as to the rules of law by which they should be controlled in pronouncing their verdict. Judgment affirmed.

---

## UNITED STATES v. MISSOURI PAC. RY. CO.

(Circuit Court, D. Kansas, S. D. September 14, 1894.)

1. INTERSTATE COMMERCE — DISCRIMINATING RATES — INJUNCTION — SUIT BY UNITED STATES.

Under the amendments by the acts March 2, 1889, and February 10, 1891, to the twelfth section of the interstate commerce law, authorizing and requiring the commission to execute and enforce the act, and providing that on the request of the commission it shall be the duty of any district attorney of the United States to institute in the proper court, and to prosecute under the direction of the attorney general of the United States, all necessary proceedings for the enforcement of the provisions of the act, and for the punishment of the violations thereof, the district attorney so requested may, under the direction of the attorney general, prosecute a suit in the name of the United States against a railroad company to enjoin it from discriminating in rates against one city in favor of another city.

2. SAME—PRELIMINARY INVESTIGATION BY COMMISSION.

Under such amendment, the formal preliminary investigation by the commission, authorized by the original act, is not necessary to vest jurisdiction in the court.

Suit by the United States against the Missouri Pacific Railway Company to enforce the provisions of the interstate commerce law.

Morris Oliggett, Asst. U. S. Atty. (W. C. Perry, U. S. Atty., of counsel).

J. H. Richards and C. E. Benton (B. P. Waggener, of counsel), for defendant.

WILLIAMS, District Judge. This case is submitted to the court upon a demurrer by the railway company to the bill of complaint. For the purposes of this submission, the facts alleged in the complaint are to be taken as true. The bill avers that:

"This action is brought by the authority of and under the direction of the attorney general of the United States, which said authority and direction is given and made in pursuance of the request of the interstate commerce commission of the United States that the United States attorney for the district of Kansas be directed and authorized to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate commerce law against the defendant in relation to the matters hereinafter complained of."

The facts as set forth show the defendant railway company to be a common carrier, owning the lines of railway, and engaged in interstate commerce, between the cities of St. Louis, Mo., Wichita, Kan., and Omaha, Neb. The distance from St. Louis to Wichita is 458 miles; to Omaha, 501 miles. That all freight on defendant's lines to the two cities, going to and from St. Louis, passes over 232 miles of the same track, to Holden, Mo.; thence on separate lines to Wichita, 226 miles, to Omaha, 269 miles, being a haul of 43 miles less to Wichita than to Omaha. The bill further sets out in detail the schedule rates of freight to the two cities, showing that about 100 per cent. greater rates are charged to Wichita than to Omaha, on the same kind and classification of freights, and this while the shipments are made, as alleged, contemporaneously and under similar circumstances and conditions. It is further alleged that such rates are "unreasonable, excessive, and exorbitant," and are unjust discrimination against the city of Wichita; that the city of Wichita is a general distributing point for a large scope of country, embracing Central and Southern Kansas and the Indian Territory and Oklahoma; and that these exorbitant and unjust rates, and this unlawful discrimination against the city of Wichita and its distributing territory, cause great and irreparable prejudice and injury to the citizens of the United States and the public generally engaged in and affected by this interstate commerce between St. Louis and Wichita.

The provisions of the interstate commerce act upon which the charges are based are as follows:

Section 1 of "An act to regulate commerce" provides:

"That all charges made for any service rendered, or to be rendered, in the transportation of passengers or property as aforesaid, or in any connection therewith, or for receiving, delivering, storage, or handling such property shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 2 provides:

"That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any services rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section 3 provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or subject

to any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

If the allegations of the bill are true,—and they are so taken on demurrer,—there seems to be no room for doubt as to the violation of the law by the defendant company.

In the able briefs presented by counsel for the respective parties, the main point of controversy is—First, as to the right of the United States to maintain such a complaint against defendant in any form; and, second, as to the form in which that remedy is to be sought. Counsel for defendant very tersely state their case as follows:

"It is the theory of the defendant that the complainant has stated in its bill no just or sufficient facts to constitute a cause of action in its behalf against this defendant; that, as a matter of law, the United States of America has not, pursuant to 'An act to regulate commerce,' upon which this bill is founded, a cause of action against this defendant, and that this court has no jurisdiction, and cannot, by virtue of said act or other power or right, draw unto itself original and independent jurisdiction to try said cause."

In view of what, upon the face of the bill, would seem to be a very gross violation of the express prohibitions of the interstate commerce act, there certainly ought to be a remedy somehow and somewhere, and there ought to be a means of compelling defendant company to obedience to this law. The whole object, intent, and design of the interstate commerce act, with its sweeping clauses, and far-reaching and all-providing prohibitions, was to provide a safe, easy, and expeditious mode of reaching and preventing just such abuses as are charged in this bill. That relief may be had through a court of equity by injunction in such cases where the proper parties are before the court is abundantly supported by the authorities, and, as a general proposition, will hardly be questioned. "But," say the counsel for defendant, "we have here neither the proper parties nor the proper forum." By acts of Congress of March 2, 1889, and February 10, 1891, the twelfth section of the original act was amended by inserting after the first clause a provision which seems to have a special bearing on this question. The amendment is as follows:

"And the commission is hereby authorized and required to execute and enforce the provisions of this act; and upon the request of the commission. it shall be the duty of any district attorney of the United States to whom the commission may apply, to institute in the proper court, and to prosecute under the direction of the attorney general of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States," etc.

Now, these amendments mean something. They are couched in the language of a grant of new authority, and impose additional requirements as to the rights and duty of the commission to see to it that the law is enforced. And a significant fact in this connection is that this enactment follows and might appear to be the

logical sequence of the condition of things prior to the passage of the amendments, as shown by the report of the commission on the 1st day of December, 1891, and of the rulings of the courts in reference to the powers of the commission prior to the passage of these amendments; for, although the date of the report is after the passage of the amendments, it obviously relates to the condition of things prior to their passage.

In fifth annual report, 1891 (pages 14-19), the commission say:

"Though required to execute and enforce the provisions of the act, the commission, not being invested with power to enforce its own orders, is dependent for the efficiency of such execution and enforcement upon the courts. Within the year, and in compliance with the provisions of section 16 of the act, applications have been made by petition to the United States circuit court, and suits are now pending for the enforcement of the orders which, with a single exception, were made in previous years."

Attention is called to the fact that the orders of the commission made in previous years were then going through the slow process of enforcement by the courts. This is what is by the counsel for the defendant forcibly styled "the circumlocution of procedure in the hitherto established ways." To avoid this "circumlocution," and afford a speedy remedy, is obviously desirable, if it can be accomplished.

The abuse charged in the bill affects the public, and is pecuniary in its nature. The injury is suffered by a large number of citizens of the United States, through the alleged wrongdoing of the defendant in its quasi public character of a great corporation, engaged in interstate commerce, and under the direct protection, control, and prohibition of the laws of the United States. The United States is bound to its citizens for the enforcement even of the criminal prohibitions of the statute leveled at all violations of the duties owed to the public by such common carriers. Section 10 of the act makes any violation of the provisions of the act a misdemeanor, punishable by a fine not exceeding \$5,000. The act was passed by the congress of the United States in pursuance of a right reserved by the constitution to regulate interstate commerce. With this right to legislate on the subject goes the corresponding duty of the United States to protect the public interests, when invaded by violations of the rules laid down and prescribed by this law. Here we have, by the averments of the bill, a case where thousands of her citizens, spread over a large territory, are being injured daily in their property rights and commercial interests by a violation of this law in many of its most important features. The only practicable remedy would seem to be by an equitable injunction against such practices, and it would appear eminently right and just that the government should move in the matter for the protection of its citizens, and to enforce obedience to its laws on the part of this great corporation, acting in its capacity of a quasi public servant. These views are in harmony with and supported by many adjudicated cases main-

taining the authority and duty of the sovereign to protect the public interests from unjust invasion and violation.

It is contended that, even if the United States might bring such a complaint, it could be done only by proceedings initiated through the commission; that the remedy provided by the act is exclusive, and that access to the courts in such cases is solely and only through and by way of the commission; that a formal preliminary investigation by the commission is essential to vest jurisdiction in the court. There is no question but that this is one way to reach the court; and it was at first, doubtless, deemed desirable as a ready mode of bringing the parties together, and enabling them, in a spirit of mutual concession, to adjust amicably and fairly their differences before the commission. But in practice it seems the inherent defects of the system were very soon felt, in that the decisions of the commission did not decide anything, and its orders were not enforceable except upon the voluntary submission of the offending party.

In *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, cited by counsel for defendant, Judge Jackson, in commenting on the relative powers of the commission and the courts, says:

"The act to regulate commerce does not undertake either to create an 'inferior court,' or to invest the commission appointed thereunder with judicial powers or functions. It is invested with only administrative powers of supervision and investigation, which fall far short of making it a court, or its action 'judicial,' in the proper sense of the term. Its action or conclusion upon matters brought before it for investigation is neither final nor conclusive; nor is it invested with any authority to enforce its decision or award. It hears, investigates, and reports upon complaints made before it, but subsequent judicial proceedings are contemplated and provided for, as the remedy for the enforcement of the order or report of the commission in all cases where the party against whom its decision is rendered does not yield voluntary obedience thereto. The act does not make the circuit court the mere executioner of the commissioner's order or recommendation, so as to impose upon the court a nonjudicial power. The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the commissioner's report is made *prima facie* evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the case *de novo*, upon proper pleadings and proofs; the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."

This was in January, 1889, that Judge Jackson so plainly shows the defects of the commission as affording no final judicial settlement of controversies. As he well says, upon the circuit court of the United States "the jurisdiction is conferred of enforcing the rights, duties, and obligations" recognized by the interstate commerce act. When cases begun before the commission reach the courts, the only legal effect given by the act to the findings of the commission is to make them simply *prima facie* proof of the facts found, subject to be relitigated on a trial *de novo* as to the whole matter. This decision, and others in line with it, and the report of the com-

mission in 1889, heretofore cited, in which complaint is made of the want of any ready means of enforcement of the decisions or orders of the commission, may well have led congress to the enactment, on February 10, 1891, of the amendment to section 12 of the act, cited *supra*, and may throw some light, too, upon the proper construction of the amendment. When this amendment is considered, particularly in its historical connection, with the first clause of the act, it seems impossible to escape the conclusion that it was intended to confer upon the commission a power and a direction to avoid this happily styled "circumlocution of procedure in the hitherto established ways," and to afford a speedy and effective means of bringing the offenders immediately before courts of competent jurisdiction, to answer both civilly and criminally for their violation of the law. The language of the amendment is:

"And the commission is hereby authorized and required to execute and enforce the provisions of this act; and upon the request of the commission, it shall be the duty of any district attorney to whom the commission may apply to institute in the proper court, and to prosecute under the direction of the attorney general of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof."

This was after four years' trial of the practical operations of the commission, and painful experience of its inherent defects, so far as concerned the ultimate and final relief sought for by the honest citizen contending against the abuses practiced by these great corporations. The "preliminary investigation" was not only inefficient to right his wrong by any binding adjudications, but often, even where administered by the ablest jurists and best men in our country, was the means of piling up difficulties in his way, and creating new obstacles to the attainment of his rights. Now, this amendment, in just so many words, places the power in their hands, and imposes upon their conscience the duty, of seeing that this interstate commerce act shall be enforced; and, that there may be no delay in the matter, it is added: "And upon the request of the commission, it shall be the duty of any district attorney," etc., as cited *supra*. This request of the commission is alleged in the bill. It will be noted that the United States attorney, when called upon, is not merely to prosecute by indictment for the criminal feature of the violation of the law, which, of course, is done without the formal preliminary trial, but in the very same connection, and by the sanction of this same provision, he is "to institute in the proper court, and prosecute under the direction of the attorney general of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof." The language of this amendment clearly distinguishes the remedy from that provided in section 16, which is for an application to the court for the enforcement of the orders of the commission. This is an application to be made by the proper United States officer, on the request of the commission, "for the enforcement of the provi-

sions of this act, and for the punishment of all violations thereof." "Punishment" refers to the prosecution for misdemeanors, under section 10. The clause "provisions of this act" occurs a score of times throughout the act, and, except in a few instances where it is limited by the special matter to which it applies, is always used with reference to the great remedial features of the act,—the rights protected and the wrongs redressed by it. To reach a proper construction of this act and this amendment, it must be kept in view steadily that the object of the creation of this commission was not merely to afford, as was supposed, a ready method of settling controversies between individual shippers and the common carriers, but it had a far wider sweep and higher scope and design, which was by affirmative action on the part of the commission, on its own motion, to have instituted and carried through proceedings for the correction of abuses and the righting of wrongs, which affected the public commercial interests; and this even without the intervention of individual litigants at all. In section 16 it is made the "duty of the commission," and is "lawful for any company or person interested," to make the application there provided for. That is merely to carry out and have executed by the courts the orders already made by the commission. But the amendment to section 12 obviously contemplates the action of the commission, in causing original proceedings to be instituted in the proper courts for the enforcement of the act. Not only is the commission wanting in judicial authority to execute its decrees, but is also unlike the court, in that it is not to wait for injured parties to appear at its door to prefer their complaints. It is actively and aggressively to "inquire into the management of the business of all common carriers," and to keep itself "informed as to the manner and method of which the same is conducted," and to obtain from them "full and complete information necessary to enable the commission to perform and carry out the objects for which it was created." These extracts are all from the first clause of section 12 of the act, and following this is the next clause (quoted *supra*), which lays upon the commission broadly the duty to see to the enforcement of the wise and beneficent provisions of the act; and to that end, whenever a proper case is found, its duty is plainly to call upon the United States, through its appointed officer, the district attorney, to institute the necessary proceedings to right the wrongs and correct the abuses found to exist. The language of this clause is imperative,—*"is authorized and required to execute and enforce."* And, upon such request, the district attorney shall "institute in the proper court" the "necessary proceedings for the enforcement of the provisions of this act." In accomplishing the enforcement of the civil features of the act, the commission bears much the same relation to the court that the grand jury does in criminal matters. By the methods provided under the act,—and they are ample,—the commission is to keep itself thoroughly informed as to all the operations of every common carrier in the United States engaged in interstate commerce; and whenever, in the course of its



investigations, it discovers abuses which affect the public commercial interests injuriously, its duty is at once to have such abuses suppressed, and, if need be, to call in the strong arm of the government, through its appointed courts, to enforce the provisions of the law.

In this case the allegation is made that the action is prosecuted "in pursuance of the request of the interstate commerce commission of the United States," and "under direction of the attorney general of the United States." These prerequisites for the bringing of the action are safeguards against the indiscriminate and ill-advised prosecutions apprehended by counsel for defendant. It is not to be supposed that the commission and the attorney general of the United States would lend the sanction of their authority and direction to institute such proceedings, except in cases where, after due consideration, their judgments dictated the necessity for the interposition of the strong arm of remedial justice.

Without attempting to follow counsel in detail through the able and exhaustive presentation of cases in their briefs, the court is of the opinion that the course pursued in the bringing of this action is sustained by the great current of authority as applied to the acts of congress under which it is instituted. The invasion of great property rights, as distinguished from questions of mere sentiment or public policy, are in apt terms alleged in the bill. These property rights are such as, by the act of congress, the United States is bound to protect and enforce, and by a court of equity alone could any full and complete remedy be afforded. The demurrer to the complainant's bill is therefore overruled.

---

IDLER et al. v. BORGMEYER.

(Circuit Court of Appeals, Third Circuit. January 22, 1895.)

No. 3.

1. CONTRACTS—INTERPRETATION—AWARDS BY VENEZUELAN MIXED COMMISSIONS.

Between 1817 and 1821, one I. furnished supplies to the government of Venezuela. Payment therefor not having been made, I. went to Venezuela to collect the debt, and in 1832 secured a judgment in a court of Venezuela, against the government, for \$70,520. On September 25, 1832, I. entered into a written contract with one C., whereby, in consideration of services rendered in procuring said judgment, I. agreed to pay C. 10 per cent. of the amount of his claim on the government of Venezuela "as soon as the payment or satisfaction is realized, in virtue of the judgment." Appeals were taken by the government of Venezuela from the judgment, but the same was affirmed. Subsequently, however, by a proceeding known as "restitutio in integrum," the government obtained the vacation of the judgment, and caused the matter to be restored to the position in which it was before such judgment was entered. Failing to obtain payment from Venezuela, I., and others having claims against that country, sought the intervention of the United States government, and in 1866 a convention was concluded between the United States and Venezuela, under which the claim of I., with others, was submitted to a mixed commission, authorized to

make such decision "as they should deem conformable to justice." The commission awarded to I. the amount fixed by the judgment of the Venezuelan court, with interest, and, in pursuance of such award, certain payments on account were made in 1871 and 1876. Both Venezuela and certain citizens of the United States being dissatisfied with the proceedings of this commission, a new treaty was concluded in 1885, providing for a new commission, also authorized to decide "as they should deem conformable to justice," which commission made the same award to the representatives of I. as the first commission, deducting the payments on account, and further payments were afterwards made on this award. The representatives of C. claimed the 10 per cent. commission on the payments made to I. *Held*, that the payments agreed to be made to C. were contingent upon I.'s recovering satisfaction for his judgment against Venezuela; that such satisfaction was never realized, the government of the United States not having attempted to collect the judgment, but its intervention having been strictly diplomatic and peaceful, the awards of the commissions having been made, independently of the judgment, upon the merits of the claim, and not at all in consequence of C.'s services; and that the 10 per cent. agreed to be paid to C. never became due, under the terms of the contract.

2. PAYMENT—PRESUMPTION AFTER TWENTY YEARS.

Shortly after the execution of the first contract, I. also made a second contract with C., by public record, according to the law of Venezuela, whereby he acknowledged himself indebted to C. in the sum of \$4,400, for moneys advanced by C., and agreed to pay the same from the first funds paid him by the government of Venezuela, to which C., by the same instrument, assented, and agreed to wait. C. died in 1836, and his heir, under the law of Venezuela, immediately succeeded to all his property, with the right to demand, sue for, collect, and recover all claims due him. I. died in 1856, and his estate was duly administered. No claim was made on behalf of C. until 1892, when letters of administration were taken out in Pennsylvania, and suit brought upon the contract. *Held* that, even assuming that the evidence presented did not prove payment of the debt, in fact, as it appeared to do, the debt would be presumed to be paid, since for more than 20 years there had been a person entitled to demand and receive it, who might have taken out administration if he so desired, and, even if C.'s agreement to wait bound him for more than a reasonable time or after the vacation of I.'s judgment against Venezuela, more than 20 years had elapsed since the first payment, in 1871, which, according to the claim of C.'s representatives, was a payment upon the judgment.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action by Charles L. Borgmeyer, administrator of the estate of Alexander Chataing, deceased, against William Idler and John W. Haseltine, administrator de bonis non of Jacob Idler, deceased, upon two contracts, made in 1832 and 1833. Judgment was rendered in the circuit court in favor of the plaintiff, this court (BUTLER, District Judge), filing (March 6, 1894) the following opinion:

On the trial it appeared that between 1817 and 1820 Jacob Idler of Philadelphia and certain associates furnished Venezuela, then engaged in war, with various military supplies, on account of which she became their debtor in a large sum of money. After peace had been declared Mr. Idler, on his own account and as agent for his associates, proceeded to collect the amount due. Encountering difficulties, he placed the business in the hands of Alexander Chataing a reputable citizen of Caracas. After great labor and extended litigation Mr. Chataing succeeded, on September 18, 1832, in obtaining a judgment in Mr. Idler's name for \$70,520.11. In the meantime Mr. Chataing had furnished Mr. Idler a large sum of money to enable him to live in Venezuela (where he had gone to assist about the business) and to carry on the litigation.

A few days after the judgment was obtained (September 25, 1832) Mr. Idler entered into the following obligation of record with Mr. Chataing.

"[Seal. Fifth seal for the economic year 1832-1833; value, a real.]

"Be it known by this document, that I bind myself to pay to Senor Alexander Chataing, as well on my own account as upon that of my absent associates, a commission of ten per cent. upon the amount of the payment that I am claiming from the government of Venezuela on account of supplies that I made to the aforesaid government in the years 1817 to 1820, as soon as the payment or satisfaction is realized which the aforesaid government has to make me in virtue of a judgment of the Senor 'Juez de Letras' issued on the 18th of the current month. I declare that the aforesaid commission of ten per cent. has been well merited and gained by Senor Alexander Chataing, on account of the assistance that he has given me during the prolonged suit which he has pursued against the government, and on account of the numerous acts of diligence, which he has performed to that purpose; and in conclusion, on account of the entire direction which he has given to the matter, although no publicly given power has authorized him, since he has discharged exactly, and with my consent in all details, the matter referred to, as an honest and careful attorney. For which reason I give him the aforesaid commission of ten per cent. upon the whole amount that the government has to pay me; i. e. as well upon the principal as upon the interest that I claim from the state. I will make payment of the aforesaid commission of ten per cent. in the same way that the government makes it to me, that is to say, if it makes it to me by installments in metal I will pay the commission as well in metal by installments, in pro rata of the sum that I receive at each installment; and if the government makes me the payment in treasury notes or bonds for the whole amount, or whatever other nature in the same way I will make payment of the aforesaid commission in the same specie or form of treasury notes or bonds. I desire that this document shall have the same force as if it had been a public writing, and renounce all laws that could favor me; in virtue of which I sign the present document in the presence of three witnesses.

"Caracas, September 25, 1832.

Jacob Idler.

"(The words 'ano' amended. Vale.)

"Witness: Franco Ribas.

"Witness: J. N. Zeressa.

"Witness: Cipriano Morales."

On January 9, 1833, Mr. Idler entered into a second obligation of record with Mr. Chataing in the following terms:

"[Seal. Fifth seal for the economic year 1832-1833; value, two reals.]

"I, Colonel Andres Ybarra, principal registrar of the province, certify: That in the registry of public instruments kept by the Escribano Juan Antonio Hernandez, appears a writing of the following tenor:

"'Obligation: In the city of Caracas, on the ninth of January, 1833, before me the escribano publico and witnesses, appeared Senor Jacob Idler, of this vicinity, and over twenty-five years of age, whom I certify that I know, and exhibited to me a ticket of the following tenor:

"'"Treasury General of Venezuela: Ticket No. 18:—January 9th, 1833: For 20 reals which Senor Alexander Chataing has paid, registry fee, due for 4,000 pesos which Senor Jacob Idler owes to him and promises to pay by a writing agreed to by himself before the Escribano Antonio Hernandez: two pesos four reals:—(Copy of an entry made upon folio 2 of the memorandum book of this month.)

"'"Caracas, date as above.

"'"[Signed]

Lecuna Smith."

"'—As literally appears by the original which remains in the record office in my charge, which I refer to, and certify.

"'Whereupon he said: That he acknowledges that he owes to Senor Alexander Chataing, also a neighbor, and of the "commercio," the amount of 4,400 pesos, of eight reals of silver each, which in coined and current money of account to his satisfaction the latter has furnished him, since the 24th of September, 1831, for expenses of his subsistence, and costs of the prolix and expensive suit pursued against the government of Venezuela in compensation for supplies made in the years 1817, 1820, in virtue of a contract made for him.

self and his absent associates, and, granting to him proper receipt with renunciation of the laws of delivery, exception of non numerata pecunia, proof, etc., of the case,—obliges himself to satisfy it executively, with costs, from the first funds that may be paid him by the government, his debtor,—with his person and estate, present and future, judicial power; submission to this in order that it may compel and constrain him executively to its fulfillment, as if it was by judgment given by consent and passed as a thing adjudged authoritatively, and making hereby renunciation of all laws, statutes and rights in his favor, although it be one that may be propitious and afford a valid exception. The creditor, whom also I certify that I know, being informed of the literal contents of this writing, said that he accepts it according to law, and agrees to wait. Thus respectively have said, granted, and signed,—Senores Luis Apesteguia, Manuel Galloso and Lorenzo Callett of this vicinity (being witnesses), Jacob Idler, Alex. Chataing.

"Before me, Juan Antonio Hernandez, Escribano Publico."

When Mr. Idler demanded payment of his judgment Venezuela procrastinated; and eventually denied liability and sought to rid herself of the judgment.

Failing to accomplish the latter by an appeal to the supreme court (where the judgment was affirmed) she resorted to a proceeding known in that country as the "remedy of restitutio in integrum", which, if not obsolete at the time, was clearly inapplicable to the case, and by this means, and a reorganization of the courts to suit her purposes, she obtained what purported, and was intended, to be a nullification of the judgment.

In the meantime Mr. Idler, in despair of obtaining redress at the hands of Venezuela or her courts had returned to Philadelphia, and in conjunction with other persons having claims against Venezuela, sought the aid of his own government in the enforcement of his and their rights. After the lapse of many years (in 1867) a treaty was signed between the United States and Venezuela, whereby commissioners were appointed to examine and settle these claims. The commission sat at Caracas, and in 1868 made an award which sustained the claim of Idler and his original associates,—taking the judgment of 1832 as the basis of the claim, treating it (the judgment) as valid and binding—adding interest thereto, and awarding accordingly the sum of \$252,814.

Under this award Venezuela, on June 21, 1871, paid \$17,696.93. She was dissatisfied, however, with the result of the commission, and sought to escape it. In 1873 the congress of the United States declared the award final. Following this (May 16, 1876) she paid a further sum of \$20,224.27. She continued, however, to express dissatisfaction and in 1878 congress repealed the statute of two years previous, declaring it to be without prejudice to the rights of the claimants under the previous award. The president of the United States continued to press for payment of the award; and in 1889 another treaty was entered into with Venezuela, whereby a second commission was appointed, which met at Washington in 1890.

After a very full and protracted hearing, this commission also sustained the claim of Idler and his original associates, taking the judgment of 1832, which it held to be valid and binding, as its basis, adding interest, as the former commission had, and crediting the payments made under the former award. In pursuance of this second award, \$48,374.60 were paid October 15, 1890, and \$20,330.64 January 23, 1892.

The record of proceedings before the commissions, as well as numerous other papers and documents connected with the claim, and the litigation thereon, are in evidence, and exhibit many facts, of more or less importance, not embraced in the foregoing statement, some of which will be referred to hereafter.

The plaintiff sues on the two obligations given Mr. Chataing (who died in 1836,) to recover the amount due from the several sums recovered from Venezuela.

The defendants requested the court to charge as follows:

"Fourth. The construction of the contract for compensation is for the court. It was not in contemplation of the parties to that contract that Chataing should receive compensation for an award made by an international tribunal many years after his death, presented and prosecuted by other agents and

attorneys. Venezuela having declined and refused payment, there can be no recovery based upon any award made in Caracas in 1868 or in Washington in 1890 (*Pemberton v. Lockett*, 21 How. 257); and the verdict under all the evidence must be for the defendant."

"Sixth. The undisputed evidence in this case is that no payments have been made by the government of Venezuela on account of the judgment rendered against it and which is set forth in said Exhibit B of plaintiff's statement, and therefore the verdict should be for the defendant.

"Seventh. The undisputed evidence in this case is that no payments have ever been made by the government of Venezuela on account of the original judgment or sentence of her courts, and she has uniformly refused and resisted payments of it for more than fifty years past; therefore no obligation to make payment has accrued under Exhibit B of the plaintiff's statement in this action, and the verdict should be for the defendant.

"Eighth. The effect of the treaties between the government of the United States and Venezuela on the Idler claim was to nullify and set aside the judgment referred to in Exhibit B. and remit the claimants to their original claims, subject to all just and equitable defenses.

"Ninth. The award in favor of Idler and his associates was made by an international commission administering justice and equity, for the supplies, etc., furnished by them to that government, and was a sentence or award, after full examination of the merits of the claim, irrespective of the original sentence of the Venezuela court.

"Tenth. By the decree of *restitutio in integrum* the judgment in favor of Idler and his associates was annulled in Venezuela. More than fifty years afterwards an international tribunal made an award to these parties, and the moneys they received were based on that award, and there can be no recovery in this suit."

"Twelfth. Upon the whole evidence the verdict should be for the defendant."

Counsel agreeing that the questions involved were for the court alone, the jury was directed to find for the plaintiff in the amount of his claim—the defendants' points requesting a different direction being reserved. Subsequently the defendants took a rule for judgment notwithstanding the verdict, and also a rule for new trial—which rules are now under consideration. Each will be disposed of in its order.

To answer the points separately is unnecessary. A sufficient answer to each will be found in the following discussion of the case.

The first matter for consideration is: What is the proper construction of the earlier of the two obligations sued upon? This obligation is in substance for the payment of 10 per cent. of the judgment obtained by Idler, when satisfaction is realized upon it. He is to be paid from this source alone. Although the consideration is stated to be past services of great merit, he cannot recover anything if nothing is realized from this source. The language of the obligation is unequivocal, and we are not at liberty to speculate about the meaning of the parties; we must find it in what they have said. Chataing chose to accept, as satisfaction for his services, the stipulated percentage of what might be collected on the judgment; and Idler obliged himself to pay this amount, in this manner. The former did not undertake to collect the judgment. The parties, of course, contemplated its payment; and probably supposed it would be soon, and without further litigation. This supposition is however, unimportant. The duty of collecting it was on Idler. If the trouble and expense was greater than had been contemplated it concerned him alone. His obligation is, in terms, unconditional and absolute; and no condition can be read into it by conjecture. If he desired such condition he should have required it. Chataing would then have been at liberty to accept the obligation, or to reject it and demand immediate payment of the debt—which was overdue. Why should he not, under such circumstances, have demanded immediate payment? The consent to await collection of the judgment seems very liberal; why should he suffer from Idler's subsequent misfortune? A different view would deprive him of a right to recover anything on a debt which Idler acknowledged to be due and highly meritorious, if the latter should incur labor and expense in recovering his money—would attribute to him the folly of agreeing to abandon his debt if Idler should encounter this misfortune.

The case bears no material resemblance to *Pemberton v. Lockett*, 21 How. 257, cited by the defendants, where the contract was, mainly, for future services, the performance of which became impossible because of a total change of circumstances, as stated by the court in that case. *Bachman v. Lawson*, 109 U. S. 659 [3 Sup. Ct. 479], is nearer in point.

The second question is: Was the money which has been received collected on this judgment? It is unimportant how Venezuela considered this; how should it be considered as between Chataing and Idler? In entering upon this inquiry it must be remembered that the judgment could not be collected by ordinary execution. Satisfaction could only be obtained through voluntary payment by the debtor, or the intervention of the creditor's government. Venezuela refused to pay, and the creditor's government intervened and collected the money. Was it collected on the judgment? Substantially it was. A full examination of the evidence leaves no doubt of this. At all times, from the rendition of the judgment in 1832, until the award of the last commission, the contention of Idler's administrators and his counsel, has been that the proceeding restituito in integrum was illegal and void, that the judgment was unimpeached, valid and conclusive, and that Venezuela should pay accordingly. Before the first, as well as the second, commission, this was Idler's position. From the time his government intervened to aid him, this was its attitude. On the one side the effort was to sustain and collect the judgment, and on the other to show that it no longer existed. So the respective commissions regarded the controversy; and finding the judgment alive and valid, they awarded the amount of its face, \$70,520, with interest added to date. The opinions filed by Mr. Talmage, the United States commissioner, and Mr. Machado, the umpire, of the first commission, show these facts (so far as they relate to that commission) with such distinctness and clearness that I am constrained to annex copies of them to this opinion.<sup>1</sup>

In 1889, when preparing to appear before the second commission, Idler's administrators and his counsel prepared a statement of his case, in the form of a petition, in which, after giving a history of the claim and the litigation upon it, asserting the binding and conclusive force of the judgment of 1832, they state the petitioner's attitude before the first commission, and the conclusions of that commission, as well as his attitude before the second commission, as follows:

"The claim of your petitioner's intestate was duly presented on or about the 29th of April, 1868, to the mixed commission which was organized at Caracas under the aforesaid treaty of April 25, 1866, between the United States and Venezuela, and that the administratrix of his estate claimed for and on account of the aforesaid judgment of the supreme court of Venezuela and the previous judgments of the courts below, confirmed thereby, the sum of \$70,529.11½, awarded by the aforesaid final arbitrator, Jose Cadenas, with interest thereon at the rate of six per cent. per annum from June 30th, 1825 (to which date interest at that rate had been included in said award), until the 1st day of October, 1832, when the said award was confirmed by the said superior court at Caracas, amounting at that time, principal and interest, to the sum of \$101,209.28, and interest thereon at the rate of six per cent. per annum from October 1, 1868, the date of the decision of the umpire of the said mixed commission, amounting to \$217,509.95, and making in all the sum of \$318,809.23; that, upon the disagreement of the commissioners, the said claim was referred to the umpire of the said mixed commission, who made an award in favor of your petitioner's intestate in the sum of \$252,314; that the said umpire, instead of calculating interest on the aforesaid award of Jose Cadenas to the date of its confirmation by the aforesaid superior court, and then calculating interest on the sum total due upon that judgment, calculated simple interest from June 30, 1825, at the rate of six per cent. per annum, on the amount awarded by the said Cadenas, to the date of his own award, thus giving the Venezuelan government an undue advantage of more than \$65,000."

The counsel who appeared for the United States before the second commission (Mr. Ashton) commences his statement of the Idler claim in these words: "The claim in this case originated in four contracts made between Jacob Idler, a citizen of the United States, and the Venezuela government in and prior to

<sup>1</sup> See note at end of case.

the year 1820, and is based upon a judgment of the supreme court of Caracas rendered on the 1st of October, 1832, in favor of Idler, affirming a judgment of the jury de letras de hacienda (treasury court) entered September 18, 1832, upon an award made in his favor by Jose Cadenas at Caracas on the 11th of September, 1832."

The brief throughout is consistent with this statement—the source and foundation of the claim being the judgment of 1832.

The opinion of this commission was delivered by Mr. Little and is found at page 155 to 194 of its records. He starts out with a statement of the questions involved, as follows: "How far is the judgment of 1832 to be accepted as binding in the proceeding before us? Was the court organized for the Idler case, (the court that applied the *restitutio in integrum* remedy) in 1836 a legal body? If not, were its proceedings valid? Did the remedy *restitutio in integrum* pertain to Venezuela as respects the Idler case? If so did the proper court obtain jurisdiction in the premises? Was the general effect of the proceedings in 1836-39 a denial of justice? If so should the judgment of 1832 be allowed to stand?" After these questions are considered at great length they are answered in favor of Idler, the *restitutio in integrum* proceedings held to be unlawful and void—the judgment to be valid and binding upon Venezuela, the opinion terminating as follows: "Our conclusion from the foregoing considerations is that the proceedings in *restitutio* were, as against Idler, and are against the claimant, a nullity. This is the best we can say of them. The judgment of 1832, standing as it does, unaffected by the subsequent proceedings, must be sustained unless manifestly wrong." He then examines it on other objections raised, in which he finds no substance, and concludes as follows: "An entry can be prepared, allowing the claimant the amount of the judgment, \$70,520, omitting the odd cents, with six per cent. interest, that being the rate named in the contracts, from October 1, 1832 (when the judgment was affirmed by the supreme court) to September 2, 1890, inclusive, less the deductions on account of payments made on the former awards. The same to be distributed as per agreement on file dated March 17, 1863." A decree was prepared and entered accordingly.

In view of these facts I can entertain no doubt that the money collected must be regarded as realized on the judgment; the fruits of its execution by the government of the United States.

The third question is: What is the proper construction of the second obligation? This presents no difficulty. The undertaking is, in effect, for the payment of 4,400 pesos "from the first funds that may be paid him (Idler) by the government of Venezuela, his debtor," in consideration of money theretofore furnished him for his support in Venezuela, and to enable him to prosecute his claim against that country. And as the obligation states, Mr. Idler "accepted it for his debt and agreed to wait."

Here no question arises respecting the right to payment from the money received,—unless the claim is subject to some other defense. Like the earlier obligation, it was not due, however, until money was received from Venezuela in 1871, and no interest is therefore recoverable on it prior to that date. It was an obligation to pay a sum certain on the happening of a described event, and the payment of this sum when the event occurred would have discharged it.

It follows from what has been said that judgment cannot be entered for the defendants in pursuance of their points.

Should a new trial be granted? It is asked for on the ground of after-discovered evidence, and an excessive estimate of the amount due. As respects the first there is no room for difficulty. There is no after-discovered testimony that should not have been previously discovered, if wanted. This is all I need say on that subject; but it may not be improper to add that I am not satisfied that the evidence referred to would be material if heard.

The second ground involves several considerations. I do not find any evidence of payments on account, beyond the plaintiff's credits.

The statute of limitation does not apply, inasmuch as there was no administration on Chataing's estate until recently, and there was no one, therefore, to receive the money or sue for it. *Marsteller v. Marsteller*, 93 Pa. St. 350.

Nor did a presumption of payment run as respects the proportion claimed of the money received in 1871, for the same reason. There was no one who had a

right to demand it—no one to whom it could lawfully be paid. It may be said that Chataing's heirs could have qualified themselves to receive, and to sue for it. But such an argument applies with equal force to the plea of the statute, in such cases. It is wholly illogical to say that the presumption of payment runs under such circumstances, and that the statute, which is founded on the presumption (and applied to simple contract debts) does not. The defendant cites and relies on *Foulk v. Brown*, 2 Watts, 215. A careful examination of this case shows that the court there concedes that under ordinary circumstances, the absence of administration precludes the presumption of payment, and puts the decision on the ground, distinctly and exclusively, that while the plaintiff (the decedent's husband) could not sue without administering, he was absolute owner of the claim, had complete authority to receive it and to enforce payment, during his wife's lifetime, and that therefore the presumption ran against him. The administration after her death was necessary only to meet a legal technicality. The money was his unconditionally. It was not applicable to the decedent's debts; she could have none under the existing law.

Here the money was not due, as we have seen, until 1871; and Chataing being then dead, and no legal representative appointed until recently before suit, no presumption of payment can arise. If the circumstances were different, however, I am inclined to believe the evidence here would repel the presumption. The obligations as we have seen were payable alone out of the money received from Venezuela, and I think it appears quite distinctly that they were not paid from this source. But it is unnecessary to pursue the subject.

Independently, however, of this defense (which goes to a part of the claim) the defendant says the verdict is too large, and this I think is true.

What should the plaintiff recover? Sympathizing with Idler's misfortune in his endeavors to realize on the judgment, the plaintiff has waived claim to a percentage of the one-third paid Mr. Whiton, an attorney, for services subsequent to the judgment. To ascertain the amount due we must take the sum paid in 1871, \$17,696.98, and deducting one-third (\$5,898.99) ascertain the amount due from the remainder, on the obligation of 1832, and after subtracting this, deduct the amount due on the obligation of 1833, \$2,887.76. Thus we find what should have been paid on these obligations in 1871. Adding interest to the date of verdict, we have the amount due on that account at that date. Taking 10 per cent. of two-thirds of each subsequent payment and adding interest will, when added to the sum just stated, show the whole amount due from the defendant. The annexed table <sup>2</sup> is an illustration, and shows

<b>1871.</b>				
<b>June 21.</b>	Administrator paid administrator.....	\$17,696 98		
	Less one-third.....	5,898 99		
		<u>\$11,797 99</u>		
	10 per cent. on.....	\$11,797 99	\$ 1,179 79	
	Pesos.....	\$ 4,400 00		
	Less credits.....	1,512 24	2,887 76	
		<u>\$ 4,067 55</u>		
	Interest on \$4,067.55 from June 21, 1871, to October 18, 1893, verdict	5,460 51		\$9,528 06
<b>1876.</b>				
<b>May 16.</b>	Amount paid administrator.....	\$20,224 57		
	Less one-third.....	6,741 52		
		<u>\$13,483 05</u>		
	10 per cent. on \$13,483.05.....	\$ 1,348 30		
	Interest on same from May 16, 1876, to October 18, 1893.....	1,408 97		1,757 27
<b>Oct. 15.</b>				
	Amount paid.....	\$48,374 60		
	10 per cent. thereof.....	\$ 4,837 46		
	Interest thereon from October 15, 1890, to October 18, 1893.....	870 66		5,705 12
<b>1892.</b>				
<b>Jan. 23.</b>	Amount paid.....	\$20,330 64		
	10 per cent. thereof.....	\$ 2,033 06		
	Interest thereon from January 23, 1892, to October 18, 1893.....	213 46		
		<u>2,246 52</u>		
				<u>\$20,239 97</u>



the sum due to be \$20,239.97 being \$7,432.33 short of the verdict. If the plaintiff will release this amount he can have judgment for the balance. Unless he does so, in writing, within 20 days from this date, a new trial will be granted.

The defendant thinks that as he received but one-third of the amount collected from Venezuela, he is liable (if at all) only on account of that sum. This is a mistake. The failure to receive more was the result of his voluntary act, and affects him and those with whom he acted alone. Shortly before the commission of 1868 assembled Idler's administrators entered into an agreement with his original associates defining their respective interests, and providing for a direct distribution to the several parties, of their shares of the money which might be collected. This agreement did not affect the rights of Chataing or his legal representative, under the obligations in suit. As respects that of 1832, as we have seen, Idler bound himself for 10 per cent. of what might be collected on the judgment. The obligation bound his associates, for whom he acted; but even if it did not, it bound him; and he could not escape this liability, or any part of it, by the voluntary agreement with his associates in 1868. As respects the second obligation, as we have seen, it bound Idler for 4,400 pesos to be paid from the first money collected on the claim which Idler was prosecuting, and this was represented by the judgment. The claim embraced the interest of Idler's associates as well as his own. The rights of Chataing under this obligation, as under the former, could not be affected by the agreement referred to.

Defendants bring error.

Edward H. Weil and M. Hampton Todd, for plaintiffs in error.

Samuel F. Phillips, Frederic D. McKenney, and Henry R. Edmunds, for defendant in error.

Before SHIRAS, Circuit Justice, and ACHESON and DALLAS, Circuit Judges.

ACHESON, Circuit Judge. This was a suit brought on September, 15, 1892, by Charles L. Borgmeyer, administrator of Alexander Chataing, deceased, against William Idler and John W. Hazeltine, administrators de bonis non of Jacob Idler, deceased. Alexander Chataing was a citizen of Venezuela, and a resident and merchant of the city of Caracas, where he died on August 20, 1836. Letters of administration upon his estate were granted to the plaintiff on September 14, 1892, the day before this action was commenced. Jacob Idler, who resided in Philadelphia, died there May 26, 1856. His widow administered on his estate, and upon her death, some 12 years later, letters of administration de bonis non, dated December 16, 1869, were granted to the defendants. The defendants settled administration accounts in the orphans' court of Philadelphia, and the moneys which had been received by them were distributed under the orders of that court. No claim on behalf of the estate of Alexander Chataing was ever made against Jacob Idler, nor was any such claim made against his personal representatives until the year 1892.

The plaintiff's statement of claim sets forth as grounds of action two instruments of writing (the originals of which are in the Spanish language), one dated September 25, 1832, and the other January 9, 1833. Before giving translations of these papers, it should be premised that, between the years 1817 and 1819, Jacob Idler, acting for himself and his associates in the enterprise (they all being citizens of the United States), furnished military supplies to

Venezuela. They claimed that a large balance was due them on that account. Disputes arose between that government and Idler, and the latter went to Venezuela about 1823, to effect a settlement. A prolonged litigation between the government and Idler in the courts of Venezuela ensued. On September 18, 1832, the juez de letras, the treasury court, an inferior tribunal, adjudged that the government was indebted to Idler in the sum of \$70,520.11½. In this state of affairs, the first of the two above-mentioned writings was executed. The translation furnished us reads thus:

"[Seal. Fifth seal for the economic year 1832-1833; value, a real.]

"Be it known by this document, that I bind myself to pay to Senor Alexander Chataing, as well on my own account as upon that of my absent associates, a commission of ten per cent. upon the amount of the payment that I am claiming from the government of Venezuela on account of supplies that I made to the aforesaid government in the years 1817 to 1820, as soon as the payment or satisfaction is realized which the aforesaid government has to make me in virtue of a judgment of the Senor 'Juez de Letras' issued on the 18th of the current month. I declare that the aforesaid commission of ten per cent. has been well merited and gained by Senor Alexander Chataing, on account of the assistance that he has given me during the prolonged suit which he has pursued against the government, and on account of the numerous acts of diligence which he has performed to that purpose; and in conclusion, on account of the entire direction which he has given to the matter, although no publicly given power has authorized him, since he has discharged exactly, and with my consent in all details, the matter referred to, as an honest and careful attorney. For which reason I have given him the aforesaid commission of ten per cent. upon the whole amount that the government has to pay me; i. e., as well upon the principal as upon the interest that I claim from the state. I will make payment of the aforesaid commission of ten per cent. in the same way that the government makes it to me, that is to say, if it makes it to me by installments in metal I will pay the commission as well in metal by installments, in pro rata of the sum that I receive at each installment; and if the government makes me the payment in treasury notes or bonds for the whole amount, or whatever other nature in the same way I will make payment of the aforesaid commission in the same specie or form of treasury notes or bonds. I desire that this document shall have the same force as if it had been a public writing, and renounce all laws that could favor me; in virtue of which I sign the present document in the presence of three witnesses,

"Caracas, September 25, 1832.

Jacob Idler.

"(The word 'ano' amended. Vale.)

"Witness: Franco Ribas.

"Witness: Jo. N. Zeressa.

"Witness: Cipriano Morales."

What particular services Mr. Chataing had rendered in procuring the judgment does not appear, and perhaps is a matter of no consequence. But in a letter dated Caracas, September 24, 1831, from Mr. Idler to Mr. Chataing, the former, after alluding to the protracted litigation in which he had been involved, and the mention of an appeal which the government had taken from a decision of Mr. Sprotto, a referee in the case, said:

"To avoid such an unjust loss to me and associates, who serve this government at a most critical epoch, I beg your assistance to obtain justice, knowing the great influence you have with the persons who can prolong or end this costly suit, as pr. liquidation of Mr. Sprotto, so just and clear. By so doing, I will allow you, for self and my associates, ten per cent. from the amount awarded and by the sentence, and, when received, to be paid to you in the same class of payments I receive of this government."

The translation of the other writing in suit reads thus:

"[Seal. Fifth seal for the economic year 1852-1853; value, two reals.]

"I, Colonel Andres Ybarra, principal registrar of the province, certify: That in the registry of public instruments kept by the Escribano Juan Antonio Hernandez, appears a writing of the following tenor:

"Obligation: In the city of Caracas, on the ninth of January, 1833, before me, the escribano publico and witnesses, appeared Senor Jacob Idler, of this vicinity, and over twenty-five years of age, whom I certify that I know, and exhibited to me a ticket of the following tenor:

"Treasury General of Venezuela: Ticket No. 18:—January 9th, 1833: For 20 reals which Senor Alexander Chataing has paid, registry fee, due for 4,000 pesos which Senor Jacob Idler owes to him and promises to pay by a writing agreed to by himself before the Escribano Juan Antonio Hernandez: two pesos for reals:—(Copy of an entry made upon folio 2 of the memorandum book of this month.)

"Caracas, date as above.

"[Signed]

Lecuna Smith."

"As literally appears by the original which remains in the record office in my charge, which I refer to, and certify.

"Whereupon he said: That he acknowledges that he owes to Senor Alexander Chataing, also a neighbor, and of the "comercio," the amount of 4,400 pesos, of eight reals of silver each, which in coined and current money of account to his satisfaction the latter has furnished him, since the 24th of September, 1831, for expenses of his subsistence, and costs of the prolix and expensive suit pursued against the government of Venezuela in compensation for supplies made in the years 1817, 1820, in virtue of a contract made for himself and absent associates, and, granting to him proper receipt with renunciation of the laws of delivery, exception of non numerata pecunia, proofs, etc., of the case, obliges himself to satisfy it executively, with costs, from the first funds that may be paid him by the government, his debtor,—with his person and estate, present and future, judicial power; submission to this in order that it may compel and constrain him executively to its fulfillment, as if it was by judgment given by consent and passed as a thing adjudged authoritatively, and making hereby renunciation of all laws, statutes and rights in his favor, although it may be one that may be propitious and afford a valid exception. The creditor, whom also I certify that I know, being informed of the literal contents of this writing, said that he accepts it according to law, and agrees to wait. Thus respectively have said, granted and signed,—Senores Luis Apesteguia, Manuel Galloso and Lorenzo Callett of this vicinity (being witnesses), Jacob Idler, Alex. Chataing:

"Before me, Juan Antonio Hernandez, Escribano Publico."

The judgment of the juez de letras was affirmed by the superior court on October 1, 1832; and on December 6, 1832, the decision of the latter court was affirmed by the supreme court of justice. The Venezuelan government, however, refused to pay the judgment, or to recognize its validity; and in the year 1836 took steps in the supreme court of justice to have the judgment annulled by the allowance of the remedy of restitutio in integrum. The matter was then so proceeded in that on December 20, 1838, the superior court made a decision granting to the government the remedy of restitutio in integrum against the decisions of September 18 and October 1, 1832, and restoring the whole subject to the condition in which it was on August 31, 1830; and this judgment of the superior court was affirmed on February 22, 1839, by the supreme court of justice of Venezuela. The effect of this decision of the highest judicial tribunal of Venezuela was to set aside the judgment of the juez de letras of September 18, 1832, and to open up the whole controversy.

No further proceedings with respect to the claim of Idler took

place in the courts of Venezuela. He and his association sought and obtained the friendly interposition of the United States in their behalf. Other citizens of the United States had claims against Venezuela. To all these claimants the government of the United States lent its good offices, and, as a result, a convention was concluded on April 25, 1866, between the United States and the republic of Venezuela for the adjustment of American claims upon the latter government. By the terms of this convention, a mixed commission, to sit at the city of Caracas, was created, consisting of two members, one appointed by each government, and an umpire chosen by the two commissioners, to whom all claims by citizens of the United States against Venezuela were to be submitted for final decision. "The commissioners," it was stipulated, "shall make such decision as they shall deem, in reference to such claims, conformable to justice, even though such decisions amount to an absolute denial of illegal pretensions, since the including of any such in this convention is not to be understood as working any prejudice in favor of any one, either as to principles of right or as to matters of fact." It was further stipulated that the commission should issue certificates for the sums to be paid claimants under its decisions, and that all such sums should be paid to the government of the United States.

Previously to the submission of the Idler claim to the mixed commission, and with a view thereto, Mrs. Idler, as administratrix of her deceased husband's estate, and her co-claimants, referred to William H. Whiton disputes which had long existed as to their respective interests in the claim; and it was agreed that, for his services in making the apportionment and in the preparation of the claim for presentation before the commission, Whiton should have one-third of the claim. Whiton performed these services, and the arrangement was carried out. The claim being submitted to the mixed commission, the two commissioners disagreed. The umpire, however, awarded to the claim the sum of \$252,814. Nine certificates of equal amounts were issued therefor, three of which were delivered to the administrators of Idler's estate, three to their associates, and three to Whiton. Partial payments on account of these certificates were made by Venezuela to the United States; namely, on June 17, 1871, the sum of \$17,696.98, and on May 16, 1876, the further sum of \$20,255.12. The state department of the United States paid one-third of these sums to the administrators of Jacob Idler, one-third to their associates, and one-third to Whiton. No further payments were made on the award under the treaty of 1866.

On March 3, 1883, the president of the United States approved a joint resolution of congress providing for a new mixed commission in accordance with the terms of the treaty with Venezuela of April 25, 1866. That resolution, after reciting that serious charges affecting the validity and integrity of the proceedings of the former mixed commission had been made by the government of Venezuela, and also by divers citizens of the United States, who had presented claims for adjudication to that tribunal, requested the president to open diplomatic correspondence with Venezuela with a view to the

revival of the general stipulations of the treaty of April 25, 1866, and the appointment thereunder of a new commission, and also provided that, from awards that might be made to claimants, any moneys theretofore paid upon certificates upon awards made by the former commission should be deducted, and such certificates deemed canceled. Accordingly, on December 5, 1885, a new treaty was concluded between the two governments, reviving the general stipulations of the former convention, adopting the provisions of the joint resolution of congress, and providing for a new mixed commission, composed of two commissioners and an umpire, whose decisions, or those of a majority of them, made "as they shall deem" to be "conformable to justice," should be final and conclusive. To this new mixed commission the Jacob Idler claim was presented, and a majority of the commission made the following award:

"Award of the Commissioners. July 14th, 1890.

"Claim of Jacob Idler vs. The United States of Venezuela. No. 2.

"The undersigned, commissioners appointed under the convention between the United States of America and the United States of Venezuela, for the reopening of the claims of citizens of the United States against Venezuela, under the treaty of April 25, 1866, concluded at Washington, December 5, 1885, concurring in the decision herein, having duly heard the above claims, and considered the evidence and arguments of counsel pertaining thereto, do decide that there should be, and there is hereby, awarded against the government of the United States of Venezuela, in full satisfaction of the said claim, the sum of seventy thousand five hundred and twenty dollars (\$70,520), gold coin of the United States of America, with interest thereon at the rate of six (6) per cent. per annum from October 1, 1832, to September 2, 1890, inclusive; amounting in all, after deducting the payments heretofore made on account of the former award, to the sum of two hundred and seventy-seven thousand six hundred and seventy-eight dollars and forty cents (\$277,678.40), which sum is to be distributed, and certificates issued therefor, as follows: Ninety-two thousand five hundred and fifty-nine dollars and forty-six cents (\$92,559.46) to William Idler and John W. Hazeltine, as administrators d. b. n. of Jacob Idler, deceased; thirty thousand eight hundred and fifty-three dollars and fifteen cents (\$30,853.15) to Frederick J. Whiton; ninety-two thousand five hundred and fifty-nine dollars and forty-seven cents (\$92,559.47) to Henry L. Bogert, trustee; thirty thousand eight hundred and fifty-three dollars and sixteen cents (\$30,853.16) to Mary L. Russell, and thirty thousand eight hundred and fifty-three dollars and sixteen cents (\$30,853.16) to Crammond Kennedy.

John Little,  
"John V. L. Findlay,  
"Commissioners."

Upon the trial in the circuit court, the defendants submitted the following point with respect to the 10 per cent. commission payable to Chataing under the paper of September 25, 1832:

"Fifth. The payments agreed to be made to Alexander Chataing for his services, as set forth in Exhibit B of plaintiff's statement, were contingent on Jacob Idler's recovering satisfaction for his judgment against the government of Venezuela in said Exhibit B, referred to.

This point the court below affirmed. Other points relating to the same matter were submitted by the defendants, and were reserved by the court. We will quote several of these reserved points as indicative of them all:

"Fourth. The construction of the contract for compensation is for the court. It was not in contemplation of the parties to the contract that Chataing should receive compensation for an award made by the international tribunal many

years after his death, presented and prosecuted by other agents and attorneys. Venezuela having declined and refused payment, there can be no recovery based on an award made in Caracas in 1868, or in Washington in 1890, and the verdict must therefore, under all the evidence, be for the defendant."

"Sixth. The undisputed evidence in the case is that no payments have been made by the government of Venezuela on account of the judgment rendered against it, and which is set forth in said Exhibit B of plaintiff's statement, and therefore the verdict should be for the defendant."

"Ninth. The award in favor of Idler and his associates was made by an international commission, administering justice and equity for the supplies, etc., furnished by them to that government, and was a sentence or award after full examination of the merits of the claim, irrespective of the original sentence of the Venezuelan court."

"Tenth. By the decree of *restitutio in integrum*, the judgment in favor of Idler and his associates was annulled in Venezuela. More than fifty years afterwards, an international tribunal made an award to these parties, and the moneys they received were based upon that award, and there can be no recovery in this suit."

Eventually the court below decided the reserved points against the defendants, and entered judgment against them.

As is to be seen from its affirmance of the defendants' fifth point, the circuit court rightly considered that the payment to Alexander Chataing of the stipulated commission was contingent upon Jacob Idler's recovering satisfaction of the judgment he had obtained on September 18, 1832, against the government of Venezuela. Evidently, Idler and Chataing dealt with respect to that judgment. It, indeed, was the very basis of Idler's undertaking to pay the commission. Undoubtedly, they contemplated the voluntary payment of the judgment by Venezuela, and this within a reasonable period. Idler was to pay the commission in the same way that the government made the payment to him and at the same times. Was satisfaction of the judgment, within the fair meaning of the paper of September 25, 1832, ever realized? The circuit court was of the opinion that substantially the money was collected on the judgment, the court saying: "The money collected must be regarded as realized on the judgment; the fruits of its execution by the government of the United States." In this view we are not able to concur. The United States never undertook to enforce the payment of the judgment. From first to last, its action in this matter was strictly diplomatic and peaceful. It merely exercised in a friendly manner its good offices on behalf of Idler and his coclaimants. Had it gone beyond this, it would have violated its settled policy with respect to claims of its citizens founded on their contracts with foreign governments. Whart. Int. Law, § 231. Moreover, the judgment of September 18, 1832, was absolutely annulled. The decision of the supreme court of justice of Venezuela is conclusive upon that point. It must be observed that the final judgment of that tribunal in the litigation with Idler did not affect his contractual rights, but left them in full force. The decision was merely that the remedy of *restitutio in integrum* was open to the government, and was applicable to Idler's case, and that the action of the superior court in granting that remedy, and thus reopening the case, was right. Could Alexander Chataing, a citizen of Venezuela, or those claiming under him, challenge, anywhere, the binding force of the judgment thus pro-

nounced by the highest court of his own country? Surely, the courts of this country are to respect that judgment. *Elmendorf v. Taylor*, 10 Wheat. 152, 159; *Smith v. Condry*, 1 How. 28.

Idler's judgment having thus been swept away, the consideration for his promise to pay to Chataing a commission thereon wholly failed. The event upon which the commission was to be paid never occurred. Very certain is it that nothing was paid by Venezuela to Idler or to his personal representatives on the footing of the judgment. To apply, then, the writing of September 25, 1832, to the state of affairs brought about more than half a century afterwards by the award made by a mixed commission, acting under an international treaty, would be a perversion of the paper, and would work the greatest injustice to the estate of Idler. The whole situation had radically changed without his fault. His judgment had utterly failed him. The allowance of the claim was ultimately secured by the action of an independent tribunal, proceeding upon original grounds. The favorable result was due to the long-continued personal exertions of Idler and his associates, and the services, at a vast expense, of other agents and attorneys. All this the evidence shows. To the result neither Chataing nor his personal representatives contributed aught.

We do not consider it a matter of any moment that, in pressing their claim before the mixed commissions, Idler's administrators relied upon the Venezuelan judgment of 1832. That judgment was a part of the complicated transactions between their intestate and the government of Venezuela. It, perhaps, afforded some evidence of the correct amount of the indebtedness in dispute. Nor is it important how the majority of the commissioners may have regarded that judgment. Neither its correctness nor its existence was recognized by either of the treaties. The mixed commissions were to decide with reference to the merits of all claims submitted to them. The opinion filed on behalf of the majority of the last commission shows that the Idler claim was investigated and sustained by them upon its original merits. They were at liberty, had the facts so warranted, to have found against the claim altogether. That they awarded the face amount of the judgment with interest is of no consequence. The reasons for their award are immaterial here. The important fact is that whatever moneys Venezuela paid on the Idler claim were paid on the awards of the mixed commissions, and not otherwise. Construing the paper of September 25, 1832, with reference to its terms, its subject-matter, and the situation of the parties, we conclude that no payment or satisfaction of the judgment therein recited was ever made or realized within the true intent of the parties, and that the stipulated commission to Chataing never became payable. It follows, therefore, that the reserved questions of law appertaining to this branch of the case should have been decided in favor of the defendants.

To the plaintiff's demand upon the other instrument in suit,—the paper of January 9, 1833,—three defenses were set up, namely: First, payment in fact; second, the statute of limitations; third, the presumption of payment arising from the lapse of 20 years. Un-

der the first head, uncontradicted evidence of a persuasive character was produced to show that this indebtedness was entirely discharged in the lifetime of Alexander Chataing. By a writing dated Caracas, May 15, 1833, Chataing receipted for certain accounts due to Idler, amounting to \$1,051.65, left with him for collection, and a small amount of personal property to be sold, on Idler's account. In a letter dated Caracas, June 6, 1834, and addressed to Idler at Philadelphia, Chataing acknowledged payment by Idler of \$1,071.68 on this debt. Other correspondence shows that at different times Idler shipped merchandise to Chataing upon his orders. It is admitted that this correspondence, on its face, shows Idler to be entitled to an additional credit of \$440.56. William Idler, a son of Jacob, testified that, to his personal knowledge, his father made other shipments of goods to Chataing; that "there were a great many shipments made"; that Chataing paid nothing on those shipments; that, while not able to state the exact amount of the shipments, he always believed that the whole debt of 4,400 pesos had been paid; that many of his father's books and papers had been lost or destroyed. Having regard to the antiquity of these transactions, the evidence of actual payment strikes us as remarkably full. It is to be considered in connection with the significant fact that no assertion of such indebtedness was made by the personal representatives of Alexander Chataing until the year 1892. This nonclaim for a period considerably more than 50 years is inexplicable, except upon the hypothesis of full satisfaction in the lifetime of Chataing.

To hold that the debt of 4,400 pesos was payable only out of money to be received by Idler from the government of Venezuela, we think, would be to give a false effect to the paper of January 9, 1833. That writing did not create any debt, but was a formal acknowledgment before the escribano publico of a previously existing indebtedness. The paper, it seems to us, must be regarded as a collateral obligation. That this is a correct view is evinced by the subsequent acts of the parties. Thus regarding the transaction, we can understand how it happened that Idler made payments to Chataing on account of the debt. Is it to be supposed that the parties intended that Chataing was not to be paid at all if the government of Venezuela never\* paid Idler? That conclusion would contravene the plainest principles of justice. True, the writing states that Chataing "accepts it according to law, and agrees to wait." But how long was he to wait? Was he to forbear forever? Can it be that Chataing had so bound himself that no proceedings could be had upon his original and principal cause of action, notwithstanding the refusal of Venezuela to pay Idler and the action of the court in vacating Idler's judgment? We think not. The utmost effect that can justly be attributed to Chataing's agreement to wait is that he was to allow Idler a reasonable time for the collection of the money which the government owed him. Whether the statute of limitations commenced to run in the lifetime of Chataing we need not decide. We are entirely satisfied, however, that the presumption of payment which arises after the lapse of 20 years applies here. That presumption is applicable to every species of security for the payment of



money, whether bond, mortgage, judgment, or recognizance,—to debts of all descriptions not barred by the statute of limitations; and, until the presumption is rebutted, the instrument does not furnish even prima facie evidence of indebtedness. *Van Loon v. Smith*, 103 Pa. St. 238; *Lash v. Von Neida*, 109 Pa. St. 207; *Biddle v. Bank*, Id. 349.

Now, it is satisfactorily shown that by the law of Venezuela, at all times, the heir, whether under a will or ab intestato, is considered to be the same person as the deceased, and succeeds the deceased directly, in all his rights and title in and to the property, whether real or personal, which forms the estate, from the very moment of the death, and is invested with the right to demand, sue for, collect, and recover all claims and debts due to the deceased. This so appears from the affidavit (taken, by agreement, with the same effect as a deposition under a rule of court) of Jose Ignacio Rodriguez, a doctor of civil law, etc. This affidavit, while taken after the trial before the jury, was for use before the court upon the hearing of the rule for judgment upon the questions of law reserved, and is therefore to be treated as part of the record, at least so far as concerns the reserved questions of law; and the reservation of the defendants' twelfth point covers the question now under discussion.

The law of Venezuela, then, being as stated, it follows that the heirs of Alexander Chataing had the right to demand and receive payment of the debt of 4,400 pesos mentioned in the paper of January 9, 1833, if any part of it remained unpaid. Therefore, the presumption of payment is operative here, although no administrator had been appointed in the state of Pennsylvania. Administration was, indeed, necessary in order to maintain a suit in the state of Pennsylvania, but not at all for the purpose of the receipt and acquittance of this debt; and the presumption of payment applies and should be enforced. *Foulk v. Brown*, 2 Watts, 209, 215, 217. There a suit was brought in the year 1829 by Lewis Foulk, administrator of Isabella Foulk, his deceased wife, against the executor of William Brown, deceased, to recover a legacy bequeathed to Isabella. The testator died in 1802, and Isabella Foulk in 1804. The presumption of payment arising from the lapse of 20 years was set up against the plaintiff. To meet this defense he set up the want of administration, but without avail. The court said:

"Now, although it is true that, in order to sustain a suit for this legacy after his wife's death, the plaintiff would have been obliged to take out letters of administration, yet that was a ceremony at all times in his own power to resort to. He had but to ask, and would have received them as a matter of course. His disability to sue was a voluntary one. How, then, can he set up his own laches and indolence in this respect? Or how does it show that he was not paid?"

The point of this decision was that as the plaintiff, as surviving husband, had acquired the right to the legacy, the presumption of payment arose, even in the absence of administration. The principle applies here; and the following observations of the supreme court of Pennsylvania made in that case are very pertinent:

"The rule of presumption, when traced to its foundation, is a rule of convenience and policy, the result of a necessary regard to the peace and se-

curity of society. No person ought to be permitted to lie by whilst transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life, unacquainted with the affairs of a past age, and often regardless of them."

We entertain no manner of doubt that, at least as early as the decision of the supreme court of justice of Venezuela affirming the vacation of Idler's judgment, the heirs of Alexander Chataing had the right to demand payment of the balance, if any, of the debt of 4,400 pesos. But, even upon the plaintiff's view, the presumption of payment had closed against the debt before this suit was brought; for in the year 1871 the defendants received, out of moneys paid by Venezuela on the Idler claim, a sum in excess of the debt.

Upon the whole record, we are of the opinion that the court below should have entered judgment for the defendants on the reserved points; and following the practice laid down in *Insurance Cos. v. Boykin*, 12 Wall. 433, we will enter the judgment which that court ought to have rendered.

The judgment of the circuit court is reversed; and it is ordered that judgment be entered in favor of the defendants below (the plaintiffs in error) upon the questions of law reserved non obstante veredicto.

#### NOTE.

The following are the opinions of Messrs. Talmage and Machado, Jr., referred to on page 915, ante:

Opinion of the United States Commissioner upon the Claim of Jacob Idler, Deceased (Sophia Idler, Administratrix; William Idler, Attorney. No. 1, as per Secretary's List), Submitted to the Umpire, as per Minutes of July 18th, 1868.

The undersigned, David M. Talmage, commissioner of the United States of America upon the mixed commission celebrated between the United States of America and the republic of Venezuela, April 26th, 1866, admits the said claim for the full amount as presented before this commission, the same being founded in justice, and upon which claim the legal tribunals of Venezuela uniformly, in every stage of Mr. Idler's suit before them, decided that the government of Venezuela was bound to pay him the amount claimed, as will fully appear by reference to data following, to wit:

By a reference to the expediente containing all the proceedings had and made in Mr. Idler's case before these authorities, it appears: First, that, in the year 1817, Gen'l Bolivar, then the acknowledged supreme civil and military chief of Venezuela, forwarded to Gen'l Lino De Clemente, at the time residing in the city of Philadelphia, in the United States, a commission as agent of Venezuela, with powers full and ample to make and negotiate for supplies or otherwise, of whatever nature or kind (which, in said commission is acknowledged as obligatory and binding in the most sacred manner upon the government of Venezuela), and, in the case of his (Clemente's) death or absence, then the same power and authority to devolve on Pedro Gual, at that time residing likewise in Philadelphia, under which power and authority and pledge so given Gen'l Lino De Clemente did enter into certain contracts for supplies therein named with Jacob Idler and associates. That subsequently Gen'l Lino De Clemente left the United States, substituting by authority Manuel Torres as the agent of Venezuela, with the same powers in all matters of negotiation, contracts, and supplies which had been previously given to and exercised by Gen'l Clemente, with the same preferences and pledges of the government of Venezuela, and with whom the said Idler continued his contracts and supplies up to the year 1821. It would

appear that the agents of Venezuela, General Clemente and Manuel Torres, under the powers of their commission (diploma) and instructions attached to the same, did pledge all and singular the guaranties therein offered by the supreme civil and military chief, to wit, Barinas tobacco, cacas, coffee, indigo,—in fact every production of the country,—together with the privilege of discounting in payment in full all duties on imports and exports made by the contractors, under which guaranties the said Idler and associates entered into the contracts with the agents of Venezuela, but which in various settlements made were withheld (particularly the Barinas tobacco, which was exclusively the property of the government), under various pretexts, from the said Idler and associates, and that, too, after the most sacred pledges given by the supreme chief, in the most trying, and, I may say with truth, the most eventful, period of the revolution. The agents of Mr. Jacob Idler and associates then residing in Venezuela, not having liquidated or settled in full the contracts made by them, induced them to send out a special agent from the United States, in the person of Mr. William Duane, to adjust the balances and close the same, not doubting but an immediate arrangement would be made to liquidate and adjust the claims of the said Idler and associates against the government of Venezuela. In this it appears that he did not succeed. Another was sent out, and he did not succeed. Mr. Idler, therefore, as principal, concluded to leave his large and helpless family of children, and embark for Venezuela, that he might in person attempt the adjustment himself. He therefore presents himself before the authorities of Venezuela, and under a liquidation previously made in the office of the intendency, acknowledged by the intendant, makes out his claim, admitted to proof by Gen. Lino De Clemente, who declares the contracts made by himself and Manuel Torres under the powers given by the supreme chief, General Bolivar, were concluded in their terms without the supervision of any other authority, and which contract should be paid in preference to all others, pledging the crop or crops of Barinas tobacco, and, if not in that, in hard dollars." In this state, and upon the admitted and liquidated account of the intendant, Gen. Escalona, Mr. Idler brings his case before the then intendant, Mendoza, who, by his decree of the 28th of May, 1828, and signed by his assessor, Castillo, refers the whole matter in dispute between Mr. Idler and the government of Venezuela "to arbitrators," and for this purpose named Elias Mocatta and Vicente Aramburn, both of whom declined, from a want of time to attend to the same. In the meanwhile, Gen. Briceno had been named intendant, who excused the previous arbitrators, and nominated, with the consent of his assessor, Duarte, Jose M. Rojas, and Francisco Amaritique in this place. In this situation, a discordia takes place with the treasury; and Mr. Idler, through his attorney, asks that in case a disagreement should occur in the adjustment of the accounts and claims of said Idler with and upon the treasury, that he should be privileged to nominate a third person to examine entirely and thoroughly all and every account, contract, contract payments, liquidations, or settlements; and for this purpose Mr. G. B. Sprotto was named, a respectable and intelligent merchant, and well known as such to the authorities. The nomination was acceded to by the intendant, Mr. Lecuna, and the assessor, Duarte, and the same admitted by the treasurers, Lecuna and Smith. Mr. Sprotto accordingly examined the accounts entire, from beginning to end, and finally rendered a balance against the government of Venezuela, in favor of Mr. Idler, of \$72,346.34, which is confirmed in an able and lucid illustration of the case by the fiscal, lawyer, the legal defender of the rights of the state, in which situation the case goes before the judge of letters of the treasury, juez letrado de hacienda, who in a very distinguished and able manner argues the case, and confirms the liquidation made by Sprotto and the decision of the fiscal, and refers the matter in consultation (consulta) to the superior court of justice, allowing both parties, the state and Mr. Idler, the legal time for taking an appeal. In consultation, the superior court revoked the sentence, not on the justice or principle of the case, but on the grounds of some errors having been made in the liquidation in debit and credit made by Mr. Sprotto, and that the general treasury, with the knowledge of Mr. Idler, should nominate another person to examine into the settlement made by Mr. Sprotto, who was about absenting himself from the country. The supreme court, in the appeal of Nulidad

(recurso de Nulidad) had in this state of the case, refers the case back again to the superior court, who finally, by their decree, nominate Juan Silva to examine the statement made by Sprotto. Mr. Idler accuses Mr. Silva. The superior court admits the accusation, and nominates thereafter Jose Ventura Santana for the same purpose, who accepts the same, but subsequently renounces the appointment, which is admitted by the court. The supreme court then nominates John Cadenas, who accepts, and after a most minute and laborious examination into every account and contract and settlement made one by one, and the general liquidation made by Mr. Sprotto, and the objections to the same made by the treasury, in a most able, intelligent, and independent manner, decides and establishes, "by the documents in the liquidation," that the government of Venezuela is indebted to Mr. Jacob Idler in the sum of \$70,520.11½, "hard dollars," with interest from the 30th June, 1825, until paid. The attorney general of the state (the fiscal) asserts and confirms this liquidation, and the judge of letters of the treasury (juez letrado de hacienda) confirms it as follows: "Que los fondos publicos sen responsable al Senor Jacob Idler de la citada cantidad de setenta mil quimientos pesos dice y medio centavos fuertes que seran satisfechos en el modo y terminos que dispenga el supremo gobierno a quien ocani el interesado con testimonio que se le dara delo que sea conduento a la classificacion del ededito y order de pago; consultase antes esta determinacion con su excelencia la coste suprema de justicia remitiendose al efecto les antos originales, y satisfaciendo el Senor Idler, todas las costas causadas y que causaren."

This decision, as above, is referred in consultation to the superior court, who confirms that decision of the judge of letters (juez letrado de hacienda). The documents are again produced to the juez letrado de hacienda, who, according to his previous decree and the approval of the superior court as above in consultation, and the sanction of the attorney general (fiscal), orders the execution of said sentence.

Mr. Jacob Idler, in this state of his business, having established clearly and unequivocally his claims by the laws of Venezuela, appeals to his excellency, the president, for the payment of the amount adjudicated to be due to him by the courts of the country, to which he is answered by the secretary of exterior relations and secretary of hacienda: (1) That the judge of letters of the treasury (juez letrado de hacienda) had no power in the case; (2) that the contracts were made by agents of the executive; (3) that in controversies of this kind the supreme court of justice could only take cognizance of the case, according to article 147, attribution 5, of the constitution, and disowns the authority of the judge of letters of the treasury (juez letrado de hacienda) to declare Mr. Jacob Idler a creditor of the state, for reasons of the contracts, and resolving that the government will take notice, hear, and examine the accounts when the divisions that heretofore composed Colombia shall take into consideration the public debt, etc. In this situation the case is again brought before the attorney general (fiscal), who clearly establishes by argument and law his power and authority as such constitutionally and legally, and the nullity of the opinions of the secretary of exterior relations and treasury in all cases in which the state is interested, which is confirmed by the supreme court, and again confirmed by the judge of letters of the treasury (juez letrado de hacienda) that the government of Venezuela was indebted to Mr. Idler in the sum reported to be due by Mr. Jose Cadenas of \$70,520.11½, hard dollars, with interest from the 30th June, 1825, until paid. When these decisions are brought again before the secretary of exterior relations and treasury, the case is referred in consultation with the council of government (consultase el consejo de gobierno). The council of government, after the decisions of all the courts of justice, and admitting the lawsuit of Mr. Idler by the authorities of the government in such cases, and defending it through all its stages with a most determined hostility, creating heavy expenses, opposing the claim of Mr. Idler at every step, and by all means which persons in authority can use against a private individual, but which, fortunately for Mr. Idler, he sustained in a most triumphant manner, and at every step gains decisions after decisions in his favor, both by the authorities appointed in such cases to overlook and defend the rights of the state, as well as the legal and independent courts of the coun-

try, until finally an appeal is made to the executive for payment of his established claim, when he declares, in consultation with the council of government: "Por las razones y fundamentis legales de la precedente consulta de consejo de gobierno se declare que no ha lugar a la solicitud de Jacob Idler. Por S. E., El Presidente de la Republico Michelena." Mr. Idler again makes a memorial to his excellency, the president, the 18th December, 1832, asking payment for the sum adjudicated to be due him, and handing a decree of supreme court in the case of Vicente Michelena, Brothers Michelena & Co., claiming payment of Venezuela (not Colombia) for a bill of exchange drawn by the government of Colombia in favor of Mr. Idler, and indorsed by him to the Michelenas, which is ordered by the attorney general (fiscal) to be paid (and confirmed by the supreme court) by the government of Venezuela, and which was accordingly paid. Mr. Jacob Idler again memorializes his excellency, the president, in two instances, without receiving an answer. The attorney general (the fiscal) then presents the case to his excellency, the president, and asks its adjustment and reference to the supreme court (according to the opinion of the secretary of exterior relations and treasury), who declare that, having once decided the case, and admitted and adjudged on the justice of the claim of Mr. Idler, it is therefore concluded legally and definitely by the tribunal.

By all of which facts above recited, "to be found upon the pages [indicated] in the expediente," it is clearly proven by the decisions of all the courts of Venezuela that the said claim of Jacob Idler is established and admitted, and has been due and owing to the said Idler "by the government of Venezuela" since June 30, 1825; and the undersigned can only be astonished how any equivocation could arise in its adjustment by these authorities, and how the payment should have been evaded and resisted to this late day.

In all civilized countries (especially republican in form) the decisions of the legal tribunals are respected and obligatory, not only upon the citizen but the government. However, it appears that here, under a written constitution, under admitted rights of equality and justice, the decisions of the courts of justice ("the highest tribunals" known) are subject to nullity by a power which I cannot conceive given or granted in any part of the constitution or laws to a co-ordinate part of the government. To acknowledge the existence of such a power would in its effects control and subvert the liberty of freedom and justice. There is no power reposing in the government of Venezuela competent to declare the decisions of its highest tribunals illegal, much less to deny to a citizen of the United States his rights under and by virtue of such decisions and the mandates of international law. The claim of Jacob Idler has all the authority and sanction of law for its support, notwithstanding which he is denied even that sympathy which a struggling nation owes for the supplies furnished by him in the hour of her direst extremity, and but for which she might never have achieved her independence.

It should be observed in this connection that there is a strange contradistinction connected with the case of Mr. Idler and the parallel one of Vicente Michelena, for Brothers Michelena & Co., referred to above. The final decision of the tribunals in this case of Idler—but denied by Mr. Santos Michelena, secretary of hacienda (treasury), one of the firm of Michelena Brothers—is the ground on which Vicente Michelena, as aforesaid, brings an action against Venezuela to pay a bill of exchange drawn by the government of Colombia on England in favor of Mr. Idler, and indorsed by Santos Michelena, which bill was returned protested, and which, according to the memorial of Vicente Michelena, has been paid in full, with all the damages and costs, by Venezuela, and that, too, after the said Santos Michelena had declared, as secretary of the treasury (hacienda), Mr. Idler should wait a settlement of the affairs between the separate parts of Colombia before his claim could be adjusted. I forbear to make any remark on this affair, leaving it to Venezuelan authorities to reconcile, if they can, the justice of this settlement with the Michelenas with the refusal of justice to an actual parallel in the case of Mr. Idler.

It has been attempted to palliate the evasion and resistance of Venezuela to the payment of this just claim with the old "subterfuge" of "restitutio in integrum" against verdicts rendered, without remembering that that

Venezuela Republican Code, from its birth, abolished all the laws and practice of the old regime which were at variance with the spirit of legal equality which constitutes the basis of her institutions, and that, as a consequence, "the laws specially applicable to judicial proceedings in Venezuela have always, since the emancipation of the republic, laid down the prohibition of opening judicial lapses after their fulfillment, through restitution or any other motive whatsoever; that, in accordance with the fundamental principles of the republic, the Civil Code does not admit of recourse to restitution or nullification of acts of minors or incapables where the necessary formalities for their validity have been observed"; and, finally, that, by an appeal to that method of restitution, the dignity of both the courts and the state is assailed, by supposing that a nation able to bring to a happy conclusion the gigantic struggle for its independence has become so weak and imbecile, incapable of defending itself in a civil suit before its own magistrates.

Again, Mr. Idler's contracts having been arranged and executed with the agent of Venezuela in the United States, it would be a violation of the principles of international law to pretend or to contend that special privileges never known in North American jurisprudence should be brought to bear in the questions which have arisen from these contracts, and it must be borne in mind that it would be against the principles of the "Rights of Nations" to oblige Idler (who was not only a stranger in Venezuela, but who never acquired any sort of residence therein) to follow up in said country suits of restitution or of any other kind in which it were intended that he should act the part of defendant.

Further, this indebtedness was contracted by Venezuela solely, previous to her confederation with Colombia, and for a period of eight years subjected to the liquidations and decisions of her own tribunals, etc., and by them definitely determined, and consequently could not by any possible legal construction or color of justice be considered within the promise of or subject to the jurisdiction of any commission growing out of the subsequent confederation or conventions or treaty stipulations as between the parties to such confederation, and such the decision at one time of the government of Venezuela herself, considering it her pleasure and sole privilege to contest and conclude this matter with Idler. All action on the part of Venezuela since 1833 (when this case was declared by the highest tribunals finally determined and concluded) in evading and resisting payment to Idler is mere subterfuge, and the means resorted to not only illegal (by its own constitution), but without precedents in jurisprudence, and cannot be recognized or considered by the undersigned, save to ignore and condemn the same as unworthy the resort of an individual, much less a government founded upon the broad basis of equality and justice, and assuming to administer the same.

In view of all the facts of the case, and the final judgment and decision (afore referred to) of the highest tribunals known in the land, is established beyond controversy or appeal the irrevocable right acquired by Idler to be recognized as a creditor of Venezuela for the full amount of his claim; and, in accord therewith, I do adjudge and determine the heirs of Jacob Idler, deceased, entitled to the sum of three hundred and twenty-five thousand six hundred and twenty-five 54/100 hard dollars, as an award made in adjustment of said claim of heirs of Jacob Idler, deceased, and justly owing and to be paid by the government of Venezuela, as per my rendering subjoined:

Amount of final liquidation, with interest to date of confirmation of same by the sentence of the supreme court, October 30, 1833.....	\$105,780 17
Add interest on above amount at rate of six per cent. per annum, from October 30, 1833, to date, June 20, 1868.....	219,845 37
Sum total .....	\$325,625 54

The above amount now due the heirs of Jacob Idler, deceased, by the government of Venezuela, S. A.

[Signed]

David M. Talmage, United States Commissioner.  
Alfred Alderson, Secretary of Mixed Commission.

## Decision of the Umpire upon the Claim of Heirs of Jacob Idler.

## No. 1.

(Translation.)

Gentlemen of the Mixed Commission of the U. S. of Venezuela and N. America:

Caracas, August 1st, 1868.

The Idler claim being submitted to me as umpire, on account of the difference of opinions that has arisen between the commissioners, I have examined all the papers relating to it, and it is with the fear of committing an error that I proceed to give my opinion on this delicate question, and to pronounce the verdict required of me.

I shall not enter into the history of the lengthy course through which this affair has run, the origin of which goes back as far as 1817, in which year the liberator authorized Genl. Clemente to contract in North America for the supply of war materials wherewith to uphold the independence of Venezuela. One of the North American contractors, Jacob Idler, carried into effect an extensive contract of these articles of war; and it is a fact that the tribunals of the republic, by verdicts given on the 18th of September and the 1st December, 1832, acknowledged Idler to be a creditor of the state for seventy thousand five hundred and twenty dollars eleven and a half cents. These verdicts having been argued upon as null, they were reconsidered by the supreme court, which repelled the invalidity attempted to be shown, and by its verdict of the 6th of December, 1833, declared the suit to be completely concluded and done with. The executive government of Venezuela thought that the tribunals of the republic had acted with precipitancy, without a detailed acquaintance of the facts and transactions in question, and, through its influence, prevailed upon the supreme court to order the restitution in integrum regarding the matter, taking for its authority an old Spanish law (1 P. tit. 19, Partida 6), which puts the state on the same footing as a minor, for the purpose of by these means obtaining the revision of those final decisions. The North American legation invariably opposed itself to such proceeding, and considers the suit as completely concluded.

The undersigned considering (1) that the bringing back these questions to the state they were in previous to the courts of Venezuela taking cognizance of them would necessitate anew a strict settlement of the respective claims, thus incurring serious difficulties arising from the antiquity of those transactions and accounts which would have to be examined; (2) that this appeal to restitution (to which the government of Venezuela has manifested a dislike), if it was not undivested of some support in law, has at least become so unpopular as to have fallen into its present state of explicit reprobation; (3) that the convention of the 25th of April, 1866, opens the way to an equitable decision, which can reconcile conflicting pretensions as far as possible,—I judge and decide that the before mentioned \$70,520.11½, hard dollars, be acknowledged in favor of the heirs of Jacob Idler, and, moreover, one hundred and eighty-two thousand two hundred and ninety-four hard dollars as interest; the amount of the claim being two hundred and fifty-two thousand eight hundred and fourteen hard dollars. So I decide.

I am your obedient servant,

[Signed]

J. N. Machado, Jr.

Alfred Alderson, Secretary Mixed Commission.

## MERCHANTS' NAT. BANK v. ARMSTRONG.

(Circuit Court, S. D. Ohio, W. D. January 28, 1895.)

No. 4,427.

## 1. NATIONAL BANKS — LIABILITY FOR FALSE REPRESENTATIONS BY OFFICERS — DECEIT.

The directors of the F. National Bank made four reports to the controller of the currency, under the provisions of the national banking law,

all of which were false. The officers and directors published and distributed to the stockholders of the bank a statement representing that the bank was in a very flourishing condition, whereas in fact it was insolvent, and was known to the officers and directors to be so. The M. Bank, believing these representations to be true, discounted a note for one J., solely upon the security of certain shares of the stock of the F. Bank, which ultimately turned out to be worthless. There was no connection or communication between the F. Bank and the M. Bank or J. Held, that the F. Bank could not be held liable to the M. Bank for deceit, since there was no privity between them, and it was not in the power of the officers to bind the bank by representations to a mere stranger to induce him to enter into a transaction in which the bank was not at all interested.

2. DECEIT—TO WHOM REPRESENTATIONS MADE.

In order that a party may be made liable for deceit, the representations claimed to be false must be made directly to the person injured.

This was an action by the Merchants' National Bank of Hillsboro, Ohio, against David Armstrong, receiver of the Fidelity National Bank of Cincinnati, to recover damages for false representations and deceit. Defendant demurs to the complaint.

Follett & Kelley, C. H. Collins, and Robert M. Dittey, for plaintiff.  
John W. Herron, for defendant.

SAGE, District Judge. From the allegations of the petition it appears that the plaintiff loaned \$10,000 on the 23d of December, 1886, to J. H. Matthews, and took as security therefor certain shares of the capital stock of the Fidelity National Bank. The directors of the bank, in accordance with the provisions of section 5211, Rev. St. U. S., made four reports exhibiting its financial condition. These reports were issued October, 1886, January, 1887, March, 1887, and May, 1887, and were all false. On the 13th of January, 1887, the bank caused to be issued and published a certain statement in writing, or circular, and mailed it to the plaintiff, among others. In that statement it was represented that the bank was doing a larger business than ever, and that the deposits had reached on that day the highest point in its history; that it had the largest capital, surplus, and deposit account of any national bank in Ohio. This statement was signed by the president, vice president, cashier, and assistant cashier of the bank.

It further appears from the petition that the bank was in fact insolvent at the date of each one of said reports, in which it was represented to be solvent and in a highly prosperous condition; that said reports were made with the knowledge and assent of the officers and directors of the bank; and that said officers had actual knowledge of the falsity thereof, and were grossly negligent of their duties in the management of the affairs of the bank.

It is further averred that the bank was wholly insolvent when the circular aforesaid was issued; that the same was issued and published with the knowledge and assent of said officers and directors; and that they had actual knowledge of the falsity of its statements.

It further appears that the several reports of the condition of the bank were published in the daily newspapers of the city of Cincinnati. The petition also sets forth the particulars in which the statements and circulars aforesaid were false, and states that, relying



upon the false statement of October, 1886, published on the 11th day of that month, and believing it to be true, plaintiff accepted 100 shares of the capital stock of the bank as security for its loan to J. H. Matthews, and that said loan was made upon the credit of said stock, and upon its value as appeared from said reports, and upon no other credit or security; that said loan would not have been made, or said security accepted, if said report had contained a true statement of the condition of said bank. The note was payable on demand.

It is further averred that believing and relying upon the statements of the subsequent reports, and of the circular of January 13, 1887, the plaintiff made no demand upon said Matthews for the payment of said note until the 17th of June, 1887, nor did it attempt to convert said stock held as collateral into money, as it might have done; that on said date, by reason of the mismanagement of the affairs of the said corporation by its said directors, the misappropriation of its means, and the unlawful loaning of its moneys by its vice president, as set forth in the petition, and the misconduct of its officers and board of directors, the bank had become wholly insolvent, and said stock entirely worthless.

Finally, it is alleged that the plaintiff has suffered loss and damage by reason of the premises in the sum of \$10,000, and has presented its account therefor to the defendant as a valid claim against the bank, and made demand for the allowance of the same, which he has refused. The prayer is for judgment for \$10,000, with interest from April 5, 1887.

The defendant demurs for insufficiency, stating two general objections to the plaintiff's recovery. The first objection is that it is not in the power of the directors and officers of a national bank to bind the bank for deceit by representations made to a mere stranger, which had the effect to induce him to loan another stranger money upon the security of shares of the capital stock of the bank, the bank not being in the least interested in the transaction. The defendant does not deny the liability of a national bank for deceit or tort committed by its officers when the representations complained of are made by them in the regular course of their duties prescribed by law. The contention is that the plaintiff had no business with the bank which authorized the officers of the bank to make representations which would bind the bank, so far as the plaintiff is concerned. It is urged that the business of the bank was banking, and that the authority of its officers was limited thereto.

In *Tyler v. Savage*, 143 U. S. 79, 12 Sup. Ct. 340, cited for the plaintiff, the bill was taken as confessed against the corporation, and no question as to its liability was considered by the court below, nor in the supreme court. The misrepresentations were made by the defendant, Tyler, who was president of the company, and the appeal was taken on his behalf. The court dealt only with the question of his personal liability.

In *Bank v. Graham*, 100 U. S. 699, it was held that corporations are liable for every wrong they commit; that in such cases the doctrine of *ultra vires* has no application, and that they are liable

for the acts of their servants, while such servants are engaged in the business of their principal, in the same manner and to the same extent as individuals under like circumstances. As to the case with which the court was dealing, the opinion was expressed that if a bank be accustomed to take special deposits with the knowledge and acquiescence of the directors, and a deposit was lost by the gross carelessness of the bailee, a liability ensued just as if the deposit had been authorized by the terms of the charter. The court also found that under section 46 of the banking act of 1864, reenacted in section 5228 of the Revised Statutes, it was clearly to be implied that a national bank, as a part of its legitimate business, might receive such deposits. Here the question is whether the officers of the bank had any authority to bind the bank by representations made to a mere stranger, who was not entering upon any transaction with the defendant, but was proposing to loan money to a private individual, and take the stock of the bank as security. At page 198 of his work on Torts, Judge Cooley, by way of illustration of the general proposition that the agents and officers of a corporation cannot impose liability on the corporation by undertaking to do what the corporation is not empowered to do, puts the case of fraudulent representations made by an officer of a national bank in the selling of railroad bonds on commission, and says that, as the bank has no power to make such sales, the fraud is the individual wrong of the officer. To the same effect see *Weckler v. Bank*, 42 Md. 581. In that case the bank was engaged in selling bonds of the Northern Pacific Railroad Company on commission, and its teller in selling same to the plaintiff made certain misrepresentations. An action for deceit was brought against the bank. The court held that the bank was not liable, inasmuch as it had no authority to sell bonds, and no authority to make representations as to them, and hence the teller who made the misrepresentations had no such authority.

The supreme court in *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, held that the vice president and general manager of a bank, without special authority from the directors for the purpose, had no power to bind the bank by borrowing money in its name. The court said that such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow the money. Applying that case to this, here was a transaction which was not within the scope of the business of the bank; had nothing to do with its transactions; was altogether *res inter alios acta*. It is claimed to hold the bank because of certain alleged representations made concerning the collaterals securing the loan. In the leading case of *Pasley v. Freeman*, 3 Term R. 51, Grose, J., said that he had not met with any case of an action upon a false affirmation, except against a party to a contract, where there was a promise, either expressed or implied, that the fact misrepresented was true. There is a case (*Levy v. Langridge*, 4 Mees. & W. 336) in which, as appears from the report of the case in the court below (2 Mees. & W. 519), the defendant had sold a gun to the father

of the plaintiff for the purpose of being used by the plaintiff, and knowingly made a false warranty that it might be safely used. Lord Denman said that the court agreed with the court of exchequer below, and affirmed the judgment on the ground, stated by Parke, B., "that as there is fraud, and damage, the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured."

Suppose the plaintiff, when it was solicited to make the loan set forth in the petition, had by letter, or by its officers personally, consulted the officers of the bank as to the condition of the bank, and the value of stock offered as collateral security, and received in answer assurances, which those officers knew to be false, that the bank was solvent and the stock of full par value; certainly it could not be held that the bank itself was liable for those misrepresentations, so entirely without the scope of the authority of those officers, whatever might be said as to their personal liability. It is not easy to see any distinction in principle between such a case and the case stated in the petition. But it is urged that the reports to the comptroller were not for stockholders alone, but also for all parties who might have occasion to deal with the bank, or in the stocks of the bank, or to take them as collateral security. The argument is that, if the purpose of making the reports were only to inform the comptroller of the currency of the condition of the bank, the requirement that the reports be published in the newspaper would be entirely unnecessary.

It is further urged that the publication is not intended alone for those who are stockholders and depositors at the date of the report, because notice of its contents could be brought home to them in a less public manner, and that the making and publishing of the reports must be for the further purpose of informing those who may contemplate dealings with the bank, or may be brought into connection with it, in any way in which the financial condition of the bank would be a consideration of moment. For illustrations, owners of shares of stock, those about to purchase such shares, and third parties having dealings in the stock, entirely independent of and apart from the bank, are referred to. In short, the claim is that the reports were addressed to the general public, and the plaintiff, having acted upon them, was misled to its damage, and entitled to recover. The reports were not made voluntarily, but in compliance with the requirement of the statute. They must be taken to be made only to those within the contemplation and protection of the statute. Experience teaches that the danger of banks, as distinguished from other corporations or agencies for the transaction of business, is not in the fact that their stock may be issued and bought and sold on the market, but in their power to issue notes, receive deposits, and make discounts. The government has always shown a disposition to regulate banks in order to secure the public against the misuse of these functions. The act is entitled "An act to provide a national currency." It is entirely directed to providing for the safety of the note issue and the security of the discounts

and deposits. All its collateral provisions, of which there are a number, including the one under discussion, are directed to that end. The conclusion is irresistible that the statute, in requiring reports such as those in question, contemplates merely the persons who deal directly with the bank as a financial institution; that the report, therefore, is directed to them, and they only can recover. Dealers in the stock of the bank, and holders of it as collateral, are not, under the statute, privy to the reports, and, if deceived or misled by them, they cannot recover against the bank. Counsel cite from Cooley, Torts, p. 493, where it is said that "some representations are made for the express purpose of inducing individuals or the public to act upon them, and whoever in fact does receive, rely, and act upon these, in the manner intended, has a right to regard them as made to him, and treat them as frauds upon him, if in fact he was deceived to his damage." But, in the view just taken, the bank cannot be held to have issued the reports for the purpose of inducing transactions such as that set forth in the petition, and the citation, therefore, does not apply.

The case of *Graves v. Bank*, 10 Bush, 34, is cited. There the action was by the bank against sureties on the bond of its cashier for acts of embezzlement occurring subsequent to the execution of the bond. It appears, however, that before the bond was executed there had been a false statement published by the bank, showing that the bank was prudently managed; the fact being that the cashier had been guilty of repeated frauds and embezzlements. The court released the sureties upon the ground that the fraudulent statement was addressed "to the public," and that those about to go upon the bond of the cashier had a right to rely upon it. This case was expressly put upon the ground that the bank owed the sureties a special duty of entire frankness as to its condition, and its relation to its cashier, and therefore the sureties had a right to rely upon the published statement. If it could be shown that there is any such privity between the bank and third persons dealing among themselves in its stock, or that the bank owed them any such duty, this case might apply; but no such claim can be maintained. Reliance, also, is placed upon the opinion of the court in *Bank v. Thoms* (Super. Ct. Cincinnati; June, 1892) *Wkly. Cin. Law Bull.* 164. The facts in that case and this are essentially the same, but the action was against the directors and officers involved, and not against the bank. It was held that the plaintiff was entitled to recover, in an action for deceit, the amount of his damage from the officers fraudulently signing said reports. Whether the directors who made the false reports in this case are liable, is not a question before the court. If we recognize that the reports provided for in section 5211 are made to the public as well as to the comptroller of the currency, it does not follow that either the directors, other than those who with guilty knowledge attest a false report, or that the bank itself, is liable. Upon the trial of the directors of the City of Glasgow Bank before the high court of justiciary, for fabricating and falsifying the balance sheets of the bank, and embezzling and theft, Lord Moncrieff in his charge to the jury said:

"A director is generally a man who has other avocations to attend to. He is not a professional banker. He is not expected to do the duty of a professional banker, as we all know. He is a man selected from his position, from his character, from the influence he may bring to bear upon the welfare of the bank, and from the trust and confidence which are reposed in his integrity and in his general ability. But I need not say that it is no part of his duty to take charge of the accounts of the bank. He is entitled to trust the officials of the bank who are there for that purpose, and, as long as he has no reason to suspect the integrity of the officials, it can be no matter of imputation to him that he trusts to the statements of the officials of the bank, acting within the proper duties of the department which has been intrusted to them."

This is a correct statement of the duty of the directors, and their liability is to be measured accordingly. It would seem to follow that the directors, who took no part in the preparation of the fraudulent statement, and had no knowledge of, or reason to suspect, its falsity, would not be liable. By parity of reasoning, neither the bank itself, nor its stockholders, would be liable; for the liability of the stockholders is involved in the liability of the bank.

Another ground upon which this demurrer is placed is that:

"It is not enough to make a cause of action that a statement is made in such manner as that the plaintiff is likely to rely upon it, or that it is on a subject which interests or affects the plaintiff. It must be made to the plaintiff. There must be some privity between the plaintiff and the defendant. Many statements are of such a nature that investors and traders use them as data in business, and rely upon them, but they do so at their own risk, if the statement was not made to them for the purpose of inducing the kind of action they took. If the statement is made to a class, the plaintiff must be one of that class. It is not enough that, though not one of the class, he is interested in the statement, and chooses to use it as a basis of action."

This proposition has been already in part considered. In support of it, the case of *Wells v. Cook*, 16 Ohio St. 67, is cited. In that case the owner of sheep apparently sound and healthy, but known by him to be affected by contagious disease, falsely and fraudulently represented them as sound and healthy to Orlando Wells, the plaintiff, as the agent of his brother, Osmond Wells; and Orlando, confiding in such representations, bought them for Osmond, with the avowed purpose of mingling them with a large flock then belonging to Osmond. In consequence the united flock was infected, and, the plaintiff and Osmond Wells being still unaware of the existence of the disease, the plaintiff bought the united flock from Osmond, and suffered damage from the continued spread of the disease. Held that, the representations not having been made to the plaintiff to induce him to act upon them in any matter affecting his own interests, he could not maintain an action against the defendant for the deceit. The court said that there must be fixed a limit between the near and remote and the direct and indirect consequences of false and fraudulent representations, beyond which the law will not take cognizance of them; and that one of the limits is that the false and fraudulent representations must have been intended to be acted on, in a matter affecting himself, by the party who seeks redress for consequential injuries.

In *Peek v. Gurney*, L. R. 13 Eq. 79, and L. R. 6 H. L. 377, the firm of Overend, Guernsey & Co. being insolvent, the parties resolved to

sell the concern to a stock company, to be organized for the purchase. To induce the public to subscribe for shares, they issued a prospectus in which the fact of insolvency was withheld. If it had been disclosed, the company would not have been formed. The directors withheld the fact, honestly believing that the speculation on which they were about to embark would be successful. In October and December, 1865, the plaintiff, on the faith of the prospectus, bought in the market shares which had been originally allotted to a partner in the insolvent firm. In May, 1866, the company stopped payment, and was afterwards wound up. The plaintiff was compelled to pay large sums by reason of his liability as a stockholder. In March, 1868, he filed a bill seeking to be indemnified in respect of his loss by the surviving directors and the estate of a deceased director. It was held that if he had been an original stockholder, and had made his claim in due time, he would have been entitled to such indemnity, but that he was debarred of his remedy on the ground that he was in no better position than the original stockholder from whom he bought; and, secondly, that he had come too late for relief. The original stockholder was not deceived as to the condition of the affairs. The court held that the directors were relieved from any liability in a criminal court by reason of their belief in the probable success of the company, but that that belief could not exonerate them from liability in a court of equity, because the absence of guilty intent, while it would divest the criminal jurisdiction, would not take away the equitable jurisdiction upon the ground of fraud. The court then came to the question whether the case of deception applied to the case of a transferee of the stock as well as to the case of an original subscriber who was deceived, assuming that, if the matter had been brought immediately to the cognizance of the court, the original subscribers could have renounced their shares, and required repayment of their advances. Lord Romilly said that "a question of considerable importance and of a distinct character arises, as regards the transferee of a share, namely, whether the misconduct of the directors is a vice that taints the share itself, into whosoever hands it passes, or whether the share itself is purified by the conduct of the allottee or any subsequent holder of the share." He was of opinion that the plaintiff could do no more than the original allottee could have done, and he thought the original allottee was cognizant of the whole matter. In other words, the prospectus was not recognized as a document on which the plaintiff could, on his own behalf, rely; for its operation was limited to those who subscribed to the stock on the faith of its representations, and the plaintiff, as transferee of shares, acquired by his purchase nothing more than the equity of the original holder. The house of lords in the same case (L. R. 6 H. L. 377) held that the plaintiff could not recover, as the prospectus was not addressed to him, nor intended to induce such action as he took, although it had been published broadcast, and the plaintiff naturally relied upon it. That case cannot be distinguished, in principle, from this. The most that can be claimed as to the false circulars is that they were intended to invite business

to the bank. See, also, *Swift v. Winterbotham*, L. R. 8 Q. B. 244, and *Richardson v. Silvester*, L. R. 9 Q. B. 34.

In *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, action was brought by one who had taken the note of the company of which the defendants were directors on faith of the certificate required by law to be filed with the secretary of state by a foreign corporation doing business in the state. The law required that the certificate should state the amount of capital subscribed for and the amount paid in. It was held that the object of the certificate was not to procure credit among merchants, but to give permission to do business in the state, and not being made to the plaintiff, though the plaintiff might naturally rely upon it, he could not maintain an action for deceit against the directors.

In *Bank v. Sowles*, 46 Fed. 731, the directors, during a run upon the bank, signed and placed conspicuously in the public banking room a statement that the bank was sound, and would pay all its liabilities. The president of the plaintiff bank loaned money to the defendants on the strength of this notice and of certain oral representations made by the defendants. The oral representations were excluded, on the ground that the statute of Vermont, in which state the case arose, required such representations to be made in writing. The court held that the defendants were not liable upon the written statements. It said:

"That such a representation was so made somewhere, at some time, to some person, by the persons sought to be charged, is not sufficient; it must be made to the person seeking to charge them."

The court cited *Grant v. Naylor*, 4 Cranch, 224; *Russell v. Clark*, 7 Cranch, 69. The court further said:

"This writing was not delivered to, nor to any one for, the plaintiff, and the plaintiff was not one of those for whom it was obviously intended. If it had been signed by the defendants as individuals, instead of as directors, it would not appear to have been a representation to the plaintiff on which they could be charged, within the meaning of this statute. But, further, this notice was an official statement of the defendants as directors, on its face, made to the then creditors to inspire confidence, rather than as individuals to procure loans."

This case did not depend upon the local statute. The only effect of that statute was to shut out the oral representations, and confine the plaintiff to the written statements. These cases are in accord with the general principles of law applicable to this case. Upon the doctrine in them stated, and upon the general principles therein stated, as well as upon the considerations heretofore set forth, the demurrer must be sustained, and the petition dismissed.

---

#### KEATS v. NATIONAL HEELING MACH. CO.

(Circuit Court of Appeals, First Circuit. January 29, 1895.)

No. 92.

#### 1. INJURIES TO SERVANT—NEGLIGENCE OF MASTER—DANGEROUS MACHINERY.

Employing a set screw on a revolving shaft in the ordinary way is not negligence, making a master liable for injuries to his servant caused by the screw catching the servant's clothing.

## 2. SAME—FAILURE TO WARN SERVANT.

Nor is a master guilty of negligence in not having given warning of danger from such screw to a servant who was a mechanic of mature years, had worked on the premises for some time, and might have performed his work without danger by adopting a different method of reaching it.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Charles Keats against the National Heeling Machine Company for personal injuries received by him while working for defendant, caused by his clothing being caught by a set screw on a rapidly revolving shaft in defendant's factory. At the trial the court directed the jury to find for defendant, and judgment for defendant was entered on the verdict. Plaintiff brought error.

Samuel A. Fuller, for plaintiff in error.

Darwin E. Ware and James Hewins, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PER CURIAM. We do not find in this case any evidence of negligence on the part of the defendant in the construction and arrangement of its premises and machinery. The employment of a set screw upon a revolving shaft, which caused the injury to the plaintiff, was the common and ordinary way in which such shafts were constructed. The defendant was a mechanic of mature years, and had worked on these premises for some time before the accident occurred. It is also shown that he might have performed the work without danger by another method of reaching it, requiring, perhaps, a little more time. Upon this state of facts, we think the defendant had no reasonable cause to believe that the plaintiff would do the work in such a way as to expose himself to danger, and that it was not guilty of negligence in not warning him. The rule laid down in cases where employes are set at work in positions of unusual and concealed danger is not applicable to the present case. In our opinion, there was no evidence of negligence sufficient to support a verdict by the jury for the plaintiff, and the court below committed no error in directing a verdict for the defendant. Judgment affirmed.

## WABASH WESTERN RY. v. BROW.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 199.

## 1. REMOVAL OF CAUSES—OBJECTION TO JURISDICTION—APPEARANCE.

The filing of a petition for removal of a cause from a state to a federal court, without objecting to the jurisdiction of the state court over the defendant's person, constitutes a general appearance; and it is too late, after such removal, to urge, in the federal court, that that court has no jurisdiction over the defendant by virtue of the process issued.

## 2. EVIDENCE—NEGLIGENCE—FELLOW SERVANTS.

Plaintiff, a car repairer in the employ of defendant railroad company, while at work in defendant's yards, was injured in a collision, caused by the negligent misplacing of a switch by a switchman, also in defend-



ant's employ, who was drunk at the time. *Held*, that evidence that the switchman had been drunk some weeks before, and in that condition had caused a similar accident, was competent, it appearing that the circumstance had been reported to defendant's foreman, who had authority to employ and discharge men; and that the doctrine of fellow servants' negligence had no application.

8. SAME—RES GESTAE.

*Held*, further, that evidence that the foreman, upon receiving the complaint, replied: "What of it? If T. [the switchman] should kill three or four Polacks, there is enough of them yet,"—was competent as *res gestae*, no claim being made against the railroad company for punitive damages.

4. RELEASE—WANT OF CONSIDERATION.

Plaintiff had given to defendant a release, under seal, of all claims to damages resulting from his injuries. It appeared that no consideration had ever been given for such release. The statutes of Michigan (How. Ann. St. § 7520), in which state the accident occurred, provide that a seal is only presumptive evidence of consideration. *Held*, that the release should be disregarded.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

In September, 1892, Joseph Brow filed his declaration in the circuit court for Wayne county, Mich., against the Wabash Western Railway, seeking to recover \$20,000 damages for a personal injury caused, as he alleged, by defendant's negligence. On the 24th of the same month the sheriff of the county duly served Fred J. Hill, as agent of the defendant, with a copy of the declaration, and a notice to appear and plead in 20 days. On October 7th the defendant filed its petition for removal as follows:

"To the Circuit Court for the County of Wayne, aforesaid: The petitioner, the Wabash Western Railway, defendant in the above-entitled cause, shows to the court as follows: (1) That the matter and amount in dispute in the above-entitled cause exceeds, exclusive of interest and cost, the sum or value of two thousand dollars. (2) That the controversy in said suit is between citizens of different states, and that the petitioner, the defendant in the above-entitled suit, is a corporation created and existing under the laws of the state of Missouri, having its principal business office at the city of St. Louis, in said state, and a citizen of the said state of Missouri, and a resident of said state of Missouri, and that the plaintiff, Joseph Brow, was then, and still is, a citizen of the state of Michigan, and a resident of the county of Wayne, in said state. (3) Your petitioner offers herewith good and sufficient security for the entry by it in the circuit court of the United States for the Eastern district of Michigan on the first day of its next session of a copy of the record in said suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto. Your petitioner therefore prays this court to proceed no further in this suit, except to make the order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed into said circuit court of the United States for the Eastern district of Michigan."

Defendant also filed his bond, conditioned to enter in the United States district court for the Eastern district of Michigan on the first day of its next session a copy of the record, and to pay all costs if the suit should be found to be wrongfully removed. The order of removal was granted the same day. On October 14th the record was filed in the court below, and afterwards, upon the same day, this motion:

"And now comes the Wabash Western Railway, defendant (appearing specially for the purpose of this motion), and moves the court, upon the files and records of the court in this cause, and upon the affidavit of Fred J. Hill, filed and served with this motion, to set aside the service of the declaration and rule to plead in this cause, and to dismiss the same for want of jurisdiction of the person of the defendant in the state court from which this cause was removed and in this court."

The motion was supported by the following affidavit:

"Fred J. Hill, being duly sworn, deposes and says: (1) That this deponent on the 24th day of September, A. D. 1892, when he was served with a copy of the declaration in this cause, was the freight agent of the Wabash Railroad Company, a corporation which owns and operates a railroad from Detroit to the Michigan state line, and was not an agent of the Wabash Western Railway, defendant in this suit. (2) That on the day aforesaid the defendant in this cause, the Wabash Western Railway, did not own, operate, or control any railroad in the state of Michigan, or have any officers or agent of any description therein, and did no business, and had no property and no place of business, in said state; and that on said day deponent was not a ticket or station agent of the said defendant, nor an officer or agent of the defendant of any description."

No other evidence was offered on the issue raised by the motion. The circuit court denied the motion, and required defendant to plead. To this action the defendant excepted, and went to trial under protest.

Brow, the plaintiff, was injured while repairing a car of defendant in its yards at Delray, near Detroit. He was one of a gang of car repairers in defendant's employ at work on some seven cars under the direction of one Heller as foreman. The cars were on a track known as the "repair track." Blue flag signals were displayed, to show to the yard men that men were at work on and under them. A switch engine crew was directed to push some other cars which had been repaired on to a track parallel with the repair track. Instead of doing so, they pushed the cut of cars on to the repair track, bumped the cars standing there together, and severely injured plaintiff, who was at work under his car putting in a drawbar, by pinning him down between his tool box and one of the axles. Plaintiff's evidence tended to show that the mistake in the turn of the switch occurred through the negligence of one Thompson, a switchman, who was drunk; that a few weeks before, a similar mistake had been made by the same man, in the same drunken condition; that Heller, plaintiff's foreman, had at that time reported Thompson's drunken negligence to Henderson, the foreman of the yard, and to Ruxton, the general foreman of the car department in the yard; that Henderson, in the absence of Dimick, the general yard master of defendant, had the authority to employ and discharge switchmen under him. Defendant's evidence tended to show that the accident was caused, not by Thompson, but by the foreman of the switch crew, and that Thompson was a sober man, and that he and plaintiff had worked together in the same yard. Defendant further introduced a release, signed by Brow, as follows:

"Whereas on the 9th day of Nov., 1887, I, Joseph Brow, was an employé of the Wabash Western Railway Company, and as such employé was engaged as carpenter in Delray yard; and whereas, I, the said Joseph Brow, received certain injuries as follows: ribs bruised; and whereas, the said railway company denies any and all negligence on the part of itself, its officers, agents, and employes, and denies any and all liability for damages for the injuries so as aforesaid by me received: Now, therefore, for the purpose of fully ending and determining the question of liability on the part of the said railway company for damages for the aforesaid injuries, and for the purpose of avoiding litigation, I, the said Joseph Brow, for and in consideration of the premises and of the sum of one dollar to me in hand paid, the receipt whereof I do hereby acknowledge, and of re-employment by said railway company for such time only as may be satisfactory to the said railway company, do hereby waive and relinquish all claims which I may have against the railway company for damages for the aforesaid injuries, and do hereby release the said railway company of and from all claims as aforesaid.

"Witness my hand and seal, this 10th day of Nov. A. D. 1887. [Signed] Joseph Brow. [Seal.]"

Ferguson, whom defendant called to prove plaintiff's signature to the release, was the clerk of the master mechanic, Ruxton. Ferguson and Ruxton witnessed the signature. Ruxton said he could not remember whether remuneration or employment was given to the plaintiff, but that defendant never refused to take him back. Ferguson testified that he did not think that any money had been paid to plaintiff, or that he had received any em-

ployment from defendant. In rebuttal, plaintiff stated that he was sent for to go to the office in the yard; that he there saw Ferguson, who had this release, and two other papers; that Ferguson asked him his wife's name, and those of his children, and then gave him a pen, and said, "Sign this;" that nothing was said to him about employment; and that he received no consideration in employment or money from defendant. Defendant moved that a verdict be directed in its favor. This was overruled.

The only part of the charge material to the present discussion concerns the release. It was as follows: "I charge you, in regard to the release, inasmuch as that is offered in bar of the plaintiff's claim, there is not, in view of the testimony laid before you, such a consideration proved to have been given for the execution of that paper as makes it competent for you to find it to be a bar to recovery. The testimony is that there was no money paid, and that there is nothing in that paper which obliges the company to employ the plaintiff." The jury returned a verdict for \$4,000 for plaintiff. The court made an order granting a new trial, unless plaintiff entered a remittitur of \$1,500, which he did. Thereupon judgment was entered for \$2,500. The judgment has been brought by writ of error to this court for review.

Several of defendant's exceptions and assignments are based on the circuit court's rulings on matters of evidence. Defendant excepted to the admission of evidence that 19 days before, Thompson, while drunk, had caused a similar accident. Again, the defendant excepted to the refusal of the court to exclude a statement by Heiler that he had reported Thompson's drunkenness and negligent conduct to Henderson, and that Henderson had responded: "What of it? If Thompson would kill three or four Polacks, there is enough of them yet." The other exceptions related to the evidence of Ferguson, Ruxton, Heiler, and plaintiff as to the signing of the release, it being claimed by counsel for defendant that, after proof of the signature, the release under seal was a binding contract, importing consideration, and could not be varied or contradicted and could only be set aside in equity.

Alfred Russell, for plaintiff in error.

William E. Banbie, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the case, delivered the opinion of the court.

Can a defendant, who makes no objection to the jurisdiction of the state court over his person, and who files a petition for removal to the federal court, be heard to urge in the latter court that the state court acquired no jurisdiction over him because of defective service? The twelfth section of the judiciary act of 1789, giving the right of removal, was worded as follows:

"That if a suit be commenced in any state court against an alien or by a citizen of the state in which the suit is brought against a citizen of another state and the matter in dispute exceeds the aforesaid sum or value of \$500.00 exclusive of costs to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, \* \* \* and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process."

Under this section it was held by the supreme court of the United States, by Mr. Justice Curtis and by Judges Krekel and Treat of Missouri, that the filing of a petition for removal, and the removal of the cause from the state court to the federal court, constituted a waiver of all objections to jurisdiction over the person. In the case of *Pollard v. Dwight*, 4 Cranch, 421, Dwight brought a foreign attachment against Pollard & Pickett in a state court of Connecticut. The defendants appeared, and removed the cause to the circuit court of the United States for the district of Connecticut, and there pleaded to the jurisdiction of the court on the ground that there was no personal service on them. This plea was held bad, and the ruling was sustained in the supreme court, where Chief Justice Marshall said:

"The point of jurisdiction made by the plaintiffs in error is considered as free from all doubt. By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood had process been served upon them, and consequently waived all objections to the nonservice of process. Were it otherwise, the duty of the circuit court would have been to remand the cause to the state court in which it was instituted, and this court would be bound now to direct that proceeding."

The necessary implication of this language is that no petition for removal was valid in a state court without such an appearance there as to waive all objection to the court's jurisdiction over the person, that a petition for removal without appearance required a remanding of the case.

In *Sayles v. Insurance Co.*, 2 Curt. 212, Fed. Cas. No. 12,421, a foreign corporation sued in a state court of Rhode Island filed a petition in that court to remove the suit to the circuit court of the United States for that district. The defendant then moved to dismiss the action for want of jurisdiction, on the ground that the only service made in the state court had been an attachment of the goods and effects of the defendant, and that the court had no jurisdiction to try a case against the defendant, because it was neither an inhabitant of the district where the suit was brought, nor was it found therein; but Mr. Justice Curtis held that under the twelfth section of the judiciary act it was not necessary that the defendant should be an inhabitant of the district, or should be personally found therein; that under that act any process in accordance with the laws of the state by which the defendant was made a party was sufficient to constitute it a pending suit for removal within the jurisdiction of the federal court. As a second ground, however, for his conclusion he said:

"Besides, it has been held in *Toland v. Sprague*, 12 Pet. 300, that the locality of the action within the district where the defendant is an inhabitant or is found is a personal privilege of the defendant, which he may waive by appearing and pleading to the action. And I am of opinion that when he appears in the state court, files a petition for leave to remove the action, gives a bond to enter it in the circuit court, and actually enters it there, he has thereby waived any personal privilege he might have had to be sued in another district. If pleading to the action amounts to a waiver of such a privilege, upon the ground that he ought not afterwards to be heard to object to the means by which he was brought into court, I do not perceive why these

proceedings should not have the same effect. The defendant comes in, becomes the actor treats the suit as one properly instituted, removes it to another court, and enters it there, and then says he was not obliged to appear at all, and the state court in effect had no suit before it. This, I am of opinion, he cannot do. I consider that this court will not look back to inquire into or try the question whether the state court had jurisdiction. The act of congress allows defendants to remove actual and legally pending suits from the state courts. If this were not such a suit, the defendant should not have brought it here. By bringing it here, he voluntarily treats it as properly commenced, and actually pending in the state court; and he cannot, after it has been entered here, treat it otherwise. It is urged that this will prevent citizens of other states from trying in this court the question whether the state court had jurisdiction. Not so. If the state court had no jurisdiction, and the defendant does not appear, its proceedings are all void, and may be shown to be so in an action brought in this court against any one who meddles with the person or property of the defendant under the color of such proceedings. The only objections which the defendant will be precluded from trying here are technical objections, which do not affect the merits; and I see no good reason why he should not be prevented from trying them here."

These remarks have been referred to as obiter dicta, and unnecessary to the decision of the case. This is hardly a proper statement of their effect. Mr. Justice Curtis put his decision on two grounds, either of which sustains his conclusion, and the statement of neither, therefore, was an obiter dictum.

In *Bushnell v. Kennedy*, 9 Wall. 387, a firm of citizens of Louisiana sued in the state court of Louisiana a citizen of Connecticut on an obligation assigned by the original owner to the plaintiffs. The defendant filed a petition for removal into the circuit court of the United States for the district, and the case, after having reached that court, on motion was remanded to the state court, on the ground that under the eleventh section of the judiciary act the plaintiffs could not maintain a suit in a court of the United States without averring in the petition that their assignors were citizens of another state than that of the plaintiffs. The order remanding the cause was carried on error to the supreme court of the United States. It was held by that court that the cause was rightly removed, and that the disability imposed upon assignees of a chose in action to sue in the United States court by the eleventh section of the judiciary act did not apply to removed cases. It was claimed in argument that the eleventh section must apply to removed cases, because the twelfth section provided that the cause should, after removal, proceed in the same manner as if it had been heard by original process. The supreme court, speaking by Chief Justice Chase, said:

"But we cannot recognize the validity of the inference that the defendant, before pleading in the circuit court, may move to dismiss the suit for want of jurisdiction. This construction would enable the nonresident defendant in a state court to remove the suit against him into a circuit court, and then, by a simple motion to dismiss, defeat the jurisdiction of both courts. Such a construction, unless imperatively required by the plain language of the act, is wholly inadmissible. And it is clear that the language of the act does not require it. Its plain meaning is that the suit shall proceed, not that it shall proceed unless the defendant moves to dismiss. The defendant is not in court against his consent, but by his own act; and the suit is to proceed as if brought by original process, and the defendant had waived all exception to jurisdiction, and pleaded to the merits. Under the eleventh section, the exception to jurisdiction is the privilege of the defendant, and may be waived,

for the suit is still between citizens of different states, and the jurisdiction still appears in the record. The first act of the defendant, indeed, under the twelfth section, is something more than consent, something more than a waiver of objection to jurisdiction; it is a prayer for the privilege of resorting to federal jurisdiction; and he cannot be permitted afterwards to question it;" citing *Sayles v. Insurance Co.*, 2 Curt. 212, Fed. Cas. No. 12,421.

In the case of *Sweeney v. Coffin*, 1 Dill. 73, Fed. Cas. No. 13,686, Judges Treat and Krekel, in considering a motion to remand a cause to the state court on the ground that the petition for removal or the affidavit in support of it was insufficient, found it necessary to discuss the question whether the filing by the defendant of a petition for removal was an entering of his appearance in the state court. Judge Treat said:

"Although no express decision in a United States court has been found, and although state courts differ largely as to what makes an appearance in causes before them, and whether appearances by attorneys are conclusive or prima facie merely, yet there are general reasons governing the removal of causes from state to United States courts, which enable this court to reach a satisfactory conclusion on the point presented. When the jurisdiction of a United States court is dependent on the citizenship of the parties under the constitution and acts of congress, if the suit be originally brought in the United States court, personal service is necessary, unless there is a voluntary appearance. *Toland v. Sprague*, 12 Pet. 300. If this suit had been brought originally in this court against the defendant, service or appearance would have been necessary for further proceedings. Although, in state courts, constructive service is sufficient, it is not so in a United States court; and hence the necessity of a voluntary appearance or of actual service. But, as appearance by attorney was and is admissible in this class of actions, where no *capias* or bail is required, this court holds that the filing of the petition for removal is the entry of an appearance within the meaning of the statute. Indirectly, the reasons for such a rule were given by the supreme court, not only in *Toland v. Sprague*, supra, but also in several other cases. By constructive service in the state court it could have proceeded to judgment, but to prevent such action defendant availed himself of his right for removal, and is precluded from denying the status he has assumed."

The twelfth section of the act of 1789 remained unamended until the act of March 3, 1875 (18 Stat. 470). Section 3 of that act provided that whenever any person entitled to remove—

"Any suit mentioned in the next preceding section shall desire to remove such suit from a state court to the circuit court of the United States, he \* \* \* may make and file a petition in such suit in such state court before or at the term at which said cause could be first tried and before the trial thereof for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court."

Section 6 provides:

"That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been

taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal."

The act of 1888, amending the act of 1875, did not affect section 6, above quoted, and made no change with reference to the mode of removal, except that it required the removal to be "at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."

Under the statutes of 1875 and 1887 and 1888 there have been conflicting decisions as to the right of a defendant after removal to object to the sufficiency of the service upon him. Reference to them will be made hereafter.

It will be observed that in the act of 1789 the time for removal was fixed as that time at which the defendant appeared to plead, and hence it has been suggested that, while a petition for removal under the act of 1789 might constitute a general appearance, the change of time under the act of 1875 and that of 1887 and 1888 would change the effect of the filing of a petition to remove as an appearance. We do not think that the difference in this language is significant of such intention on the part of congress. The decisions in which it was held under the act of 1789 that a petition for removal was in fact a general appearance did not rest upon these particular words of the statute, but rather upon the general character of the act of removal. When a person made a party on the record appears in the case, and asks a court to do anything, this is, and must be, an appearance. If the party is not in court, it is difficult to see how he can invoke the action of the court. But courts have recognized that, while a judgment against a party over whom it has not acquired jurisdiction is void, yet the spreading of it upon the court's record may involve such party in difficulties, and put him to the necessity of afterwards appealing to the court to set it aside, and they therefore have secured him the right to appear specially, without subjecting himself generally to the jurisdiction, to prevent even the semblance of the judgment against him. In extending this privilege, however, courts have been particular to insist that a party who wishes to make such special appearance shall by express limitation show that he does not wish his appearance to be general.

In *Briggs v. Humphrey*, 1 Allen, 371, Mr. Justice Hoar, speaking for the supreme judicial court of Massachusetts, in a case where the court was considering the question whether a defendant had waived his right to object to the jurisdiction of the court over his person by reason of a defect in the process issued, said:

"Now, it is well settled that a mere defect of service may be waived by a defendant, and is held to be waived if he enters a general appearance in the cause, or appears for any other purpose than to object to the sufficiency of the service."

In *Bank of the Valley v. Bank of Berkeley*, 3 W. Va. 386-391, the court said:

"The object of the service of process is to bring the party into court. A judgment by default without service would not be legal. By appearance to the action for any other purpose than to take advantage of the defective

execution or the nonexecution of process, a defendant places himself precisely in the situation in which he would be if process were executed upon him, and he thereby waives all objection to the defective execution or the non-execution of service upon him. I think, therefore, the defendant in this case, by its motions to continue, waived all errors existing in the execution of the process."

See, also, *Porter v. Railway Co.*, 1 Neb. 15; *Clark v. Blackwell*, 4 G. Greene, 441; *Ulmer v. Hiatt*, Id. 439; *Shaffer v. Trimble*, 2 G. Greene, 464; *Curtis v. Jackson*, 23 Minn. 268; *Sargent v. Flaid*, 90 Ind. 501; *Bury v. Conklin*, 23 Kan. 460; *Orear v. Clough*, 52 Mo. 55; *Stanton v. Havrehill Bridge Co.*, 47 Vt. 172; *Flake v. Carson*, 33 Ill. 518.

There are two kinds of objections to the jurisdiction of a court; the one is to its jurisdiction of the subject-matter, the other to its jurisdiction of the person. The second may be waived, the first cannot be. It is with reference to the second class of objections, namely, to the jurisdiction over the person, that there is any necessity for care on the part of the defendant in especially limiting the character of his appearance. If the court has no jurisdiction of the subject-matter, consent cannot give it. Hence it has been held that, if a defendant pleads to the jurisdiction of the court over the subject-matter, without making any objection to its jurisdiction over his person, he concedes the jurisdiction of his person if the jurisdiction of the subject-matter is sustained, and, after such plea is overruled, it is then too late for the defendant to avail himself of any objection to the jurisdiction over his person. Said Judge McIlvaine in *Smith v. Hoover*, 39 Ohio St. 249:

"The appearance of a defendant in court for the sole purpose of objecting, by motion, to the mode or manner in which it is claimed that jurisdiction over his person has been acquired, is not an appearance in the cause, or a waiver of any defect in the manner of acquiring such jurisdiction; while, on the other hand, the appearance for the purpose of contesting the merits of the cause, whether by motion or formal pleading, is a waiver of all objections to the jurisdiction of the court over the person of defendant, whether the defendant intended such waiver or not. In respect to this question, an important distinction is made between an objection to the jurisdiction of the subject-matter of the suit and of the person of defendant, although complete jurisdiction in the court to hear and determine the action is not acquired unless the court has jurisdiction over both the subject-matter and the person. An objection to jurisdiction over the subject-matter is a waiver of objection to the jurisdiction of the person, while an objection to the jurisdiction of the person is a waiver of nothing."

In *Handy v. Insurance Co.*, 37 Ohio St. 366, where a foreign insurance company made defendant filed a motion to dismiss the action for the reason that the court had no jurisdiction of the case because it appeared from the petition on file that the defendant was a foreign insurance company, and that no part of the alleged cause of action arose in the state, it was held "that the filing of such motion was a voluntary appearance in the action, and the waiver of any defect in the service of summons."

The rule, in other words, is this: that where a defendant comes into court for any purpose, if he intends to object to the court's jurisdiction of his person, he must first make that objection, and limit his appearance accordingly. If he appears for any other pur-



pose, without making this objection, he has waived it. Now, it is true that the filing of a petition for removal is in a certain sense a proceeding directed to the jurisdiction of the court. It is not strictly an objection to the jurisdiction of the court over the subject-matter, because, if the state court has no jurisdiction over the subject-matter, the federal court, by removal, can obtain none. Such a petition *prima facie* assumes the jurisdiction of the state court, and the existence of a real controversy, and merely asks a change of venue to another forum on grounds dependent on the constitution and the laws of the United States. If the petition for removal can be likened to an objection to the jurisdiction at all, however, it is analogous, not to an objection to the jurisdiction of the person, but to that of the subject-matter. It therefore follows that an appearance to file a petition for removal, not limited in any way, waives all objections to jurisdiction over the person.

It is not necessary for us to discuss whether, under the act of 1789, it was possible in any way to limit the effect of the appearance by a petition for removal, because we are convinced that the sixth section of the act of 1875, quoted above, permits it. That section directs the federal court to proceed as if the same proceeding had been taken before it as had been taken in the state court prior to its removal. This certainly requires that any motion undisposed of at the time of the removal should stand for hearing before the circuit court as it would have stood before the state court if no removal had taken place. Therefore, if a defendant appears specially in the state court to move a dismissal for want of proper service, and then files his petition for removal, the motion must come on regularly for hearing in the federal court. He does not waive by his petition his right to insist on his motion, because, conceding the analogy between a petition for removal and an objection to the jurisdiction over the subject-matter, there is no authority which holds that an objection to the service by special appearance may not be united with an objection to jurisdiction over the subject-matter without a waiver of the first objection. While this construction of section 6 of the act of 1875 is not necessary to the decision of the present case, it is essential in considering the authorities upon the subject, which are in great conflict.

In the following cases it has been held that a petition for removal was not a general appearance, and that the plea to the jurisdiction of the person would be entertained in the United States court after it was filed, though no special appearance was entered in the state court for the purpose: *Atchison v. Morris*, 11 Fed. 585; *Small v. Montgomery*, 17 Fed. 865; *Perkins v. Hendryx*, 40 Fed. 657; *Clews v. Iron Co.*, 44 Fed. 31; *Bentlif v. Finance Co.*, Id. 667; *O'Donnell v. Railroad Co.*, 49 Fed. 689; *Ahlhauser v. Butler*, 50 Fed. 706.

In the following cases, where there was a special appearance to plead to the jurisdiction over the person, followed by a petition for removal, it was held that the plea to the jurisdiction could be entertained in the federal court: *Parrott v. Insurance Co.*, 5 Fed. 391; *Blair v. Turtle*, Id. 394-398; *Elgin Canning Co. v. Atchison, T. & S. F. R. Co.*, 24 Fed. 866; *Kauffman v. Kennedy*, 25 Fed. 785; *Miner*

v. Markham, 28 Fed. 387; Golden v. Morning News, 42 Fed. 112; Reifsnider v. Publishing Co., 45 Fed. 433; Forrest v. Railroad Co., 47 Fed. 1; Richmond v. Brookings, 48 Fed. 241; Brooks v. Dun, 51 Fed. 140; Morris v. Graham, Id. 53; McGillen v. Claffin, 52 Fed. 657. The last case contains quite an elaborate and satisfactory discussion of the question by Judge Ricks.

In the following cases it has been held that a petition for removal in the absence of a special appearance to plead to the jurisdiction in the state court was a general appearance, which waived all subsequent objection on that account: Edwards v. Insurance Co., 20 Fed. 452; Tallman v. Railroad Co., 45 Fed. 156; Hinds v. Keith, 6 C. C. A. 231, 57 Fed. 10,—a decision by the circuit court of appeals of the Fifth circuit; Construction Co. v. Simon, 53 Fed. 6; Caskey v. Chenoweth, 10 C. C. A. 605, 62 Fed. 712.

Construction Co. v. Simon is a vigorous decision by Mr. Justice Jackson, taking the same view of the act of 1875 and 1887 which was taken by Mr. Justice Curtis of the act of 1789.

In Schwab v. Mabley, 47 Mich. 512, 11 N. W. 294, the supreme court of Michigan held that the filing of a petition in a state court for removal to a federal court was not a general appearance in the state court, if the petition was denied, though the court concedes that, if the case had been actually removed to the federal court, the effect would have been to enter the general appearance there. The reasoning of the court is not entirely to be reconciled with the view we have above taken, though its conclusion is not different. Moreover, what the nature of a petition for removal is, and whether it is a waiver of the right of defendant to object to the jurisdiction of the federal court over the person, are really questions of federal practice, and must be determined by us as such, and without regard to the practice in the particular state in which the removal is effected. We should not feel bound, therefore, to accept without question the view of the supreme court of Michigan as to the effect of the petition for removal on the jurisdiction of the federal court.

The result of what has been said is that in the case before us the appearance of the defendant company to file its petition for removal effected a general appearance, and it was too late, after such removal had been perfected for it in the circuit court below, to attempt to plead that that court had not personal jurisdiction over the company by virtue of the process issued.

Coming now to examine the assignments of error, we think the evidence that Thompson had been intoxicated, and, as a result of that intoxication, had negligently caused a similar accident some weeks before, was entirely competent in view of the fact that his conduct had been reported by Heiler to Henderson, who had the power of employment and discharge, and in that, of course, represented the company. It is the master's duty to use due care to employ only competent, careful, and skillful workmen, and any person to whom he delegates this duty is his representative, and for his negligence the master is responsible, and cannot escape liability by pleading the fellow-servant doctrine. It has no application to such a case. Railway Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932.

Henderson' reply to Heiler's complaint concerning Thompson: "What of it? If Thompson should kill three or four Polacks there is enough of them yet,"—was competent as *res gestae*. Henderson was the representative of the company in the employment and discharge of men, and his reply was in the course of his duty. It is true that, if spoken in earnest, it indicated a wanton recklessness on his part with reference to the discharge of his duty which the company might not be responsible for; but no claim was made for exemplary or punitive damages, and no charge asked by the defendant to prevent the jury from returning them. Because the manner in which a servant discharges the duty of his master has elements of malice in it for which the master cannot be mulcted in punitive damages, we cannot hold that the circumstances tending to show whether the duty was discharged or not are incompetent evidence. The danger of unjustly increasing the damages against the company, because those circumstances may also show malice on the part of the employé, must be avoided by proper instructions from the court.

With reference to the release, we are very clear that the court was right in charging the jury to disregard it. All the evidence in the case showed that no money was paid, and no employment tendered or received, to fulfill the recited consideration of the release. In the absence of any consideration, the release could not, of course, constitute a bar to the action. It is true that a seal imports consideration, but by section 7520 of Howell's Annotated Statutes of Michigan it is only presumptive evidence, and may be rebutted. *Green v. Langdon*, 28 Mich. 221-225. As the evidence here conclusively established that there was no consideration, the seal had no effect.

The instructions asked by the defendant were each of them, in effect, that the jury should be instructed to bring in a verdict for the defendant. They were rightly refused. There was evidence to show that the accident occurred through the negligence of Thompson, the brakeman. There was evidence tending to show that in his conduct some three weeks before he had shown a drunken recklessness, resulting in a similar accident, and that this was reported to the officer of the company whose duty it was to employ and discharge persons in the position of Thompson. It was for the jury to say whether the information thus conveyed should have led a careful, prudent employer of men to discharge him. We certainly cannot say that there was not evidence sufficient to justify a submission of this issue to the jury.

This covers all the assignments of error that we deem at all material, and leads to an affirmance of the judgment, with costs.

---

#### BALTIMORE & O. R. CO. v. CAMP.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 194.

##### 1. EVIDENCE—NEGLIGENCE.

In an action against a railroad company for personal injuries resulting from the negligence of a telegraph operator in its employ, one of the

issues was as to the negligence of the company in employing such operator, when he was known to be incompetent and careless, or when his incompetency and carelessness might, with reasonable diligence, have been ascertained. *Held*, that it was competent to show that such operator had been suspended a few months before for going to sleep while on duty, and also to show what the operator's experience had been with other railroads.

**2. FELLOW-SERVANTS—TRAIN DISPATCHER AND ENGINEER.**

A train dispatcher, who has complete control of the movements of all trains on a division of a railroad, is not a fellow servant of the engineer of a train running on such division, either at common law, or under the statute (Act April 2, 1890, § 3) of Ohio providing that every person in the employ of a railroad company, actually having power or authority to direct or control any other employé, is not a fellow servant, but a superior, of such other employé.

**3. SAME—TELEGRAPH OPERATOR AND ENGINEER.**

A telegraph operator at a station on the line of a railroad, whose duty it is to receive telegraphic orders relative to the movements of trains from the train dispatcher at another place, and communicate them to the engineers and conductors of trains at his station, is not the superior, but the fellow servant, of the engineer of a train on such railroad, both at common law and under the statute (Act April 2, 1890, § 3) of Ohio.

In Error to the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

This was an action by John P. Camp against the Baltimore & Ohio Railroad Company to recover damages for personal injuries. On the trial in the circuit court a verdict and judgment were given for the plaintiff. Defendant brings error.

John P. Camp, while engaged as a locomotive engineer of the Baltimore & Ohio Railroad Company, was seriously injured in a collision between two of its freight trains at a point about six miles east of Black Hand Station, on its Central Ohio Division. He brought his action in the Licking county, Ohio, common pleas court, against the company, for damages; and the company, which is a citizen of Maryland, removed the case to the court below, where, after a trial, verdict and judgment were rendered in plaintiff's favor, and against the company, for \$10,000. This is a proceeding in error to review that judgment.

The Central Ohio Division of the Baltimore & Ohio Railroad Company extends from Newark, through Zanesville, to Bellaire. The only telegraph station between Newark and Bellaire is Black Hand, which is about 10 miles east of Newark and 15 miles west of Zanesville. Camp's engine was No. 999, and at the time of the collision was drawing the first section of east-bound train No. 28. The west-bound train in the collision was No. 23. No. 28 was a daily east-bound freight train, due to leave Newark at 9:15 p. m. No. 23 was a west-bound freight train, due to arrive at Newark at 5:38 p. m. Train No. 47 was a west-bound express passenger train, due to arrive at Newark at 7:15 p. m. On the evening of the collision, trains No. 47 and No. 23 were several hours late. Camp, as engineer, and his conductor, were directed to wait at Newark until the arrival of No. 47, and then to run as the engine of the first section of train No. 23, and to carry green signals, indicating that a train was following from Newark to Bellaire. This was order No. 1,275, to the conductor and engineer of No. 28, at Newark. The freight train waited at Newark some distance from the station, until train No. 47 came in, somewhere between 10:45 and 10:50. About the time of the arrival of train No. 47, and the departure from the freight yard at Newark of Camp's train, No. 23, the train dispatcher sent dispatch No. 1,285 to the engineers and conductors of the four sections of train No. 23, which was then at Zanesville. The dispatch was as follows: "First 28, engine 999, and first, second, third, and fourth of 23, engines 986, 962, 988, and 983, will meet at Black Hand." This was received by the operator at Black Hand, and acknowledged by him, as it was also by the operator at Zanesville, and the conductors and engineers

of train 23 at Zanesville, but it was not handed to or received by the conductor and engineer of train No. 28. There is some conflict in the evidence as to whether, at the time the dispatch was sent out, it might not have been delivered to the conductor and engineer of train 28 in the Newark yard. At the same time a dispatch was sent to the operator at Black Hand (No. 1,286), of this character: "Hold first and second 28 for orders." The receipt of this was acknowledged by the operator, Keelty, at Black Hand. Train No. 28 reached Black Hand at 11:31, where it took water, and then whistled for the target, which was displaying a red light. The operator at Black Hand looked about to see whether he had any orders for train No. 28, and negligently overlooked the two orders which he had received an hour before, to hold 28 for orders, and the direction that 28 and 23 would meet at Black Hand. Not finding any orders, he withdrew the red signal, and gave the white light, which was an indication to the engineer that there were no orders for him. It therefore became his duty, under his running order, to proceed to Bellaire, because, so far as he was informed, the track was clear. This was in accordance, too, with the general running rule, A, which provided that regular trains moving east have absolute right of track over regular trains moving west, of same or inferior class. Train No. 23 left Zanesville for Black Hand at 11:15 p. m. The collision occurred about 12 o'clock, six miles east of Black Hand. Camp was caught between the wheels and the boiler, had one foot burned off, so that the leg had to be amputated, and was otherwise injured.

Rule 225 of the regulations of the defendant company provides as follows: "Safety demands that all persons connected with the movement of trains by telegraph should use the utmost care and watchfulness. All rules regarding the same must be strictly observed. Orders must be plain and explicit, and not too long. If not fully understood by those to whom addressed, an explanation will be required before signing them."

Rule 226 of the defendant company governs the issuing of train orders by telegraph, and provides as follows: "All special orders, by telegraph or otherwise, for the movement of trains, will be given in writing, with the date on which they were sent, and addressed to the conductors and engineers of each particular section of the trains for which they are intended. They shall be written in full, without abbreviations, except such as are provided for herein."

Rule 227: "Orders shall be sent and signed by the superintendent, or for him by train dispatchers appointed for that purpose. When issued by train dispatcher, he will add his initial letter to those of superintendent."

Rule 228: "Only one person at a time will be allowed to move trains by telegraph on any division or subdivision."

Rule 257: "When a meeting point is to be made between two trains at a certain station, the orders should be sent to said trains to stations on either side of the actual meeting point, and never, when it can possibly be avoided, to said meeting point itself. Should it, however, at any time, be absolutely necessary to send the orders to the actual meeting point, the train dispatcher must see that special precautions are adopted to secure safety, by sending out flagmen, or otherwise, at said meeting point, as the circumstances may require."

Rule 261: "All train dispatchers or others who may move trains by special order are cautioned to use the utmost care in all their work. Do not let your anxiety to hasten the movement of trains induce you to take any risks. When you change off with each other, take great pains to make sure that the man who is about to assume charge fully understands the position of trains, and the character of their orders. In all cases, give him a full, written statement, showing the exact situation."

Rule 264: "An order to be sent to two or more offices must be transmitted simultaneously to as many as practicable. The several addresses must be in the order of superiority of rights of trains, and each office will take only its proper address. When not sent simultaneously to all, the order must be sent first for the train having the superior right of track."

Rule 265: "When an order has been transmitted, preceded by the signal '31,' operators receiving it must, unless otherwise directed, repeat it back at once from the manifold copy, and in the succession in which their several

offices have been addressed. Each operator repeating must observe whether the others repeat correctly. After the order has been repeated correctly by the operators required at the time to repeat it, the response, 'O. K.,' authorized by the train dispatcher, will be sent simultaneously to as many as practicable, naming each office. Each operator must write this on the order at the time, and then reply, 'I O. K.,' with his individual and office signal. Those to whom the order is addressed must then sign their names to the copy of the order to be retained by the operator, and he will send their signatures to the superintendent. The response, 'Complete,' the exact time, and the superintendent's initials will then be given, when authorized by the train dispatcher. Each operator receiving this response will then write on each copy the word 'Complete,' the time, and his last name in full, and will then deliver a copy to each person included in the address, and each must read his copy aloud to the operator."

Rule 266: "For an order preceded by the signal '31,' 'Complete' must not be given to the order for delivery to a train of inferior right until 'O. K.' has been given to and acknowledged by the operator who receives the order for the train of superior right. The signature of the conductor, engineman, and pilot of the train of superior right must be taken to the order, and 'Complete' given before the train of inferior right is allowed to act on it: provided, however, in cases of great emergency, and the conditions favorable, a train of a superior right can be held through the agent and operator, and one or more reliable employes. In addition thereto, torpedoes must be placed on the rail, and the dispatcher notified that the torpedoes are thus placed, and all signals out. This notice to the dispatcher that torpedoes and signals are out must be made as follows: 'There is one torpedo on each rail, and all holding signals are out.' No letter or character will be allowed to communicate the above.

"After 'O. K.' has been given and acknowledged, and before 'Complete' has been given, the order must be treated as a holding order for the train addressed, but must not be otherwise acted on until 'Complete' has been given.

"It must be understood, in explanation of the foregoing paragraph, that after 'O. K.' has been given and acknowledged the train is held for orders, but will not use the order until 'Complete' is given. In other words, the inferior train will not be moved against the superior train until 'Complete' is given the superior train."

In this case, if rule 257 had been followed, train No. 28 would have received orders to stop at Black Hand before leaving Newark, as train No. 23 received orders at Zanesville to stop at Black Hand. In this case, however, the orders were sent to the actual meeting point, but the train dispatcher did not see that special precautions were adopted to procure safety, by sending out flagmen, or otherwise, at the meeting point. Train No. 28, by the rules of the company, running east, had superior right over train No. 23, of the same class, going west. By virtue of rule 266, the order to stop at Black Hand should first have been received by train No. 28, and should have been made complete by the officers of that train before train 23 was allowed to act on it. The rule, however, has the exception that in case of great emergencies, and in favorable conditions, train 28 could be held through the agent and operator, and one or more reliable employes, by whom torpedoes should be placed on the track, and the dispatcher should be notified that the torpedoes are thus placed, and all signals out. But in such a case the inferior train is not to be moved against the superior train until the officers of the superior train have been notified, and "Complete" marked on their dispatch. There was some evidence tending to show that it had been the custom not to live rigidly up to the rules, in this respect, and that Camp had acted on similar orders before without the precautions enjoined by the rules. The operator at Black Hand, whose name was Keelty, was a boy of 18 years of age, and, some 10 months before the collision, had been employed by the railroad company, and, after 4 months' service as night operator at Glencoe station, was suspended indefinitely for going to sleep, because he stopped a fast express train, and did not give it the white signal in response to its whistle. He was then off for 10 days, and was again appointed by Kimball, the division general operator, who had the authority to hire telegraph operators for the railway company, and was employed again by the same person for day

work at Glencoe. He was then discharged as day operator for quarreling with an employé. He then applied for work on the Pan Handle road, and was examined as telegraph operator by the officers of that road. He did not get his certificate, because of a defect in his left eye, and was discharged after three weeks' employment by that company. He was then employed by the Cleveland, Canton & Southern Railroad Company, but had trouble with the train dispatcher, and was discharged. He was then again re-employed by Kimball for the Baltimore & Ohio Company, and worked two nights at Utica, on that road. He was then called by telegram from Kimball to Newark, who sent him from there to Black Hand to do night work. He reached Black Hand at 1 o'clock in the afternoon of the 27th of September, and the collision occurred that night. When Kimball sent Keely to Glencoe, a month before the collision, he told him "to stay awake and attend to his business," or something like that. Kimball testified that he had put Keely through an examination, and determined that he was a competent and safe man to handle train work, though he said nothing to contradict the facts above stated.

The averment of the petition was as follows: "That said collision and injury was caused by the carelessness and negligence of said telegraph operator at Black Hand, whose name is Keely, in failing to notify said plaintiff and the conductor of the first section of train 28 to stop at Black Hand, and in failing to stop said train 28 at that point, and also by the carelessness and negligence of the officers and agents aforesaid of the defendant [referring to superintendent, train master, or train dispatcher], in failing to give said plaintiff any notice or order to wait at Black Hand for train 23, and meet said train 23 at that point, and in failing to have train 28 stopped at Black Hand; and also by the carelessness and negligence of said officers and agents aforesaid in appointing a meeting point for said trains at said time and place, and in failing to give proper notice to the conductors and engineers of said trains, thereof, and in ordering and permitting said train 23 to leave Zanesville to run westward to Black Hand to meet train 28. And plaintiff further avers that said defendant negligently and carelessly employed and kept in its employment at said time, as such telegraph operator at Black Hand, said Keely; being then and there a careless, negligent, inexperienced, incompetent person, and wholly unfit for the position of telegraph operator at that point."

At the close of the evidence the defendant requested the court to charge the jury as follows: "Upon the pleadings and the testimony in this case, the plaintiff is not entitled to a verdict, and you will therefore return a verdict for the defendant." Second. "The plaintiff, John P. Camp, and the telegraph operator at Black Hand, Francis T. Keely, were at the time of this accident fellow servants of a common master; and the plaintiff cannot recover in this case for any negligence of the said telegraph operator, producing the collision in which the plaintiff received the injuries complained of in this case." Third. "The train dispatcher, Baird, who made the order over the initial signature of the superintendent of the road for the movement of these trains which collided, and which produced the injury complained of in this case, and the plaintiff, John P. Camp, were, at the time of this accident, fellow servants of a common master; and the plaintiff cannot recover in this case by reason of any negligence of the said train dispatcher." These three charges the court refused to give, and the defendant excepted. Parts of the charge which the court did give, to which the defendant objected and excepted, are as follows: "Now, if Keely at that time occupied such a position under the defendant company that he could direct or control Camp, or direct and control the men on that train, then he was not, under this statute, the fellow servant of Camp, but his superior,—the representative of the company; and the company is responsible for whatever injury was caused by his negligence, or failure to do his duty." "The order to train No. 23 was to proceed westward. The order to the operator at Black Hand was to detain No. 28, and that No. 23 would meet and pass at that point. The testimony is that upon that order it was the duty of the operator at Black Hand to display the red light. The result of so doing would be, according to all the testimony in the case, to stop train No. 28. That train could not pass that station (I mean if the conductor and the engineer obeyed the rules of the company) so long as the red light was displayed. Whether Keely had power

to direct the train has been argued upon the question what was the effect of changing the red light to the white light, but I think that does not go back far enough. His duty under that order was to display the red light, and keep it displayed. According to all the evidence, that was a stop order, and would have had the effect to stop the train. Indeed, the witness called (Mr. Costello) from the Hocking Valley road, when put upon the stand for the defense, testified that the order sent to Black Hand was just as good as a 'do not' order, or as an order, in terms, to stop and wait for orders, because it would effect the same purpose. How? Because it required Keely to hold the train. Now, I can see no escape from the conclusion that Keely was vested with the authority, and that he had the power, to direct train No. 28 in that respect. And if he had either the power without the authority, the actual power, or had the authority, or if he had both, the case, in my judgment, and I so charge you, comes within the operation of the third section of the act of April 2, 1890; and Keely was the superior officer, and the company is responsible for Keely's neglect. Therefore, gentlemen, if you find the fact to be as it is claimed for the plaintiff, I say to you, as a matter of law, that Keely was not the fellow servant of Camp. He was his superior, and the company is responsible for any damages resulting."

The act of April 2, 1890, referred to by the court in the preceding charge, was an act, the title to which reads as follows: "For the protection and relief of railroad employes; forbidding certain rules, regulations, contracts and agreements, and declaring them unlawful; declaring it unlawful to use cars or locomotives which are defective, or defective machinery or attachments thereto belonging, and declaring such corporation liable in certain cases, for injuries received by its servants and employes on account of the carelessness or negligence of a fellow servant or employe." The first section makes it unlawful for any railroad company to require any of its employes to agree in advance to hold the corporation harmless for any injury he may sustain, which he otherwise might recover damages for from the company. It forbids the company to require any employe to contribute any part of his wages to an association. It gives him the right, if discharged, to require within 10 days a reason from the company for his discharge, and provides a penalty for the violation of the section. Section 2 makes it unlawful for any corporation knowingly or negligently to use any defective car or locomotive, and provides that, if the employe of such company shall receive any injury on account of it, it shall be prima facie evidence of negligence on the part of the corporation. Section 3, which is the one referred to by the court above, is as follows: "That in all actions against the railroad company for personal injury to, or death resulting from personal injury, of any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employes, it shall be held in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employe of such company, is not the fellow servant, but superior of such other employe, also that every person in the employ of such company, having charge or control of employes in any separate branch or department, shall be held to be the superior and not fellow servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

J. H. Collins, for plaintiff in error.

R. A. Harrison (S. M. Hunter, of counsel), for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Error is assigned to the ruling of the court below in permitting an answer to this question which was put to Keely, the operator whose negligence caused the collision, "Why were you suspended indefinitely (that is, before the collision)?" Answer: "I went to



sleep, and stopped a fast train, No. 6." The question and answer were plainly relevant. The petition charged that the defendant company was guilty of negligence in the employment of Keelty, through whose gross neglect of duty the collision occurred, because he was careless, negligent, incompetent, and unfit for duty. The petition does not expressly charge that this negligence of the company caused the accident, but it was evidently inserted in the petition for this purpose. The case below was tried on that as one of the issues, and after a verdict and judgment it is too late to say that the petition is inartificially drawn. The fact that this operator, only a few months before, while on night duty, had gone to sleep, and had thereby stopped a train, which it was his duty to allow to pass, was most significant evidence upon the issue whether the company had been careless or not in his re-employment.

The second assignment of error is that the court refused to charge the jury to return a verdict for the defendant. In this the court was clearly right. Without respect to the question whether Keelty, the telegraph operator, could be considered the superior of Camp, the engineer, under section 3 of the act of 1890, above quoted, there were two other issues upon which the case must have been submitted to the jury. The first was whether the company had been negligent in the re-employment of Keelty as night operator at Black Hand. The highly-responsible character of the duties of a night telegraph operator at a station upon a trunk-line railroad is too obvious to need much comment. The great degree of care, therefore, which the company must use in the selection of such agents, is also plain. Fidelity, watchfulness, ability to stay awake, promptness, knowledge of telegraphy, and a proper sense of responsibility, should all be present in such an agent, and the obligation upon the company to make proper inquiries concerning the presence or absence of these qualities in the person to be selected for the position must certainly be recognized by courts and juries alike. It has been emphatically recognized by the supreme court of the United States in the opinion delivered for that court by Mr. Justice Harlan in the case of *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932. The trial court in that case charged that the position of a telegraph night operator upon a line of road was one of great responsibility, the lives of passengers and employes of trains depending on his skill and fidelity; that the company was under duty to exercise "proper and great care" to select competent persons for that branch of its service; and that the defendant was chargeable with notice of all facts concerning the fitness of such employes, which by reasonable diligence they might have known. This charge was objected to because the court used the expression "proper and great care," instead of "ordinary care," and for other reasons. The supreme court held that the objections were not well taken. It follows from this case that it was competent for the plaintiff to show the entire record of Keelty as a telegraph operator, whether the facts were actually known to the defendant company or not, because if they were facts of such a character that the de-

fendant company might, by reasonable diligence, have known them (which was a question for the jury), then it ought to have known them. We therefore think that it was competent to show what Keelty's experience had been with the Pennsylvania Company and other railroads, because it was for the jury to say whether such facts might not have been known by the Baltimore & Ohio Railroad Company, had they made proper inquiry. We are convinced, from an examination of the evidence, that it was ample for submission to the jury upon the issue whether the company had not been negligent in continuing Keelty in their employ as a night operator,—a boy of 18 years of age,—who, within a few months before the accident, had gone to sleep on duty. A verdict based on such evidence against a railway company, and the other circumstances here shown, a court would not be justified in setting aside.

Another issue which it was the duty of the court below to submit to the jury was the question whether the train dispatcher had not been guilty of negligence in the orders which he gave for the movements of the two colliding trains, No. 28 and No. 23. The train dispatcher, by the evidence in this case, had complete control for eight hours of the movement of all trains. He sent his dispatches in the name of, and in the stead of, the superintendent, who was absent from the office, and he was therefore at the head of the division for the operation of trains. It needs no argument to show that he was the superior of the engineer and conductor of train No. 28, within the third section of the act of April 2, 1890, quoted above, and that under that act the railroad company was liable for his negligence. More than this, we do not doubt that a train dispatcher is a representative of the company, within the rule of the common law, as expounded by the supreme court of the United States in the case of *Railroad Co. v. Baugh*, 149 U. S. 369, 13 Sup. Ct. 914. He represents the company for two reasons—First, because he is pro tempore in supreme control of a distinct department of the railroad, namely, the running department of the company for his division; and, second, because the work which he is called upon to do is in the discharge of a positive duty owed by the company to its employes. By the train dispatcher's authority to sign the superintendent's name to his telegraphic orders which control the operating department of his division, he becomes the superintending officer of his division; and as was said by Mr. Justice Field in the *Ross Case* (5 Sup. Ct. 184), of the conductor, unless he is the representative of the company it has no representative in charge of the operation of trains.

Again the railway company is bound to provide general rules and general time-tables for the reasonably safe operation of its railway system, and also rules applicable to all emergencies likely to arise. It is inevitable that at times, and in sudden exigencies, the general time-table must be set aside. It then becomes the duty of the company to construct a temporary time-table with such care and skill that it may be reasonably adapted to secure the operation of all the trains on the road without accident or injury to passenger or employé. The person who devises this

temporary time-table for the company, and issues telegraphic orders to carry it out, is the train dispatcher. He acts, it is true, under certain rules, but he is intrusted with a wide discretion and absolute control. That he is the representative of the company, and not the fellow servant of those required to obey his orders, is held by many courts. *Hankins v. Railroad Co.*, 142 N. Y. 416, 37 N. E. 466; *Dana v. Railroad Co.*, 92 N. Y. 639; *Sheehan v. Railroad Co.*, 91 N. Y. 342; *Slater v. Jewett*, 85 N. Y. 62; *Darrigan v. Railroad Co.*, 52 Conn. 285; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514; *Hunn v. Railroad Co.*, 78 Mich. 513, 44 N. W. 502; *Railroad Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097; *Railroad Co. v. McLellan*, 84 Ill. 109; *Smith v. Railroad Co.*, 92 Mo. 359, 4 S. W. 129; *Washburn v. Railroad Co.*, 3 Head (Tenn.) 638; *Railroad Co. v. Arispe*, 5 Tex. Civ. App. 611, 23 S. W. 928, and 24 S. W. 33; *McKin. Fel. Serv.* § 143.

In this case the rules of the company were certainly ample to secure safety in the movement of trains under telegraphic orders. Dispatches were required to be sent to trains which were to meet, so as to reach each train one station away from the meeting point. The receipt of these dispatches was to be acknowledged by the operator and those in charge of the trains affected thereby, before the orders were acted on. The east-bound train had, by the rules of the company, the right of way, and the west-bound train was not to leave, under the orders sent, until the officers of the east-bound train had signified their understanding of the orders to the train dispatcher. In case of great emergency, it was permitted that trains should meet at a point without having received directions so to do at previous stations, but in such cases the train dispatcher was required to see to it, by communication with the operator at the proposed meeting point, that extra precautions, by torpedoes and flagmen, had been taken to stop the trains. It does not appear why it was necessary to delay sending out the dispatch for the meeting of train 23 and train 28 until the latter train had left Newark, if, indeed, it had then done so. There was a conflict as to whether, when the dispatch was sent, it might have been delivered to train 28 at Newark. Indeed, there was little or no evidence before the jury to show the emergency which justified a departure from the ordinary rule in this case. But, even if there were, certainly no attempt was made to show why the train dispatcher had not, in accordance with the rules, insisted on receiving from the operator at Black Hand assurance that the extra precautions required by the rules—namely, the display of holding signals and the use of torpedoes—had been taken. Had he done so, the collision would not have occurred. All these circumstances were for the consideration of the jury on the issue whether the company was reasonably prudent and careful in the management of its trains; its own rules furnishing competent evidence, as against itself, of a proper standard of care. The long acquiescence of the engineer in a departure from such rules without objection, if anything of the kind were shown, would be competent to prove an assumption of the additional risk thereby involved, and defeat an

action for injury caused thereby; but a compliance with an exceptional order varying from the rule, suddenly made, would not constitute such acquiescence. On the whole case, we are clearly of opinion that the evidence of negligence in the train dispatcher's orders was quite enough to support a verdict for defendant.

The third and fifth assignments of error present the question whether, either under the statute of Ohio or at common law, the plaintiff, Camp, as engineman, and Keelty, the telegraph operator, were fellow servants. The circuit court held that they were not fellow servants, by virtue of the Ohio statute. We are not able to concur in this construction of the statute. In our opinion the telegraph operator has neither power nor authority to direct or control the engineer. He is only the medium through whom orders from the train dispatcher are communicated to the engineer and the conductor. He gives notice to the engineer and the conductor. He gives notice to the engineer of certain facts, from which the duty of the engineer arises, under the rules of the company. The conductor is in control of the train, and the engineer and the brakeman are his subordinates. Suppose that the conductor sends an order to the engineer by the brakeman. Does the brakeman thereby become a person actually having power or authority to direct or control the engineer? Manifestly not. When a switchman throws a switch, and signals to the engineer that he has done so, is he actually exercising power or authority to direct or control the engineer? Clearly not. The duty of the switchman, in such a case, is merely to give notice to the engineer of the condition of affairs upon which the engineer is required to act. And so the engineer's duty to act upon the signal from the telegraph operator does not come from any authority or power to control reposed in the telegraph operator. The authority or control is in the train dispatcher, who gives the order, not in the mere transmitter of it. When there is no order, but the telegraph operator conveys by signal, to the engineer, information as to the position of other trains, or the condition of the track ahead, the operator is the mere register of the fact; a mere notifier; a mere giver of information, upon which the engineer, under the rules of the company, at once knows his duty, and acts accordingly. In *Railway Co. v. Ranney*, 37 Ohio St. 665 (decided before the act of 1890 became the law), the question was whether an engineer, who gave signals by whistles, to the brakeman, to put on and release brakes, exercised a power to control and direct the brakeman in the performance of his duties. Judge McIlvaine (page 671), referring to this argument, says:

"It is contended that these signals are in the nature of orders or commands, which the engineer is authorized to give to brakemen, which they are bound to obey, and hence the relation of superior and subordinate is created. A majority of the court do not so understand either the purpose or effect of the rule. These signals are so named properly, and are intended to notify all concerned of the thing signified. They are addressed to the conductor as well as brakeman, and it is the duty of the conductor to see that brakemen perform the duty signified. This duty is imposed upon the brakemen by force of the rule itself, and not by virtue of any authority vested in the engineer over the brakemen. The signal is a mere notice,

The rule is the order of the company to the brakeman, directly. Suppose a train is signaled by a station agent, as this train was, to stop for orders. It thereby became the duty of the conductor, as well as of each employé on the train, to stop for orders; and yet no one can contend that such station agent who gives the signal is the superior, and the train crew subordinate employés of the company, within the meaning of the rule under consideration. A variety of signals, under a variety of circumstances, are required to be given by different employés of the company, to signify that an occasion exists for the performance of a particular duty; but it would be absurd to hold that in each case the employé giving the signal is a superior servant, to whom all others to whom information is thus communicated are subordinated, so that the company would be responsible to them for any act of negligence of the employé who gave the signal, whether such negligence was in giving the signal, or in the performance of other duties."

The same rule was laid down in the case of *Railway Co. v. Lewis*, 33 Ohio St. 196.

There is much less ground for holding that a telegraph operator has any control or authority over an engineer or a conductor than there is that the engineer has control over a brakeman. The engineer exercises discretion to determine when the brakes shall be put on, and when not. Knowing that his signals are to be acted on by the brakeman, and having discretion to give them as he thinks it proper, in the running of the train, he may, with some plausibility, be said to exercise actual power and authority over the brakeman, though, under the decision of the supreme court of Ohio, as we have seen, this is not the proper view. But a telegraph operator, in giving notice to an engineer of a train about to pass, has no discretion whatever. He gives the exact notice which the train dispatcher orders him to give, and no other. He exercises no discretion. He is a mere messenger boy. He is the vehicle by which the order is carried.

But it is said that, while this might otherwise be a reasonable and proper construction of the statute, there is a clause in section 3 which imposes upon the court the duty of giving to the words, "actually having power or authority to direct and control," a meaning they do not usually have. The important words of section 3 are:

"It shall be held in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employé of such company, is not the fellow servant, but superior of such other employé, also that every person in the employ of such company having charge or control of employés in any separate branch or department, shall be held to be the superior and not fellow servants of employés in any other branch or department who have no power to direct or control in the branch or department in which they are employed."

The argument is that because, by the decisions of the supreme court of Ohio previous to the passage of this act, where one employé actually had power or authority to direct or control another employé, the two were not fellow servants, and the master was liable for the negligence of the superior, therefore the court must now strain the meaning of the words, "actually having power or authority to direct or control," so as to give them a wider effect than the then prevailing rule of liability, and so satisfy the legislative

intent expressed in the words, "in addition to the liability now existing by law." From this necessity for a strained construction, the court is urged to hold that mere mediums of communicating orders, mere signal givers, mere registers of facts, exercise actual power and authority to direct and control the persons to whom it is merely their duty to communicate information or orders issued by others. It is true that, in the construction of a statute, it is the duty of the court, when it can, to give effect and meaning to every clause and part of it. It is also true that, before the passage of the act, it was uniformly held by state courts of Ohio that any person in the employ of a railroad company or other master, actually having power or authority to direct or control any other employé of the same master, was his superior, and that the master was liable for injury to the inferior caused by the negligence of such superior. This has been the holding since the decision of *Railroad Co. v. Stevens*, 20 Ohio, 415, as will be seen by reference to the following cases: *Railroad Co. v. Keary*, 3 Ohio St. 201; *Railroad Co. v. Barber*, 5 Ohio St. 541; *Whaalen v. Railroad Co.*, 8 Ohio St. 249; *Manville v. Railroad Co.*, 11 Ohio St. 417; *Railway Co. v. Devinney*, 17 Ohio St. 197; *Stone Co. v. Kraft*, 31 Ohio St. 287; *Railway Co. v. Lewis*, 33 Ohio St. 196; *Railway Co. v. Lavalley*, 36 Ohio St. 221; *Railway Co. v. Ranney*, 37 Ohio St. 665; *Dick v. Railroad Co.*, 38 Ohio St. 389; *Railway Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 467; *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623, 631, 30 N. E. 69. But the words, "in addition to the liability now existing by law," can have no effect to pervert the ordinary meaning of language. Courts are not compelled to stultify themselves for the purpose of reconciling inexplicable inconsistencies of legislatures; nor in this case is it necessary for the court to do so. The second provision in section 3, namely, that the superior in one branch or department shall not be the fellow servant of a subordinate in another branch, does add to the liability of the railway companies under the decisions of the Ohio courts, as they were at the time of the passage of this act. In *Railway Co. v. Devinney*, 17 Ohio St. 197, it was held that a company was not liable to a brakeman on one of its trains, for injuries sustained by him in a collision occurring by reason of the negligence of the conductor of the other train, because such conductor and brakeman were fellow servants. And this was the holding until was passed the statute now under investigation, whereby the company becomes liable to the brakeman for injury by the negligence of the conductor or engineer of another train. *Railroad Co. v. Margrat* (a decision by the supreme court of Ohio) 37 N. E. 11. The words, "in addition to the liability now existing by law," therefore, may be given effect by referring them to this latter provision of the section. Taking the parts of the section together, it would seem that the first clause was introduced as merely declaratory of the law then existing, for the purpose of making fuller and clearer the meaning of the legislature with reference to the second clause. In commenting on the first clause, and the alleged implication in the statute that it increased the liability of railroad companies, Judge Bradbury, in delivering the opinion in *Railroad Co. v. Margrat*, said:

"The remedy was so complete, where the relation of superior and subordinate actually existed, that the statute here could have little or no operation. Still it may be said that the statute makes the rules of liability of certain and universal application, denying any exception to its operation, wherever the relation of subordinate and superior exist, and the subordinate is injured by the negligence of the superior while engaged in the common service."

There is no suggestion in this by the court that the words, "actually having power and authority to direct or control," do not describe a relation in which one is the "superior" and the other the "subordinate," within the ordinary meaning of those terms. It seems too plain for further argument that the conductor and the engineer are not subordinates of the telegraph operator, within the statute.

Second, it is argued that, even if this be true, the telegraph operator is nevertheless not a fellow servant of the conductor and engineer, within the common-law rule. We think he is. He and the engineer and the conductor work together, at the same time and place, for a common employer, with an immediate common object, namely, the proper running of trains. It is essential, in the operating department of a railroad company, that there should be provision for communicating to those in charge of different trains the whereabouts of other trains, to avoid collision. This information is given by means of the general time-table and general rules for the running of trains with reference to each other, which the employés in charge of each train are obliged implicitly to obey. But it often happens that the general time-table must be varied from, and these variations must be communicated to those in charge of trains. This is effected usually by telegraphic orders from the superintendent or the train dispatcher, who has supreme control of the running of trains. The information is also communicated by means of flagmen, by means of torpedoes, by red lights and green lights upon trains, by the block-signal system, and in other ways. The subordinate employés, whose duty it is to transmit the orders of the officer in control, or to give information as to the presence of trains upon any part of the track, without special orders, are engaged at the same time and place with the persons operating the train, in a common employment, having an immediate, common object, namely, that of the running of trains, and therefore are fellow servants. The man who makes the signal at the station to the engineer on the approaching train to stop is as much engaged in the running and operation of that train as the flagman sent out ahead to signal the condition of a switch. Neither exercises the discretion or the judgment or the control of the master, but each contributes his part to the safe running of the train. There can be no separation of the signal department and the operating department, for the employés engaged upon the train, in the actual, manual operation of the train, are expected to be part of the signal department of the company. The man who puts out the green light at the back of the train, to indicate that a train is following, communicates to every station agent, every conductor, and every engineer, who sees it, knowledge upon which they, each of them,

must act, and yet it can hardly be said that the brakeman, in displaying this green light, is acting in a different department from the man who opens and closes the throttle valve of the engine. The principles which must govern in this case were first announced by the supreme court of the United States in *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322. In that case a brakeman working a switch for his train on one track in the railroad yard was injured by the negligence of the engineman of another train, in driving his engine too fast, and in not giving due notice of its approach. It was held that the two were fellow servants. Said Mr. Justice Gray, delivering the opinion of the court:

"They are employed and paid by the same master. The duties of the two bring them to work at the same place at the same time, so that the negligence of the one in doing his work may injure the other in doing his work. Their separate services have an immediate, common object in the moving of the trains. Neither works under the orders or control of the other. Each, by entering into his contract of service, takes the risk of the negligence of the other in performing his service; and neither can maintain an action for an injury caused by such negligence against the corporation, their common master."

Every word of this passage has application to the relation existing between the engineman of a train and a telegraph operator charged with the duty of signaling the engineman. Among the cases cited by Mr. Justice Gray is that of *Slater v. Jewett*, 85 N. Y. 62, where it was expressly held by the court of appeals of New York that a telegraph operator and a fireman upon an engine were fellow servants, so that the fireman could not hold the railway company liable for an injury caused by the negligence of the telegraph operator in transmitting a dispatch giving orders to the engineer.

In *Steamship Co. v. Merchant*, 133 U. S. 375, 10 Sup. Ct. 397, the stewardess of the steamship was injured by leaning against the rail, which had not been properly replaced by the porter and carpenter of the ship, who had had occasion to remove it and put it back. The contention was that the carpenter was in the deck department, and that the stewardess was in the steward's department, and that, therefore, neither was the fellow servant of the other; but the supreme court refused to take this view, and held that they were fellow servants. Said Mr. Justice Blatchford:

"The carpenter had no authority over the plaintiff, nor had the porter. They and the plaintiff had all signed the shipping articles; and the division into departments was one evidently for the convenience of administration on the vessel, and did not have the effect of causing the porter and the carpenter not to be fellow servants. \* \* \* There was nothing in the employment or service of the carpenter or the porter which made either of them any more the representative of the defendant than the employment and service of the stewardess made her such representative."

The latest case on the subject is that of *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, in which it was held that a common day laborer in the employ of a railroad company, while working for the company under the order and direction of a section boss or foreman, on a culvert of the line of the company's road, was a fellow servant of the conductor and engineer of a passenger train, and



could not recover of the company for an injury sustained through the negligence of such conductor and engineer. After referring to the case of *Railway Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, and *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, Mr. Justice Brown, speaking for the court, said:

"Neither of these cases, however, is applicable here, since they involved the question of 'subordination' of fellow servants, and not of 'different departments.' Of both classes of cases, however, the same observation may be made, viz. that to hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service, as, for instance, between brakemen of the same train, or two seamen of equal rank in the same ship, are comparatively rare. In a large majority of cases there is some distinction, either in respect to grade of service, or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions, unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent, as, for example, the superintendent of a factory or railway, and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than as if they had been employed by different principals. We think this case is indistinguishable in principle from *Randall's Case*, which was decided in 1883, and has been accepted as a sound exposition of the law for over ten years, and that, unless we are prepared to overrule that case, the third question certified must be answered in the affirmative. The authorities in favor of the proposition there laid down are simply overwhelming."

In this court we have had a phase of the question now before us, in the case of *Railway Co. v. Clark*, 6 C. C. A. 281, 57 Fed. 125. There an engineer was injured by the failure of a telegraph operator to signal to him that a train had passed less than 10 minutes in advance of him; and we held that where, as in that case, the telegraph operator was acting merely as a station agent or switchman, to signal to the engineer facts within his own observation, he was, under the principle of *Randall's Case*, a fellow servant of the engineer. We did not, however, decide in that case—because it was not necessary—that the telegraph operator, in transmitting the orders of the train dispatcher, was a fellow servant of the persons to whom he communicated those orders; and to that extent the *Clark Case* is not controlling authority here. But, after giving the question full consideration, we do not think that any distinction can be made between the case where a telegraph operator communicates facts to the engineer, within his own knowledge, and that where he transmits orders of the train dispatcher. The argument in support of the distinction is this: It is the admitted duty of the railroad company to prepare a complete system of rules for the running of trains, applicable to ordinary conditions and to extraordinary conditions, so far as they can be anticipated, adapted to secure safe transportation of employes and passengers. This duty includes that of furnishing a general time-table, upon which trains may safely run. It is the further duty of the company to promulgate the rules and time-table, and to see to it that they are brought to the knowledge of their employes engaged in running their trains. Whenever the time-table is disregarded, and

trains are run upon telegraphic orders, this is but the establishment of a temporary time-table by the company. The contention, therefore, is that the company has the same positive duty to see to it that its employes operating its trains receive notice of the temporary time-table as of the general time-table, and that the negligence of the telegraph operators in discharging this duty of the company is the negligence of the company, and the fellow-servant rule has no application. The link in this chain of argument that will not bear the strain of examination is the assumption that, because it is the absolute duty of the company to communicate to its employes its general time-table, it must have the same duty with respect to a change of time-table in an emergency. The duty of the company is to provide general time-tables and general rules, and rules for all possible emergencies, and to communicate them to its employes affected by them, because this is reasonable and possible. The circumstances are such, and the time within which the communication can be made is so ample, that the company can have no excuse for failing to make it. But an employe who enters the service of a railway company knows that the transmission of a temporary change in the time-table, occasioned by an emergency, and calling for immediate action, must be through telegraph operators and signalmen, who are stationed along the road, working with them, at the same time and place, for the immediate, common object of running trains; and therefore he must be held to assume the risk of negligence in those persons thus engaged with them in exactly the same work. The only obligation which the company can be held to, with respect to the communication of a sudden and temporary change in the running times of trains by telegraphic order, is that, so far as those who represent the company are concerned, all reasonable care shall be taken in transmitting notice of the temporary changes. Meeting exactly the same contention in *Slater v. Jewett*, supra, Chief Judge Folger, after fully conceding the master's duty to see and know that his general time-table is brought to the knowledge of his servants who are to square their actions to it, said:

"It is not true that, on an occasion like this, it is the duty of the master, or a part of his contract, to see to it, as with a personal sight and touch, that notice of a temporary and special interference with a general time-table comes to the intelligent apprehension of all those whom it is to govern in the running of approaching trains. It is utterly impracticable so to do, and a brakeman or a fireman on a train knows that it is, as well as any person connected with the business. He knows that trains will often and unexpectedly require to be stopped, and that such orders must, from the nature of the case, be given through servants skilled in receiving and transmitting them. If there is due care and diligence in choosing competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the employe takes when he enters the service. Such a variation, and the giving notice of it, is not like the supply of suitable machinery, or of competent and skilled fellow workmen. It is the act of an hour or of an instant, which, for any useful effect to be got from it must be done at the instant, and that, too, from a distance. \* \* \* The reasonable rule in such case bath this extent, and no more, that he (the master) must first choose his agents with due care for their possession of skill and competency, and that then he must use the best means of communication,

according to prescribed general rules and regulations, devised from the best experience in such business; and if, among those means, is the service of a fellow servant competent for his place, his possible carelessness is a risk of the employment that his fellows take when entering into the service."

In several of the cases already cited to sustain the view that a train dispatcher is not a fellow servant of a conductor or engineer, a clear distinction is made between the telegraph operator and the train dispatcher, by which the former is placed in the category of all subordinate employés with the engineman and conductor, and is held to be a fellow servant of them. Such is the holding in *Slater v. Jewett*, 85 N. Y. 62, already referred to, and the propriety of it has been recognized in all subsequent New York cases, and distinctly approved in *Sutherland v. Railroad Co.*, 125 N. Y. 737, better reported in 26 N. E. 609. The same distinction is recognized in *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. 175, and in *McKaig v. Railroad Co.*, 42 Fed. 288. A different view, it is true, has been taken in *Railroad Co. v. De Armond*, 86 Tenn. 75, 5 S. W. 600, and in *Madden v. Railroad Co.*, 28 W. Va. 610. But in these two states the different department theory prevails, and is the basis of the decision in each case. The different department exception to the fellow-servant rule, as we have seen, has been much limited by the supreme court of the United States in its last utterance upon the subject, and the authorities of West Virginia and Tennessee are therein expressly dissented from. In the case of *Railroad Co. v. Charless*, 2 C. C. A. 386, 51 Fed. 562, the circuit court of appeals of the Ninth circuit held that a telegraph operator, under the averments of the petition in that case, was not a fellow servant of a train employé injured by his negligence. This decision by the Ninth circuit has been considered by us, as may be seen by reference to Judge Barr's opinion in the *Clark Case*, already referred to. And only one sentence need be added to the comment there made. The court of the Ninth circuit relies on the decision of *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514, to sustain its conclusion. That case only decided that the train dispatcher was not a fellow servant of the conductor or engineer injured by his negligence. The court below had also charged that the telegraph operator was a fellow servant. But it did not become necessary for the supreme court of Pennsylvania then to pass upon the correctness of the charge of the court on this point. Subsequently, however, in the case of *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. 175, this question arose squarely, and was decided as already stated, and contrary to the conclusion reached in the *Charless Case*.

In view of the decisions of the supreme court, in view of the ruling of this court in the *Clark Case*, and because of the considerations already stated, in our judgment the telegraph operator was the fellow servant, both at common law and under the statute, of the engineer Camp. And therefore the instruction of the court to the jury upon this subject was erroneous. The judgment must therefore be reversed; with instructions to order a new trial.

## CHICAGO, ST. P., M. &amp; O. RY. CO. v. BRYANT.

(Circuit Court of Appeals, Eighth Circuit. January 7, 1895.)

No. 358.

## 1. CARRIERS—UNAUTHORIZED ACT OF YARD MASTER—USE OF PASSENGER TRAIN.

A yard master, after 6 p. m., on being relieved from duty, took a passenger car and engine to give himself and fellow servants a free ride to and from a meeting of theirs, without notice or permission from any officer who had authority to permit the passage of such a train. *Held* that, such act not having been done in the course of his employment, but for his own ends exclusively, and without authority to carry passengers for the company, and having no apparent authority, except possession of the train, the company was not liable as to a passenger for injury to one on the train.

## 2. SAME—RATIFICATION—PAYMENT OF ENGINEER.

The fact that the engineer on the train was paid for the time spent in running it as extra time is not a ratification by the company of the acts of the yard master in using the train as a passenger train, the payment having been made by direction of the master mechanic, who had no authority relative to the carrying of passengers.

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Forest E. Bryant, administrator of James Davidson, deceased, against the Chicago, St. Paul, Minneapolis & Omaha Railway Company, for death of deceased. Judgment for plaintiff. Defendant brings error.

Thomas Wilson (S. L. Perrin was with him on brief), for plaintiff in error.

F. B. Kellogg (C. K. Davis, C. A. Severance, M. D. Munn, H. C. Boyeson, and N. M. Thygeson, were with him on brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. The defendant in error, as administrator of the estate of James Davidson, deceased, brought an action in the court below against the Chicago, St. Paul, Minneapolis & Omaha Railway Company, the plaintiff in error, for negligence which he claimed caused the death of Davidson. He alleged in his complaint that the railway company was a common carrier between the Union Depot in St. Paul and a point near to its railroad shops, about a mile and a half westerly from the depot, and that the deceased was killed by its negligence while it was transporting him as a passenger between these points. The answer admitted that the company was a common carrier, but denied that at the time of the accident it was a common carrier of passengers between the points named, denied that the deceased was a passenger on any car operated by it at the time of his injury, denied that it was at that time managing or running any passenger car or cars between those points, and alleged that any injury the deceased suffered was caused solely by his own negligence and the negligence of those who were operating the passenger coach in which he was traveling. The case was tried to a jury, and at the close of the testimony the company requested the court to in-

struct the jury to return a verdict in its favor, on the ground that the evidence was insufficient to justify a verdict against it. The court refused to grant this request, and the jury returned a verdict against the company. The first question to be considered, therefore, is whether or not the evidence was sufficient to sustain such a verdict.

This was the second trial of this case. At the first trial, the court, at the close of the administrator's evidence, directed a verdict in favor of the company. On a writ of error to this court, the judgment rendered on that verdict was reversed. According to the record then before us, the company's railroad yard extended from the Union Depot to the shops, and included the two points between which the deceased was being transported when he was killed. The company's general yard master acted as conductor of the train that carried him, which consisted of a switch engine and a passenger car that belonged to the company, and the injury was inflicted in its yard. The engine was operated by one of its engineers, who was paid by it extra hours for running this train on the evening of the accident, and by one of its firemen, under the orders of this yard master. On the evening of the accident, this engineer, by direction of the yard master, went to the shops of the company, and, with the switch engine, drew the passenger coach, filled with employes of the company, from the shops to the Union Depot, where they held a meeting. The deceased rode from a point near the shops to the depot in this coach. After the meeting, and at about 10 o'clock in the evening, this coach stood opposite the platform at the depot, on the outgoing west-bound track of the company, in front of the engine. The yard master invited the employes to board the coach, and the deceased and others did so. This yard master then directed the engineer to push the coach towards the shops. He did so, and on the way pushed it against some freight cars that were on the track, and Davidson was killed in the collision. There was no evidence that any one paid any fare. The duties of the yard master appeared from that record to be to instruct the switchmen what to do, to receive orders from the shipping agents, and to tell the foremen of the crews what to do. There was no evidence that the yard master was not, at the time of the accident, in the discharge of his duties, as the employe of the company, in operating this train, and none that he was not authorized to transport passengers for it. On this state of facts, we held that the presumption was that one riding in a passenger coach or omnibus, or any other carriage of a common carrier that was palpably designed for the transportation of passengers, was lawfully there by invitation or permission of the employes of the carrier in charge of the vehicle, and that these employes had authority to bind the carrier by such invitation; that these presumptions were not conclusive, and might be rebutted by proper evidence or counter-vailing circumstances; but that, in the absence of such evidence or circumstances, there was some testimony in that record proper for the jury to consider, on the issue of whether the deceased was a passenger of this company or not. *Bryant v. Railway Co.*, 53 Fed. 997, 4 C. C. A. 146.

The case now presented differs radically from that to which we have referred. In the record now before us the following facts are established without dispute: The point near the shops between which and the Union Depot this train moved on the night of the accident was not within the limits of the company's yard, but was about three-fourths of a mile west of its westerly limit, and was connected with it by but a single track. The company operated no passenger cars or trains between these points, and never had operated any, except that, by special order of the superintendent or train dispatcher, an excursion train, with a regular conductor, engineer, and brakeman, was once or twice operated from the shops to Hudson, Wis., five or six years before this accident, to carry the employes to a picnic. The yard through which this train passed was a freight yard, was used to switch freight cars and to make up freight trains, and the yard master who ran this train had nothing to do with making up, switching, or running passenger cars or trains, unless directed to do so in a specific case by a special order of his proper superior, save that, when such trains came through his yard, it was his duty to see that they had a clear track, and to direct engineers who were not familiar with the yard on what tracks they should run their engines; and, save that he occasionally switched an extra passenger coach in the yard, this yard master never had any authority to receive or carry passengers for this company, except in one instance, when, by special order of his superiors, he was directed to take the superintendent of the company, on an engine, to Shakopee, a distance of about 25 miles, and except that occasionally, by the special orders of his superiors, he acted as conductor of a regular passenger train between St. Paul and Merriam Junction, a distance of about 40 miles, when the regular conductors were for some reason unable to act. With these exceptions, he had never carried any passengers for this company before the night of the accident. He was the "day yard master" in this freight yard. He had no duties to discharge for this company after 6 p. m. At that time he went off duty, and from that time until the next morning the yard was in charge of, and the duties of the yard master were discharged by, another, who was termed the "night yard master." These duties were so discharged by the night yard master on the night of this accident. Nevertheless, this day yard master operated this train between 7 and 11 o'clock at night, for the purpose of enabling himself and his fellow servants to ride free to a meeting of their own. He had no authority to run passenger trains or coaches over this railroad from the company or any of its officers, and none of the officers of the company that had the right to permit such trains to run between the depot and these shops knew that he intended to operate this train until after the accident occurred.

It is not only difficult to discover in this record any evidence to warrant the finding of the jury that the relation of passenger to carrier existed between the deceased, who rode on this wild train, on the invitation of this yard master, and the company, but the defense of the company that the train he occupied was not operated by the company, but by the yard master, without authority from or

notice to it, seems to be conclusively established by this uncontradicted testimony. That a yard master generally has no authority to accept, receive, or carry passengers for his company, or to run any passenger trains on its railroad, is proved without contradiction. That this particular yard master never had and never exercised or attempted to exercise any such general authority before this accident, is established by the testimony of the general officers of this company, and is nowhere contradicted. This testimony is confirmed, and the rule it establishes is proved by the instances in which the record shows that he had to do with passenger trains. They are (1) that when a passenger train arrived at this yard, whose engineer was not familiar with it, he was required to board the engine, and point out to him the tracks on which he should run his train through the yards; (2) that four or five years before the accident, in two instances, when passenger trains, with full crews, were ordered by his proper superiors to take the employes from the shops, through this yard, to picnics, he directed the engineers of the trains on what tracks to run them from the shops through this yard; (3) that in 1887, under a special order of his superior, he took the superintendent of the road to Shakopee, a distance of about 25 miles, with a switch engine; and (4) that, by special orders of his superior, he acted as conductor of a regular passenger train between St. Paul and Merriam Junction three or four times when the regular conductors were either sick, or in some way unable to act. That this yard master should have been in charge of this yard for years, and in all this time had no more to do with the passenger business of this company than is here disclosed, is very conclusive evidence that he was without authority to interfere with it. Indeed, as soon as the station and general authority of a yard master of a freight yard are proved, it becomes almost common knowledge that such an employe has no authority to operate passenger trains over the railroad of his company. That power must necessarily be, and generally is, delegated to a single officer, called the "train dispatcher," whose duty it is to know the time and place of each train, and to keep the tracks clear before them. The evidence is that this power was so delegated by this company. The case in hand is a terrible illustration of the confusion and disaster that must necessarily result when another, without the knowledge of this officer, attempts to usurp his authority.

The vital issue in this case was whether or not the deceased was a passenger of this company. The relation of a common carrier to its passenger is a contract relation. Whether or not such a relation existed between the company and the deceased depends primarily upon the question, whether this yard master must be held to have been the agent of the company when he was operating this fatal train, for the company made no contract to carry the deceased, unless it made it through this man. That this yard master had no actual authority to operate this train or make this contract is not denied, but counsel for the defendant in error, in support of their view, invoke the rule that as against third persons the principal is bound by the acts of the agent done in the course of his employment, not

only when these acts are within the scope of his actual, but when they are within the scope of his apparent, authority. This rule, in our opinion, has no application to this case, for two reasons: First, the company never invested this yard master with any apparent authority to carry passengers on or to run this passenger train for it; and, second, he did not run this train in the course of his employment for the company, but for his own ends, when he was not engaged in serving his company. There is no doubt that a principal who holds his agent out to the world as the possessor of certain authority may be bound by the latter's acts within the scope of that authority, although he has secretly restricted it to narrower limits. The reason for the rule that the principal is bound by the acts of the agent within the scope of his apparent authority is that it is inequitable for a principal to induce strangers to enter into contracts with one that he gives the appearance of his agent, and to change their actions and relations on the faith of such agency, and then to deny that the agency was what he made it appear to be. The rule rests upon the principle of estoppel. It follows that the principal is bound only to the extent of the appearance he gives, or knowingly permits the agent to give, or might reasonably expect the agent to give, to the agency, and not by any appearance of agency beyond this that the agent himself wrongfully produces without the knowledge or consent of his principal. It is only acts within the scope of the apparent authority with which the principal clothes the agent, not those within the scope of the apparent authority with which the agent wrongfully clothes himself, without the assent or knowledge of his principal, that are binding upon the latter. Undoubtedly, the principal in conferring the authority upon his agent must be held to the rule of reasonable foresight, prudence, and care, and may be bound by such acts of the agent as a reasonably prudent man would expect that his agent might appear to have the right to do, from the authority actually given. Tested by this rule, this yard master never had any apparent authority to carry passengers for this company on a wild train in the night, or in any other way, over any part of this railroad, without orders from or notice to the train dispatcher or some other superior who had the authority to permit and provide for it. The possession and control of the passenger coach gave him the only appearance of authority to carry passengers that he had, and that coach he took, according to this record, without notice to and without the knowledge of any of the employes of the company who had the authority to permit it to run upon this road. Whatever appearance of authority the possession of this coach conferred upon him, then, was not bestowed upon him by the company, but was produced by his own act, without its knowledge or assent. Nor was there any act or permission of this company that any reasonably prudent man could have foreseen would be likely to confer any apparent authority upon this agent to carry passengers for this company. The general authority of a freight yard master did not confer it. The specific authority of this yard master did not bestow it. The course of business and custom of years had never produced a single instance of its exercise by this employé without a special



order from a superior officer who had the proper authority to direct it. How could this company judge of the future but by the past? And who could have anticipated that a servant who had never had any authority to carry passengers, and who in a service of years had never carried one without a special order to do so from his proper superior, would seize a passenger coach and a switch engine, and run them, loaded with his fellow servants, over the busiest and most dangerous part of this railroad, in the night, without notice to train dispatcher, superintendent, or general manager, or any other officer that had authority to permit the passage of such a train or to clear the way for it? In our opinion, no one could have anticipated an act so foolhardy and unusual, and this was not an act within the scope of the apparent authority with which this company clothed this agent.

Moreover, it is a fatal objection to the liability of this company for the acts of this yard master in operating this train that they were not done in the course of his employment for the company, but for his own ends exclusively, while he was at liberty from his master's service. The master is not liable for an act done by a servant when he is free from his service, and is not attempting to discharge any duty to his master imposed upon him by his employment, but is pursuing his own ends exclusively, even though the act could not have been done without the facilities afforded by his relation to his master.

In *Mitchell v. Crassweller*, 13 C. B. 237, a carman, whose duty it was to put the horse and cart of his master in his stable after the day's work was completed, obtained the keys of the stable for that purpose, and then drove in another direction on his own business, without the consent of his master. On his return he drove his master's horse and cart against and injured a third person, but the master was held to be exempt from liability for this injury.

In *Cousins v. Railroad Co.*, 66 Mo. 572, the superintendent of the company took an idle locomotive from its roundhouse in the night, and ran it 2½ miles for a doctor for a sick neighbor. On the way he carelessly drove the engine upon and killed the plaintiff's mule. But the supreme court of Missouri held that the company was not liable for the death of the mule.

In *Morier v. Railway Co.*, 31 Minn. 351-353, 17 N. W. 952, a case in which an action was brought against the company for damages that resulted from a fire kindled by its sectionmen on its right of way to cook their dinners on a day when they were working for the company before and after their dinner, Judge Mitchell, of the supreme court of the state of Minnesota, states this rule in these words:

"If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, pro tempore, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. 2 Thomp. Neg. 885, 886; Shear. & R. Neg. §§ 62, 63; Cooley, Torts, 533 et seq.; *Railroad Co. v. Wetmore*, 19 Ohio St. 110; *Storey v.*

Ashton, L. R. 4 Q. B. 476; Mitchell v. Crassweller, 13 C. B. 237; McClenaghan v. Brock, 5 Rich. Law, 17."

To the same effect are *Campbell v. City of Providence*, 9 R. I. 262, and *Garretzen v. Duenckel*, 50 Mo. 104, 107, 111.

This record brings this case directly under this rule. The yard master who ran this train ceased the performance of his duties to the company at 6 p. m. on the day of the accident, and was then succeeded in the discharge of those duties by the night yard master. From that hour until the next morning he was free from his service for this company. While he was thus at liberty, and without notice to, and without the knowledge of, his superiors in the service of the company, he operated this train, not to earn fares for the company, for none were charged or collected, but to furnish himself and his fellow servants a free ride to and from the depot where they held a meeting of their own. These undisputed facts exempt this company from all liability for any of the acts done or contracts made in the course of the operation of this train. They were not the acts or contracts of the company. They were the acts and contracts of the individual who performed and made them, and his only, and he alone can be held for the injury they caused. Nor can the company be charged with these acts on the ground that it has ratified and adopted them because it paid the engineer or the fireman for three hours extra time for running this train. This payment is disputed, and the evidence regarding it is conflicting; but we assume, as we must for the purposes of this case, that the payment was made. The testimony is, however, undisputed that, if this payment was ever made, it was allowed by direction of the master mechanic at the shops, an employé who never had any authority to direct or permit the operation of passenger trains or coaches, or to make, adopt, or ratify contracts to carry passengers. His action allowing or disallowing a claim of an employé for payment for extra hours' service could not make the company a party to the contracts of a third person that he had no authority to make on its behalf.

Finally, it is said that inasmuch as the presumption that the deceased was a passenger of the company arose from the facts that the yard master was in possession of the train, operating it on the track of the company, and the deceased was riding therein, there was some evidence for the jury in support of the claim of the defendant in error, and the case was properly submitted to them by the court. But this argument loses sight of the fact that it is only when there is a dispute regarding material facts or a reasonable doubt as to the inference that must be drawn from undisputed facts that the court is required to submit an issue to the jury. All the material facts in this case are proved without contradiction or dispute. The inference that must be drawn from them under the law is not doubtful. A presumption of fact, like that which the counsel for the defendant in error here invoke, is a mere inference from certain evidence, and, as the evidence changes, the presumption necessarily varies. A trial court is not bound to disregard a conclusive presumption which arises from all the evidence at the close of a case because at some time in the course of a trial counter presumptions

arose. Possession of real estate raises a presumption of title; but, when a legal title is proved in another, a conclusive presumption arises from all the evidence that the latter is the owner, and the court must so direct. Possession of a horse raises the presumption of ownership, but the uncontradicted evidence of competent witnesses that the horse is the property of another, and that the possessor secretly took him from his owner without right raises so conclusive a presumption of ownership in the latter that the court might be bound to disregard the first presumption from possession, and the possession itself might raise a presumption of larceny. So in the case at bar, when the uncontradicted evidence established the facts that the yard master in charge of this train had no authority to carry passengers or to operate passenger trains for this company when he was on duty; that the train on which the deceased was injured was operated by him when he was at liberty from the service of the company, not in the discharge of any duty to it, but for the convenience of himself and his fellow-servants, without the knowledge of and without notice to those officers of the company who alone had the right to permit this train to be moved on the railroad at all, and that he obtained the passenger coach himself without the knowledge of any of these officers,—the conclusive presumption arose from all this evidence that his acts and contracts in this regard were not binding upon the company, and that those who rode upon that train were neither its passengers nor its licensees. *Daly v. Railway Co.*, 43 Minn. 319, 45 N. W. 611; *Karsen v. Railway Co.*, 29 Minn. 12, 11 N. W. 122.

The court below should have instructed the jury to return a verdict for the company, and the judgment below must be reversed, and the case remanded, with directions to grant a new trial. It is so ordered.

---

#### UNITED STATES v. McMAHON.

(Circuit Court of Appeals, Second Circuit. February 13, 1895.)

No. 42.

#### 1. UNITED STATES MARSHALS—FEES—SERVING WARRANTS OF COMMITMENT.

A United States marshal is not entitled to a fee of two dollars, under Rev. St. § 829, for serving the warrant of commitment or mittimus, by virtue of which a prisoner, when arrested and after examination, is committed to jail.

#### 2. SAME—DUPLICATE PER DIEMS.

A United States marshal is entitled to separate per diem allowances for separate and distinct services on the same day, for each of which a per diem allowance is authorized by the fee bill. *U. S. v. Erwin*, 13 Sup. Ct. 443, 147 U. S. 685, and *U. S. v. King*, 13 Sup. Ct. 439, 147 U. S. 676, followed.

#### 3. SAME—MILEAGE.

A United States marshal is entitled to the full allowance of 10 cents per mile, provided by Rev. St. § 829, for transporting prisoners committed pursuant to Rev. St. § 5541, to a jail outside his district, but within the state in which it lies, and is not limited to actual expenses.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Charles Duane Baker, Asst. U. S. Atty.  
Richard R. McMahon, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Martin T. McMahon was the United States marshal for the Southern district of New York from July 7, 1885, to January 12, 1890, and, at the close of each quarter during said term, rendered his official accounts to the district court of the United States for said district, which were approved. These accounts were presented to the treasury department for allowance and payment, but sundry items thereof were disallowed by the first comptroller, and still remain unpaid. To recover the amount alleged to be due, Gen. McMahon brought a petition against the United States, before the United States circuit court for said district, pursuant to the act of March 3, 1887. The circuit court rendered judgment in favor of the petitioner for \$4,843.60, the entire amount which he claimed. From this decision the United States appealed to this court. No objection was taken by the appellee in regard to the manner in which the cause came to this court. Sundry assignments of error were filed, but upon the argument of the cause four questions only were presented by the government, and those only will be considered.

1. The first point relates to the propriety of allowing the marshal for what are called, in the finding of facts, "charges of \$2 for serving temporary warrants of commitment, and for committing prisoners (50 cents) disallowed' (by the accounting officer) on the ground that the warrants were not necessary, \$611.50." The finding does not state by whom the warrants of commitment were issued,—whether by the commissioner, or by the district court, or when they were issued. It is presumed, however, that they were the original warrants of commitment, by virtue of which the prisoners, when arrested, were first committed to jail, because section 1030 of the Revised Statutes provides that "no writ is necessary to bring into court any prisoner or person in custody or for remanding him from the court into custody; but the same shall be done on the order of the court or district attorney for which no fees shall be charged by the clerk or marshal." These oral remanding orders of the district court are not considered to be warrants of commitment, and, if they were, no fees for service upon the prisoner, except a mileage fee for transportation, are allowed, under section 1030. That an original, temporary order of commitment to jail, or mittimus, is important, and in some districts indispensable, has been frequently stated by the district judges. Section 1030 "is applicable where the accused is already in custody by virtue of a warrant from the court. The first warrant of the commissioner is simply to arrest and bring before him, and when it is executed it has spent its force. A commitment to jail becomes necessary, if the prisoner is to be held." *Marvin v. U. S.*, 44 Fed. 405; *Ex parte Morrill*, 35 Fed. 261; *Heyward v. U. S.*, 37 Fed. 764; *Kinney v. U. S.*, 54 Fed. 313. The amount of fees to which the marshal is

entitled, under section 829 of the Revised Statutes, for the delivery of the prisoner to the custody of the jailer by virtue of the mittimus, depends upon the question whether a mittimus is one of the class of warrants for the service of which a fee of two dollars is authorized by the first paragraph of that section, which is as follows: "The service of any warrant \* \* \* or other writ, except execution, venire, or a summons or subpoena for a witness, two dollars for each person on whom service is made." In *U. S. v. Tanner*, 147 U. S. 662, 13 Sup. Ct. 436, which involved a claim by a marshal for travel fees of six cents per mile in serving warrants of commitment to a penitentiary, the court held that the delivery of the warrant to the warden was not a service of process upon him, within the meaning of the bill, and further, that:

"If a warrant of commitment can be said to be served at all upon any person, it is upon the criminal himself, who is transported by authority of such process, rather than upon the jailer, with whom it is simply deposited; and the fees of the marshal therefor are manifestly covered by the allowance for the travel of himself, his prisoners and guards. Not only does the transportation of a prisoner imply a travel in company with him, but section 829 expressly allows a fee of fifty cents for 'every commitment of a prisoner,' which implies the deposit of a warrant of commitment with the jailer."

The question before the supreme court was one of mileage to serve process, and not of the fee for the service of process; but the conclusion of the court that a mittimus is not a warrant, in the sense in which the term is used in the paragraph relating to service, and that the fees of the marshal are covered by other allowances, is equally applicable to the question now under consideration. The mittimus is the authority by which the marshal is transporting the prisoner, and the special mileage and the commitment fees are the compensation which the legislature apparently intended should be solely applicable for the transportation and the delivery to the jail. It will be further recollected that, while the trial is before the commissioner, the per diem fee of two dollars includes the marshal's services in bringing in, guarding, and returning the prisoner. So much of the item of \$611.50 as is represented by commitment fees of 50 cents should be allowed, and the residue is not permitted by the statute.

2. The second item is for attendance of marshal before commissioner, suspended "for name of deputy in each case, and to know what was done by commissioner in each case to constitute a hearing," \$198. The only point made by the government is that the question of allowance was suspended for additional information by the accounting officer, and that during such suspension the circuit court can properly take no jurisdiction. *U. S. v. Fletcher*, 147 U. S. 664, 13 Sup. Ct. 434. The marshal's term of office expired January 12, 1890, and his petition was filed in court on March 25, 1892. The opinion in the *Fletcher Case* guardedly says that, so long as the claim is pending and awaiting final determination in the department, courts should not be called upon to interfere, at least unless it ignores such claim, or fails to pass upon it within a reasonable time. In addition, the circuit court found that the item

was disallowed. The finding states that the various items which are set forth were suspended or disallowed, "and, notwithstanding the plaintiff's explanations, the same remain disallowed and unpaid." As no attempt was made by the government to attack the validity of this part of the claim, it may be considered as admitted that the accounting officer's construction of the statute had been substantially overruled in *U. S. v. Jones*, 134 U. S. 483, 10 Sup. Ct. 615.

3. The third disputed item consists of charges for attending examinations before commissioners, in separate and distinct cases, on the same day, "the same being duplicate per diems," \$380. The theory of the government is that although there may be separate cases against different persons, accused of different crimes, either before one commissioner or before different commissioners, the marshal is to have but two dollars for the work of the day. This theory of but a single per diem allowance for separate and distinct services on the same day, for each of which services a per diem allowance is authorized by the fee bill, was examined in *U. S. v. Erwin*, 147 U. S. 685, 13 Sup. Ct. 443, and in *U. S. v. King*, 147 U. S. 676, 13 Sup. Ct. 439, and was found to be unsound.

4. The fourth class of items in dispute is for the transportation of sentenced prisoners from New York City to the Erie county penitentiary, in the Northern district of New York, at the rate of 10 cents per mile for the marshal and for each prisoner and necessary guard. This class was disallowed by the comptroller upon the ground that, "outside his district, the marshal is entitled to actual expenses only, not to fees." The claim of the government is that the mileage of 10 cents per mile was not payable, by virtue of the following exception in section 829, Rev. St.:

"For transporting criminals convicted of a crime in any district or territory where there is no penitentiary available for the confinement of convicts of the United States, to a prison in another district or territory designated by the attorney general, the reasonable actual expense of transportation of the criminals, the marshal and the guards and the necessary subsistence and hire."

The attorney general had designated no prison in another district or territory in which criminals sentenced by the district court of the Southern district of New York must be confined, but the prisoners were sent by the court to the Erie county penitentiary, by virtue of section 5541, which is as follows:

"In every case where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or state where such court is held, the use of which jail or penitentiary is allowed by the legislature of the state for that purpose."

It is contended by the government that a marshal is appointed to execute precepts within his district only, and therefore that the fee bill applies only to services within the district, and that for other services he is reimbursed simply for his expenses. The difficulty with this argument is that the premise is untrue. The marshal is appointed to execute whatever business is legally imposed

upon him by statute, which can also regulate his fees for the particular service required. When section 5541 authorized the district court for the Southern district to order the sentences to be executed in any penitentiary within the state of New York, the statute implied that the district court had the power to direct an officer to execute the order, and the only officer whom it could direct was the marshal for its own district. The fee bill expressly authorizes the payment of mileage for the services incident to such transportation, unless the case is within the terms of the exception. This exception refers to cases which arise under section 5546, as amended by the act of July 12, 1876, and which, in substance, authorizes the attorney general, when there is no suitable or available penitentiary within a district, to designate the penitentiaries outside of the district in which criminals sentenced by the courts of the United States shall be confined. The services now in question were performed in the execution of sentences which were ordered under the provisions of section 5541, and not of section 5546. The judgment of the circuit court is reversed, with the costs of this court, and the cause is remanded to that court, with instructions to enter a new judgment, with costs of that court, for the complainant, in conformity with this opinion.

---

UNITED STATES v. ONE HUNDRED AND THIRTY-TWO PACKAGES  
OF SPIRITUOUS LIQUORS et al.

(District Court, E. D. Missouri, E. D. February 12, 1895.)

REMOVING LIQUORS UNDER FALSE BRANDS—REV. ST. § 3449.

A compounder or rectifier of liquors, who labels his products as those of a well-known distiller and rectifier, and attempts to place them on the market under such brands, removing them for that purpose from his warehouse to another place, does not thereby subject his liquors to forfeiture and himself to fine, under Rev. St. § 3449, which provides that, whenever any person ships or removes any liquors under any other than the proper name or brand, known to the trade as designating the kind and quality of the contents of the package, he shall forfeit the liquors, and be subject to fine.

William H. Clopton, U. S. Atty.  
Chester H. Krum, for claimants.

PRIEST, District Judge. This is a proceeding to condemn 132 packages of various kinds of spirituous liquors and wines, under the provisions of section 3449, Rev. St. U. S. The general averment of the information is that the Western Distilling Company did "unlawfully transport and remove, and cause to be transported and removed, said packages of spirituous liquors and wines from the building numbered 201 North Main street, in said city [St. Louis], to the building numbered 407 South Main street, in said city, under the names and brands other than the proper names and brands known to the trade as designating the kind and quality of the contents of said packages containing the same; that is to say, fifteen of said

packages were wrongfully and unlawfully marked and branded as containing 'J. & F. Martel Cognac,' that being a name and brand known to the trade as designating a certain kind and quality of spirituous liquors and brandy, when in fact none of said packages contained any J. & F. Martel Cognac, but contained a spurious imitation thereof." The information then alleges that 39 of said packages were marked "Booth & Company, London Superior Old Tom Gin"; whereas none of them contained any of that make of gin, but a spurious imitation thereof. These are sufficient to illustrate the theory of the information, the charge with respect to the other of the 132 packages being of the same tenor. The evidence tends to prove that the packages proceeded against are bottles of liquor put up in cases, and in that form sold and shipped to the retail dealers. It appears that J. & F. Martel Cognac is a foreign brandy, made by J. & F. Martel, and is among dealers regarded as a superior quality of brandy. The like observation may be made of Booth & Co.'s London Superior Old Tom Gin. The evidence shows that the liquors proceeded against bore the imitation brands or labels of "J. & F. Martel Cognac," and "Booth & Company, London Old Tom Gin," respectively, and were inferior in quality of excellence to that of the foreign makers, and were compounded at the rectifying house of the Western Distilling Company, at 201 North Main street, and, after being cased, were drayed from there to the depot of the St. Louis Drayage Company, for the purpose of being shipped thence to purchasers.

The naked question presented in this case is whether when a compounder or rectifier labels his product as that of a well-known distiller or rectifier, and attempts to place them under such brands upon the market, he subjects his liquors to forfeiture, and himself to fine, under the provisions of section 3449, Rev. St. U. S. The government urges an affirmative answer to this proposition, and justifies this insistence by reference to the very comprehensive language of the section. The section reads as follows:

"Whenever any person ships, transports, or removes any spirituous or fermented liquors or wines, under any other than the proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or causes such act to be done, he shall forfeit said liquors or wines, and casks or packages, and be subject to pay a fine of five hundred dollars."

As this section stands in the Revised Statutes, it is difficult to understand what it means by the terms "proper name or brand known to the trade as designating the kind and quality of the contents of the casks or packages containing the same." It seems to me that if we are to construe this law without reference to its history or the relation to the text of which it formed a part when first enacted, and the signification it then had, we must exclude two ideas which its literal reading might suggest, viz. that of protecting trade-marks or undue advantage in trade, and a credulous and indulging public from the imposition of a bad imitation of good liquor. And we are impelled to this conclusion by those sound rules of construction which direct us to consider the object aimed at



by the legislature and the jurisdiction of the legislative body. Congress had no authority to legislate upon the subject of trade-marks, or make regulations for the suppression of unfair advantages in trade, or to protect the public against the imposition of a base quality of merchandise. These subjects are not germane to internal revenue taxation on liquors; and it is highly improbable that any such thought occurred in connection with the formulation of a set of rules and regulations for imposing and collecting this tax. Congress aimed to derive a revenue from distilled or fermented spirits, and so surround this industry with penal regulations as to insure, as far as possible, the collection of the tax upon all liquors so produced. It had no other object in view. It is not pretended here that the liquors proceeded against have, in any manner or to any extent, escaped any tax to which they are subject, or that by this practice they could do so. If these packages are forfeited to the government, it will not be because it sustained any loss or has in any wise been defrauded, but solely because they are counterfeits of the brands of other manufacturers,—because of a personal fraud upon other makers, whom the government has in no wise undertaken to protect or could legitimately engage to secure. Such a construction is inadmissible. The words “proper name or brand known to the trade as designating the kind and quality,” etc., must mean something else than a trade-mark or make of a certain distiller. We find a very appropriate signification for them in the internal revenue law, and in the regulations and usages of the officers in the administration of that law. In the manual issued by the commissioner, and approved by the secretary of the treasury (May, 1890), the gauger, in marking, branding, and stamping casks or packages of distilled spirits, is directed (page 123) to “mark or brand with a die, stencil, or branding iron on the head of the cask, in letters not less than one inch in length, the particular name of the spirits known to the trade, which mark or brand will be varied to suit whatever kind is contained in the package, as “High wines,” “Rye,” and “Bourbon,” or “Copper distilled,” “Whiskies,” as the case may be. These are the classifications which are referred to in the section we have under consideration. “Kind” does not refer to the maker, or “quality” to the excellence of his goods. These statutes are born to outlive the most extended life of any distiller, and the standard of excellency of a product of any distiller is too varying and indefinite a standard for the measurement of punishment and forfeiture. “Kind,” in the statute, means a well-known classification of spirituous and fermented liquors, and “quality” may be a synonym or refer to the standard of proof. A statute dealing with this same subject, and which we are not entitled to ignore, gives the negative to the contention on the part of the government. By the act of 1863 (15 Stat. 151, § 59), compounders of liquors were required to pay a special tax of \$25, and were defined to be a “person who, without rectifying, purifying or refining distilled spirits, shall, by mixing such spirits, wine, or other liquor with any materials, manufacture any spurious, imitation, or compound liquors, for sale under the name of whisky, brandy, gin, rum, wine, spirits, cordials, or wine bitters,

or any other name, shall be regarded as a compounder of liquors." Thus, it appears that the very vice for which the government seeks here to condemn these liquors is authorized and licensed by it. Such an absurd construction cannot obtain. By the act of 1879 (20 Stat. 327) compounders are made rectifiers, and taxed as such. A like argument may be drawn from section 3328, Rev. St. U. S. But the true construction of section 3449 is made more apparent when we refer to its relation at the time it came into existence. We will there discover its design and the mischief it was intended to avert. Section 3449 first appeared as a proviso to section 29 of the act of 1866 (14 Stat. 155, 156); and whatever signification it then bore it must still retain, because no other meaning has been imparted to it by subsequent enactment. *Bowen v. Railroad Co.*, 118 Mo. 541, 24 S. W. 436. The general rule of interpretation is that a proviso must be construed with reference to the subject-matter of the section of which it forms a part, unless there is a manifest legislative intention that it should limit the operation of other sections of the act. *Callaway v. Harding*, 23 Grat. 542-547; *Dollar Sav. Bank v. U. S.*, 19 Wall. 227. The office of a proviso is to restrain, modify, or interpret the enacting clause. *Wayman v. Southard*, 10 Wheat. 30; *Pearce v. Bank*, 33 Ala. 693-702; *Spring v. Collector*, 78 Ill. 101-105. Where a proviso is meaningless with respect to the enacting clause, or was not intended to restrain, modify, or interpret it, some courts have altogether rejected it as a nullity. *Mullins v. Treasurer*, 5 Q. B. Div. 170. *Ihmsen v. Navigation Co.*, 32 Pa. St. 153. We must approach the consideration of section 29 of the act of 1866 with these canons of construction in mind. Section 29 provides, that each distillery shall have its individual inspector, and requires him to take an account of all the substances used for the production of spirits, and to inspect all the spirits distilled, and to take charge of the bonded warehouse established for the distillery, to take joint custody with the owner of the warehouse, and to take from the owner, when the spirits are placed in the warehouse, a subscribed entry therefor, in such form as may be prescribed, and to indorse upon the same his certificate, and transmit these to the collector of the district. The other provisions relate to his fees and the appointment of his deputy. There are two provisos to this section, the second or last of which is the one we are considering. The first punishes, by fine, the removal of any of the materials used in making spirits or the distilled product, in the absence of the inspector or his assistant, and without the permission of the collector. Then follows the proviso against the removal or shipment under a name other than that generally known to the trade as designating the kind of spirits. Construed with reference to its context and as having a similar though broader operation than the first proviso, it must apply to some removal from the distillery or warehouse under an improper or misleading title. It would be an offense under this statute to remove whisky from a distillery to the warehouse in casks under the name of brandy or the reverse, for by this means there would be opportunities for defrauding the government. Without attempting to define with precision the operative scope of this pro-

viso, or to determine whether, in view of the subsequent action of congress, it is any longer in forcé, we must hold that it only operates under some such circumstances as we have indicated. It is sufficient in this case to say that it cannot be tortured in its meaning so as to apply to the facts which are shown in this case. The peremptory instruction asked by the claimant must be given, and a judgment in accordance therewith entered.

---

SMITH v. RHEINSTROM et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 206.

CUSTOMS DUTIES—CHERRY JUICE.

A preparation of cherry juice, made by subjecting the natural juice to heat in a vacuum, to eliminate the watery parts, and adding 17 per cent. of alcohol, such preparation being thicker, darker, heavier, and stronger than the natural juice, is a different article from the cherry juice known in trade and commerce at the time of the passage of the tariff act of October 1, 1890, and subjected by section 1, par. 339, of that act to a duty of 60 cents per gallon; and such article is dutiable, as an alcoholic compound, under section 1, par. 8, at \$2 per gallon and 25 per cent. ad valorem. 60 Fed. 599, reversed.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an application by the surveyor of customs, acting as collector at the port of Cincinnati, to review a decision of the board of general appraisers reversing the decision of the surveyor relative to the duties upon certain merchandise imported by Rheinstrom Bros. The circuit court sustained the decision of the board of general appraisers. 60 Fed. 599. The surveyor appeals.

Rheinstrom Bros. imported into the United States from Germany, in 1892, 14 casks of an article invoiced to them as cherry juice, and so entered at the port of Cincinnati. It was assessed by the surveyor under Schedule A, § 1, par. 8, of the act of October 1, 1890, as an alcoholic compound not specially provided for, at two dollars a gallon and 25 per cent. ad valorem. Against this action the importers duly protested and appealed to the board of general appraisers. Their contention was that the article in question was cherry juice containing not more than 18 per cent. of alcohol, and, as such, dutiable under Schedule H, par. 339, of said act, at 60 cents a gallon; or that, if it did not come under that specific description, then it most resembled in material, quality, texture, or the use to which it might be applied the enumerated article cherry juice, and was consequently chargeable with the same rate of duty as cherry juice, in accordance with the provisions of section 5 of that act. The board of general appraisers adopted the first alternative suggested by the importers, and reversed the act of the surveyor holding that the article in question was cherry juice containing not more than 18 per cent. of alcohol. From this decision an appeal was taken to the circuit court, where the action of the board of appraisers was sustained. The paragraphs and sections of the act of October 1, 1890 (26 Stat. 567 et seq.), involved in this controversy, are as follows: Section 1, par. 8: "Alcoholic compounds not specially provided for in this act, \$2.00 per gallon and twenty-five per cent. ad valorem." Section 1, par. 339: "Cherry juice and prune juice, or prune wine, and other fruit juices not specially provided for in this act, containing not more than eighteen per cent. of alcohol, sixty cents per gallon. If containing more than eighteen per cent. of alcohol,

\$2.50 per proof gallon." Section 5: "That each and every imported article not enumerated in this act, which is similar either in material, quality, texture, or the use to which it may be applied to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembled in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which different rates of duty are chargeable, there shall be levied on said non-enumerated article the same rate of duty as is chargeable on the article which it resembles, paying the highest rate of duty." Cherry juice was at the time of the adoption of the act of October 1, 1890, a well-recognized fruit juice. It had been known in the trade and commerce of the country for many years, and had a well-defined meaning in the trade. It was the natural juice of the cherry manufactured by expression and mixed with alcohol in a sufficient quantity, not exceeding 18 per cent., to preserve it and prevent its fermentation. It was worth from 23 to 25 cents a gallon, and was used for the purpose of imparting the flavor of cherry to cordials and liquors manufactured in rectifying and compounding houses. The article in this case was not known at the time of the passage of the act of 1890. It was made from the natural juice of the cherry by subjecting it to heat in a vacuum, and eliminating the watery parts, reducing five gallons of the natural cherry juice to one gallon of the product, and adding 17 per cent. of alcohol. It was thicker and darker in color than cherry juice, and syrup-like. Its specific gravity was much greater, and its selling price was, instead of 30 cents, \$1.10 a gallon. Its use is the same as that of natural cherry juice, and it may be used in its imported condition, or may be thinned by the addition of water. In strength, one gallon of the article is equal to four gallons of the cherry juice of commerce as it was known when the McKinley bill was passed.

Harlan Cleveland, U. S. Atty., for appellant.

Jacob Shroder, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts). In our opinion, the judgment of the court below must be reversed. The main question is whether the article in question is cherry juice as it was known at the time of the passage of the act of 1890. Cherry juice then had a well-known commercial meaning. It was the natural juice of the cherry obtained by expression, with sufficient alcohol added to keep it from fermentation. The present article is not natural cherry juice with a certain per cent. of alcohol added, but it is a substance which is produced by taking natural cherry juice, and subjecting it to a process by which much of the water present in natural cherry juice is evaporated, and we have an article four times stronger than the natural cherry juice for all the purposes to which natural cherry juice is adapted,—darker in color, of less fluidity, and of greater specific gravity. The cherry juice of commerce in 1890 was valued at 30 cents a gallon; this article is valued at \$1.10 a gallon. We have no doubt that, having regard to the difference in color, weight, strength as a flavoring ingredient, and cost, it is a different article for dutiable purposes than cherry juice. The juice of vegetables or fruit is nothing but the sap obtained by expression. If the sap is subjected to heat and evaporation, the article thus produced is generally understood to be a different thing from the sap. Thus, the sap of the sugar maple is different from the molasses which is obtained from the sap by boiling, and no one would think of includ-

ing under the term "sap," if used in the tariff act, the molasses made therefrom. It is true that, for want of a better name, this is called "concentrated cherry juice." It has not been introduced generally enough into commerce to lead to a designation of it by a name which differentiates it from cherry juice other than by adding an adjective descriptive of the change. But concentrated cherry juice is different from cherry juice as molasses is different from sap, and the difference in the latter case would be quite as great even if molasses were called concentrated sap instead of molasses. Confessedly, this is a new article, one never before used in commerce. What we have to decide is whether its qualities are such as justly to prevent its being taxed as the thing from which it is made. This must depend, of course, upon the amount of change to which the original article has been subjected to make the new article. It is a question of degree. The degree of change in the quadrupling of the flavoring strength of the original article, and its market price, considered in connection with the chemical change which takes place by the elimination of so large a part of its previous watery element, is quite sufficient to make a different article from that from which it was produced. The learned judge in the court below seemed to think that the issue turned upon the question whether the particular process used in the concentration of the original cherry juice made what is technically known as a "flavoring extract." While it would be of assistance in showing that the article in question is different for purposes of taxation from that from which it was made, if it be properly defined to be a flavoring extract, the question, after all, is not whether it is a flavoring extract, but whether it is something different from the article called "cherry juice" by congress in the act of 1890; and, for the reasons stated, we think it is.

The next question is what the classification of this article shall be if it is not cherry juice. It certainly is an alcoholic compound, because it is compounded of alcohol and some other ingredient. Attempt was made in the evidence to show that "alcoholic compound," in the trade, meant a compound of alcohol in which the alcohol was used as a stimulant; but it failed. There was no evidence of any weight at all to show that the term "alcoholic compound" had a commercial meaning different from its ordinary meaning. It was not shown to be a term used in commerce with a peculiar commercial significance. If this was an alcoholic compound, then it was an enumerated article within the eighth paragraph of the first section of the act quoted above, and was thereby made subject to the tax of two dollars per gallon and 25 per cent. ad valorem. If it was such an enumerated article, then it could not come within section 5 of the act of October 1, 1890, because that section applies only to an imported article not enumerated in the act. *Arthur v. Sussfield*, 96 U. S. 128; *Arthur's Ex'rs v. Butterfield*, 125 U. S. 70, 8 Sup. Ct. 714. The classification made by the surveyor, acting as collector, in this case, was therefore right, and the article in question should have paid the tax of two dollars per gallon and 25 per cent. ad valorem. This conclusion makes it unnecessary to consider the contention that the classification of the collector should be sus-

tained, because the act of the importer was a fraudulent evasion of the provisions of the tariff act.

The judgment of the circuit court is reversed, at the costs of the appellees.

---

UNITED STATES v. WETHERELL.

(Circuit Court of Appeals, First Circuit. November 13, 1894.)

No. 93.

CUSTOMS DUTIES—STEEL STRIPS.

Strips of steel, 3 inches wide, from 100 to 250 feet long, and less than  $\frac{7}{1000}$  of an inch in thickness, which have been shaped by passing through cold rolls, are dutiable as "flat steel wire, or sheet steel in strips," under paragraph 148 of the tariff act of October 1, 1890.

This was an application by Frank J. Wetherell for a review of the decision of the board of general appraisers concerning certain merchandise imported by him. The collector levied a duty upon such merchandise of two cents per pound, under paragraph 146 of the tariff act of October 1, 1890, and an additional duty of one-fourth of a cent per pound, under paragraph 152 of said act. The board of general appraisers, upon appeal by the importer against the imposition of the additional duty under paragraph 152, held that the merchandise was dutiable at 50 per cent. ad valorem, under the second proviso of paragraph 148 of said act. The circuit court reversed the decision of the board of general appraisers, and held the merchandise dutiable under paragraph 146, without additional duty under paragraph 152. 60 Fed. 267. The government appeals.

Sherman Hoar, U. S. Atty., and William G. Thompson, Asst. U. S. Atty.

Joseph H. Robinson, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. This case turns on the construction of certain words in the tariff act approved October 1, 1890 (chapter 1244), found in paragraph 148 (26 Stat. 577), namely:

"And provided further, that flat steel wire, or sheet steel in strips, whether drawn through dies or rolls, untempered or tempered, of whatsoever width, twenty-five one thousandths of an inch thick or thinner (ready for use or otherwise), shall pay a duty of fifty per centum ad valorem."

The expression "sheet steel in strips" is not found in any prior customs legislation. The article in question was invoiced as "cold rolled cast steel," is claimed by the importer to be known commercially as "common cold rolled cast steel," and steel of its class is said by him to be intended for clock springs, shoe shanks, and other cognate purposes. This particular importation was for use in the manufacture of clock springs. It was of the invoice value of about  $6\frac{1}{2}$  cents per pound, and in strips three inches wide, and of No. 26 wire gauge in thickness, thinner than  $\frac{25}{1000}$  of an inch. Strips of this class are from 100 feet to 250 feet long. These had not been

drawn through dies, but they received their shaping by passing through cold rolls. There is some evidence that they were rolled through grooved rolls, and also that, after being first rolled horizontally, they were rolled vertically for the purpose of shaping their edges. It is conceded that they were not obtained by stripping up sheets. It is also clear that what is commercially known as sheet steel is rolled hot in mills called "sheet mills," especially adapted for the purpose, between rolls running so slowly that the sheets cannot be run over 12 feet in length, and that the sheets are not less than 8 inches wide. There may be exceptions as to the dimensions, but so rare as not to disturb the rule. The importer and all the witnesses called in his behalf admit that the importation responds to the word "strips" found in the statutory expression in question. Strips sheared from sheet steel, as sheet steel is commercially known, have been dealt in for a number of years to some extent; but, although it is claimed that they have been imported, yet the evidence on this point is not clear, and certainly these importations, if made at all, have been of such minor importance that they could have hardly been in contemplation in the enactment which we are now considering. On the other hand, the importations of steel of the class in question have been considerable, and to such an extent that their influence has been felt by manufacturers of steel in the United States. Flat steel wire may be drawn through dies or rolls, and it is without any absolute standard of width or thickness. It appears that the nomenclature covering the various steel productions we are considering is very loose, and we are of the opinion that the class of importations in question and flat steel wire might run into each other; in other words, that there might be a margin where it would be doubtful whether the product should be designated as flat steel wire or as strips or ribbons of steel.

Some controversy arises touching the interpretation of the word "drawn," as used in the statutory provision in question. It is claimed by the importer that, notwithstanding this word is used in connection with the words "through dies or rolls," it must be interpreted in its primary sense of "dragged" or "pulled"; that steel wire is sometimes drawn—that is, pulled—through rolls to flatten it, or to even it; and that in no event can the words "whether drawn through dies or rolls" apply to the importation in question. It must be admitted that the word "drawn," when used as an adjective in describing steel as "drawn steel," distinguishes from steel which merely passes through rolls. Yet in the provision under consideration the word is used as a verb, and in that use it was well known, with reference to ductile metals, in a sense other than its primary one, long before the art of drawing through dies existed. The verb "draw" is recognized by all lexicographers as sometimes meaning extending in either length or breadth by hammering or other forging. Indeed, this secondary sense was evidently its primary sense in the art of working ductile metals. Both the importer and his witnesses, on being cautioned, are careful to limit it to some method of operation which involves the application of some force exterior

to the dies or rolls, for the purpose of pulling or dragging the rod, bar, wire, or strip through them; but, when not thus cautioned, they use it in connection with every method of reducing by dies or rolls the thickness of the metal, and at the same time increasing its width or length.

At the date of the passage of the tariff act of 1890, there was no article well known commercially as "sheet steel in strips," although otherwise with "flat steel wire" and "sheet steel." We agree that at that time the words "sheet steel" had a settled commercial interpretation; that in the state of the art, as it then existed, sheet steel, as commercially known, was not easily confounded with other forms of steel; that the importation in question was not sheet steel, as commercially known; that the words "sheet steel," if they stood alone, would be construed with reference to their well-known commercial meaning; and that, as the words "sheet steel in strips" are not proved to be a well-known commercial designation of goods or manufactures, they also, standing alone, might be construed as meaning steel prepared in sheets in the ordinary sheet mills, and then in some way cut or sheared into strips. So far we agree with the reasoning of the circuit court; but, in our opinion, we are, nevertheless, controlled by the statutory context, and by some of the facts which we have stated.

It is not now claimed that this importation had advanced so far as to be subject to the additional duty, under paragraph 152; and the question submitted for our determination is whether it is subject to a duty of 50 per cent. ad valorem, under the provision we have already cited, and as determined by the board of general appraisers, or of only 2 cents per pound, under paragraph 146, as claimed by the importer's protest and determined by the circuit court.

It is claimed in behalf of the importer that, when a question of this character is one of doubt, the doubt must be resolved in favor of the importer; that the intention of congress to impose the higher rate of duty should be expressed in clear and unambiguous language; and that this case comes within that rule. In the first place, it is not easy for a court to find, on this record, whether the duty imposed by paragraph 148 is always a higher rate than the graded specific duties imposed by paragraph 146; and therefore it is not for us to say that the facts call for the application of the rule of law in question, even if it went to the extent claimed for it. Although this particular importation was clock-spring steel, said to be worth 6½ cents per pound, yet other strip steel, clearly to be classed for duties with it, is of a lower grade,—some of it known as "corset steel," and, as stated by one witness, of about one-third of the value of this in question. Therefore, under one grade in paragraph 146—that of a valuation of above 2<sup>2</sup>/<sub>10</sub> cents, and not above 3 cents, per pound—the specific duty might exceed 50 per cent. ad valorem, and with a like possible result in the grade next specified. There is nothing in the record to enable the court to determine the full value or effect of this fact, or to ascertain whether, if the present importer claims the application of paragraph 146, the next importer of strip steel may not claim the application of the provision against which the



present one objects. So far as this rule of interpretation has any application, it must, of course, be limited to cases where it relieves all importers of all articles whatsoever of the class concerned. The rule has received no practical construction by the supreme court, so far as decisions of that court have been brought to our attention. The first case was *U. S. v. Isham*, 17 Wall. 496, which related to the question whether a certain instrument was subject to a stamp duty or not; and, although the court stated generally the rule relied on by the present importer, it disposed of the case without coming to any application of it. The next was *Hartranft v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240. This raised a question as between free and dutiable goods; but the court concluded that the decision of the circuit court was correct, and continued: "But, if the question were one of doubt, the doubt would be resolved in favor of the importer." The court did not go beyond the hypothesis, so that it had no occasion to apply the rule under consideration. In like manner, in the well-known case of *Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55, the court, on page 474, 141 U. S., and page 55, 12 Sup. Ct., said that the intention of congress was plain. This, of course, was enough to end the litigation. *Earnshaw v. Cadwalader*, 145 U. S. 247, 12 Sup. Ct. 851, turned on an issue for the jury. The court merely stated the ordinary rule that the jury must be satisfied by a preponderance of evidence, and that the case was not within the earlier ones to which we have referred. There can be no question as to the general proposition; yet, like all rules of construction of a similar character, we presume it has no practical use except in cases of extraordinary doubt. It has a more appropriate application when the question is one of any tax at all; and the federal reports are full of suits where the courts have not hesitated to perform the duty of determining mere questions of classification where it was admitted some duty was to be imposed, in favor of the higher rate, under circumstances of great difficulty. The rule, in any view of it, fails to aid us in the solution of this case.

The limitations and application of the rule under which customs statutes are usually construed according to commercial nomenclature are too apparent, in the light of plain principles of construction, to need explanation so far as concerns this case. Although, if the expression "sheet steel in strips" stood alone, it might be interpreted as we have said, yet here, as everywhere, this yields to surrounding facts and the context. While the words in question, standing alone, might well have the sense we have explained, yet to the common understanding they are not inapt to cover the importation in this case. Indeed, a very large manufacturer of this and analogous steel products testified that it is generally spoken of in his mill as "sheet steel." Therefore, it is not unreasonable to suppose that congress spoke in the same language, or at least regarded this importation as covered by these words. Whether it did so or not is the turning point of this appeal.

We attach great weight to the fact that sheet steel in strips, as defined by the importer, had not been imported, or certainly only to the minor extent already described; while the article in question

in this case had been imported to a sufficient extent to come in competition with our own manufacturers, and is not specifically provided for, unless in these words. We, therefore, conclude that congress intended to legislate for the latter, and not for the former. The connection with the words "flat steel wire" can hardly be explained, except by the suggestion that congress had in mind analogous matters. We refer to the fact that flat steel wire and steel in strips, like this importation, might well have been considered by congress as running into each other, and that congress united these in one provision in order to remove all doubts arising from nomenclature, or from the successful use of new methods to evade a rigid description. We are, however, particularly impressed by the words "whether drawn through dies or rolls." Sheet steel, as commercially known, cannot, for any practical purpose, be drawn through dies, or, if at all, only in such rare cases as not to occupy the attention of either congress or the trade. Flat steel wire, as we have seen, is drawn either through dies or rolls; but, if these words "whether drawn through dies or rolls" had relation only to flat steel wire, their location would have been other than it is. We are unable to reconcile the putting by congress of this expression in the place where it stands with the interpretation laid by the importer on the words "sheet steel in strips." It is easily explained on the assumption that congress understood that "flat steel wire" and importations of the kind in question are of an analogous character, are liable to run into each other, and therefore needed to be provided for in the same class. Further, the words "of whatsoever width" conform to the purpose we assign to congress of shutting out doubts as between flat steel wire and steel strips, and they have no force or purpose except on that hypothesis. Indeed, taking the whole together, we are satisfied that congress intended by this provision to cover flat wire, ribbons of steel, and strips of steel, however designated in the trade, and of whatever width, not exceeding the thickness stated by it, and however produced, whether through dies or rolls, and to do it all by such sweeping provisions that they could not be evaded by any of the distinctions raised in the case before us. The proposition that this result charges congress with tautology overlooks the fact that the provision in question does not cover all strips, but only those of a specified maximum gauge.

The collector assessed in this case one rate of duty, the importer in his protest insisted on another, and the general appraisers found that a third was the correct one. We agree with the latter. Under these circumstances, and in view of *In re Collector of Customs*, 5 C. C. A. 101, 55 Fed. 276, we are not disposed to anticipate any questions which have not been submitted to us by counsel.

The judgment of the circuit court is reversed, and the case remanded to that court, for further proceedings consistent with this opinion.

## MARINE, Collector, v. LYON et al.

(Circuit Court of Appeals, Fourth Circuit. February 5, 1895.)

No. 95.

## 1. BOARD OF GENERAL APPRAISERS—POWERS.

The board of general appraisers has the same power which belongs to a court to allow the substitution of a copy for the original of a document forming part of the record of a case submitted to it, when such original is proved to have been lost.

## 2. SAME—EFFECT OF FINDINGS.

The findings of the board of general appraisers upon a question of fact will not be disturbed on appeal, unless without evidence to support them, or so manifestly wrong that it would be the duty of the court to disregard them.

Appeal from the Circuit Court of the United States for the District of Maryland.

This was an application by the collector of the port of Baltimore for a review of the decision of the board of general appraisers respecting certain merchandise imported by J. Crawford Lyon and others, trading as Lyon, Hall & Co. The board found that certain protests had been duly filed, and had been lost, and permitted copies of such protests to be filed. The circuit court sustained the decision of the board of general appraisers. The collector appeals.

John T. Ensor, U. S. Atty., for appellant.

John F. Preston, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

BRAWLEY, District Judge. Messrs. Lyon, Hall & Co. imported through the port of Baltimore nine separate lots of jute rugs, between July, 1891, and May, 1892, and claimed that the same were dutiable as jute carpetings, under paragraph 363, Act Oct. 1, 1890. The collector classified said rugs as pile fabrics, and dutiable under paragraph 350 of said act, which imposes a higher rate of duty than is provided in paragraph 363, and the entries were liquidated accordingly. It was subsequently held that the rugs were properly dutiable under paragraph 363, and, as protests in due form had been filed with respect to seven of the lots, the same have been reliquidated, and the excess of duties paid has been recovered. The controversy here grows out of a question as to the regularity and legality of the protests as to two of the lots, which are referred to as "No. 949" and "No. 950." The act of June 10, 1890, provides (section 14) that the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise shall, within 10 days after (but not before) such ascertainment and liquidation of duties, etc., or within 10 days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in

respect to each entry and payment, the reasons for his objections thereto, etc. It is further provided that the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of general appraisers, created by said act, which board "shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein," etc. Protests in seven cases were considered by this board, and sustained in all save one, which was overruled, for reasons not pertinent to this inquiry. It is not disputed that the two lots now under our consideration were of the same class of merchandise, and subject to the same rate of duty, as those ordered by the board to be relinquished. These two lots, imported per steamship Minnesota, September 18, 1891, and the steamship Montana, October 26, 1891, were liquidated October 14, 1891, and November 25, 1891, respectively. It is claimed that protests respecting these two importations were filed with the collector of the port of Baltimore on October 19 and November 30, 1891, respectively. What are alleged to be copies of the same, bearing those dates, were lodged with the collector, and by him transmitted to the board of appraisers on February 28, 1893, with a letter stating that, after careful investigation, he found no record in his office of said protests; and, after detailing the system of the office, tending to show how impossible it would be that such protests should be filed without leaving some trace of their existence, he insisted that "the loss of a protest has never occurred, and is extremely unlikely to occur." The alleged copies of the protests, with the letter of the collector, a letter of the naval officer of like import, and an affidavit of the chief clerk of the liquidating department of the Baltimore customhouse, tending to support the contention that such protests had never been filed, and stating other facts to sustain such contention, came before the board of general appraisers in due course, and with them was an affidavit of J. Crawford Lyon, one of the firm of Lyon, Hall & Co., to the effect that a protest in each of these cases, of the same tenor as the protests filed in connection with the other entries, was signed by him, and given to Frank H. Shallus, the customhouse broker of his firm; and affidavits of the said Shallus that protests in each case had been filed. Both Lyon and Shallus charged in their affidavits that an irregular record had been kept by the person intrusted with the filing of protests, and that said person had since been dismissed for inattention to duty. The decision of the board of appraisers was filed August 11, 1893, and it was held without dissent that merchandise identical with that in question was dutiable as claimed by the appellants, and that the real point in issue was whether the appellants had filed protests against the collector's decision within 10 days after liquidation, as required by the statute above cited. Upon this point the board found that "the customs officer referred to was inattentive to duty, and was removed for drunkenness," and that there was prima facie proof that the original protests were filed in time. The protests were sustained, and the collector authorized to reliquidate the entries accordingly. From

v.65f.no.8—63

this decision the collector appealed to the United States circuit court, where, after a hearing, a judgment was entered affirming the decision of the board of general appraisers, and from this judgment the collector appeals.

The precise question for our determination, and the only question, is whether the board of general appraisers had jurisdiction to hear and determine the subject-matter in controversy. If it had, it is scarcely disputed that its findings of fact will not be disturbed, unless they are wholly without evidence to support them, or so manifestly wrong that it would be the duty of the court to disregard them. The board being the creature of statute, we must look to the statute for the definition of its powers. The twelfth section of the act of June 10, 1890, provides for the appointment by the president, by and with the advice and consent of the senate, of nine general appraisers of merchandise, fixes their salary, and confers upon them authority to exercise the powers and duties devolved upon them by that act, "and to exercise, under the general direction of the secretary of the treasury, such other supervision over appraisements and classifications for duty of imported merchandise as may be needful to secure lawful and uniform appraisements and classifications at the several ports." The fourteenth section of the same act prescribes the method of procedure in appeals from the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, and provides for the hearing of such appeals by a board of the three general appraisers, which "shall examine and decide the case thus submitted." Judicial power is thus conferred, and the phraseology implies a court. It has been so held:

"In the circuit court the return of the board is to be considered substantially in the same manner as the report of a master is considered in that court, or as the record including the opinion of the court in an equity or admiralty suit is considered in an appellate court." *In re Van Blankensteyn*, 5 C. C. A. 579, 56 Fed. 475.

That a court can allow the substitution of a copy of a pleading in the place of the original proved to be lost is too clear for argument. If the office of the collector of the port of Baltimore had been destroyed by fire, it would scarcely be disputed that the board of appraisers could allow secondary evidence as to the contents of documents proved to have been burned. Between papers lost by a fire and those lost by the carelessness of their custodian there can be no legal distinction. When this board found as a matter of fact that the protests had been filed in time, it was clearly within its jurisdiction to allow copies of the originals to be filed in place of those misplaced through carelessness. In the absence of fraud, or mistake so gross as to amount to it, such finding should not be disturbed. We find no error in the judgment of the circuit court dismissing the appeal. It is therefore affirmed.

## SNOW v. MAST et al.

(Circuit Court, S. D. Ohio, W. D. January 12, 1895.)

No. 4.751.

## 1. COPYRIGHT—NOTICE INSCRIBED ON PHOTOGRAPH—ABBREVIATION.

In a notice of copyright inscribed on a photograph under Rev. St. § 4962, the abbreviation " '94," representing the year, is a substantial compliance with the statute.

## 2. SAME—INFRINGEMENT—JOINDER OF CAUSES OF ACTION.

Joining several causes of action for penalties under Rev. St. § 4965, for infringement of separate copyrights, is not improper, either at common law or under the Ohio Code of Civil Procedure, which allows the joinder of different causes of action for penalties under a state statute.

This was an action by Blanche L. Snow against Phineas P. Mast, J. S. Crowell, and T. J. Kirkpatrick, partners as Mast, Crowell & Kirkpatrick, for penalties under Rev. St. § 4965, for infringements of copyrights. Defendants demurred to plaintiff's petition.

The petition alleged, as three separate causes of action, infringements of three different copyrights of photographs secured by plaintiff. The notices of copyright alleged in the petition to have been inscribed on the copies of said photographs were in the following form: "Copyright '94. By B. L. Snow." Defendants demurred, on the grounds that the petition contained several pretended causes of action improperly joined, and that neither the petition nor any cause of action thereof stated facts sufficient to constitute a cause of action against defendants. Plaintiff had previously filed a bill in equity, founded on the infringement by defendants of the same copyrights, for an injunction and an account, and also for the surrender and delivery of copies of the alleged infringing photographs on hand and the plates from which they were made, and for the recovery of the penalties imposed for such infringements. On the hearing upon a demurrer to the bill, the demurrer was sustained, on the ground that plaintiff had an adequate remedy at law, by action. 63 Fed. 623. Thereupon plaintiff filed a petition for a rehearing on the demurrer, and for leave to amend the bill, and thereafter brought this action.

Wood & Boyd, for plaintiff.

Keifer & Keifer, for defendants.

SAGE, District Judge. The demurrer will be overruled. The point made for the defendants that the notices of the copyrights alleged to have been inscribed on the photographs do not comply with the requirements of the statute was urged in support of the demurrer in the suit in equity and overruled. The object of the statute is to give notice of the copyright to the public, and it would be too narrow a construction to hold that the abbreviation "'94" is insufficient. A substantial compliance is all that is necessary. In *Werckmeister v. Manufacturing Co.*, 63 Fed. 445, 452, the court said that there was enough in the notice to give any one who was looking for the truth, and desiring to avoid infringement, the thread which would lead him easily to the actual condition of the copyright, and held that that was sufficient.

There is no misjoinder. The causes of action in the petition are for injuries to property. Even at common law they might be joined. "Where the same form of action may be adopted for several distinct

injuries, the plaintiff may in general proceed for all in one action." Chit. Pl. 202. "Several counts may be joined in one action on a penal statute for different penalties of a similar nature." Id. 200. The petition is substantially in accordance with the Ohio Code of Civil Procedure. If the question be considered under the Code, there is no misjoinder; for it was held in *Railroad Co. v. Cook*, 37 Ohio St. 265, 272, that the statute providing for the joinder of actions should be construed liberally for the purpose of preventing multiplicity, and that different causes of action for penalties under a state statute may be united in the same petition. In addition, it may be said that, under section 921 of the Revised Statutes of the United States, if a separate action had been brought for each of the causes set up in the petition, they might be tried together. It would hardly be worth while, therefore, to compel the pleader to separate them, and to bring three actions.

---

SNOW v. MAST et al.

(Circuit Court, S. D. Ohio, W. D. January 14, 1895.)

No. 4,696.

**COPYRIGHT OF PHOTOGRAPH—EQUITY JURISDICTION OF SUIT FOR INFRINGEMENT**  
—63 FED. 623, REVERSED ON REHEARING.

This was a suit by Blanche L. Snow against Phineas P. Mast, J. S. Crowell, and T. J. Kirkpatrick, for infringements of copyrights of photographs. On the hearing upon a demurrer to the bill the demurrer was sustained. 63 Fed. 623. Complainant filed a petition for a rehearing, and for leave to amend the bill, and thereupon the following order was entered:

This cause came on to be heard upon the petition of the complainant for a rehearing of the demurrer of the defendants, and for leave to amend the bill, and was argued by counsel for both parties; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that the entry herein dismissing the bill be, and the same is hereby, set aside, and that the demurrer be, and the same is hereby, overruled, with leave to the defendants to answer within 15 days; and it is further ordered that the bill stand amended as prayed for in said petition.

---

JONATHAN MILLS MANUF'G CO. v. WHITEHURST et al.

(Circuit Court, S. D. Ohio, E. D. December 1, 1894.)

No. 632.

**JUDGMENT—RES JUDICATA—DECREE FOR ASSIGNMENT OF PATENT.**

A decree of a court having jurisdiction, finding that the title to certain patents was held by a defendant in trust for a corporation, and that receivers of the corporation were entitled to have the patents assigned to them, ordered the making of such assignment, which was executed and delivered accordingly. *Held*, that in a subsequent suit for infringement of

one of such patents, brought by one claiming under said defendant with notice of the rights of the corporation and the receivers, such decree and assignment were a complete defense, although in the bill on which the decree was rendered said patent was not specifically mentioned, it being within the general averments of the bill.

This was a suit by the Jonathan Mills Manufacturing Company against M. C. Whitehurst and others for infringement of letters patent No. 267,098, issued to Jonathan Mills November 7, 1882, for improvements in machines for bolting flour. A decree for complainant was rendered (56 Fed. 589), but, on petition by defendants, a rehearing was granted (60 Fed. 81), and proofs were taken under the order for a rehearing.

At the original hearing of the case complainant based its title to the patent in suit on certain assignments and other instruments in writing, which were described in the opinion rendered on such hearing as follows:

On the 23d day of January, 1883, Jonathan Mills, the patentee, assigned all his right, title, and interest in and to the patent in suit to the Phoenix Foundry & Machine Works, a corporation having its home office and principal place of business at Terre Haute, Ind. On the 18th of December, 1883, the Phoenix Foundry & Machine Works, "in consideration of \$1,000 cash in hand paid, and for a note for \$1,000, due in six months, made by Jonathan Mills to the Phoenix Foundry & Machine Works," agreed, in writing, to assign to Myron W. Clark the patent in suit, and certain other patents and rights and personal property. It was stipulated in the agreement that Clark should sell "the said property," and apply the proceeds—First, to the payment of \$1,000 to Mills; second, to the payment of said note made by Mills; and, third, to pay to Mills any balance or surplus. Then follows a provision that no liability shall attach to Clark, excepting to account for proceeds of sales, and the Phoenix Company, "in assigning said property, guaranties no value thereto." This contract is signed by the Phoenix Company and by Clark. Subjoined is a declaration, signed by Clark and by Mills, that Clark holds the property as trustee for Mills, and as security for the payment of \$1,000 due him by Mills, and to be retained from the proceed of sales, which, however, were not to be made within six months without his consent. Then follows the substitution on the 21st of June, 1884, by Mills, of George T. Smith for Clark as trustee. Meantime, on the 20th of December, 1883, Clark had assigned to Smith, in consideration of \$1,065, the patent in suit, and certain other patents included in the assignment to him by the Phoenix Company, but not still other patents and certain personal property included in said assignment. On the 15th of August, 1892, Smith, in consideration of \$100, assigned the patent in suit to Charles Wardlow, of Columbus, Ohio, and, on the next day, Wardlow, in consideration of one dollar and other valuable considerations, assigned the same to the complainant. By an instrument in writing, not dated, but recorded in the patent office July 1, 1891, Jonathan Mills, in consideration of one dollar and other valuable considerations, assigns all his interest in said patent to the complainant. This assignment contains a stipulation that the complainant should pay 10 per cent. of all royalties collected by it "for infringements" to Mills.

The petition for rehearing alleged newly-discovered evidence, consisting of the decree of the circuit court of Wayne county, Mich., in which it was determined that the patent in suit was the property of the George T. Smith Middlings Purifier Company, and that George T. Smith had transferred the patent, which he held as trustee for said company, in fraud of the creditors. The petition also set forth that the assignment from Jonathan Mills to the complainant herein contained full notice of the rights of the George T. Smith Middlings Purifier Company, and that complainant was charged with such notice when it procured Smith to make the transfer of the patent in suit to Charles Wardlow, and from Wardlow to the complainant company. See 60 Fed. 81.



The petition also set forth that prior to the said transfer of Mills to the complainant company he had assigned all his right, title, and interest in the patent here in suit to the Cummer Engine Company, of Cleveland, Ohio, and that such assignment was dated March 13, 1884, and duly recorded in the United States patent office before the time the complainant's company had acquired any title to the patent.

The answer to the petition for rehearing denied that Smith held the patent in trust for the George T. Smith Middlings Purifier Company; denied that prior to the assignment to Wardlow he had attempted to assign any rights in the patent to his wife, Eliza B. Smith; denied that such assignment was filed in the patent office; and denied that Eliza B. Smith ever made any assignment to one Charles H. Plummer, or other person, of the patent in suit. The answer admitted that the suit was filed in the circuit court for the county of Wayne, Mich., by the receivers of the George T. Smith Middlings Purifier Company against Smith, his wife, and Plummer, as alleged in the petition for rehearing; admitted that the decree of the court upon full hearing and testimony in open court found that Smith did hold the title to the patent No. 267,098 in trust for the George T. Smith Middlings Purifier Company, did order that Smith reconvey the title to the receivers, or that the decree itself should operate as an assignment, transfer and release of all the right, title, and interest which either George T. Smith, Eliza B. Smith, or Plummer, or any of them, had in said patent at the time of filing the suit, to wit, August 13, 1890; but it insisted that said decree had no force and effect for the purpose of transferring said letters patent No. 267,098, because the said letters patent were not mentioned by name, date, and number in any allegations in the pleading in said cause, or upon any proofs taken in said cause. The answer further denied that Jonathan Mills did on March 15, 1884, and on February 1, 1886, assign all his right in the patent on which this suit is brought to the Cummer Engine Company, of Cleveland, Ohio, for the reason that said Mills had parted with all his right, title, and interest in said patent No. 267,098, and that said legal title was in George T. Smith; and alleged that said conveyance to the Cummer Engine Company was null and void and of no effect for that reason.

In support of the allegations of the petition defendants introduced in evidence certified copy of the decree of the Wayne county circuit court of Michigan, referred to in the petition for rehearing; also certified copy from the records of the United States patent office of the assignment from the Consolidated Middlings Purifier Company and the George T. Smith Middlings Purifier Company to Eliza B. Smith; also certified copy from the records of the patent office of the agreement between Eliza B. Smith and Charles H. Plummer, dated July 16, 1890; also certified copy from the records of the patent office of the assignment from Eliza B. Smith, George T. Smith and George W. Weadock, executor, to the receivers of the George T. Smith Middlings Purifier Company, which assignment was made in pursuance of the order of the Wayne county circuit court; also certified copy from the records of the patent office of the assignment from Jonathan Mills to the Cummer Engine Company, dated March 15, 1884; also copy from the records of the patent office of the agreement between Finch & Mills and the Cummer Engine Company, dated February 1, 1886; also certified copy from the records of the patent office of the contract between the Cummer Engine Company and J. C. Frazier, dated March 24, 1886; also certified copy from the records of the patent office of a digest of all the assignments, agreements, licenses, etc., relating to the patent on which this suit is brought.

Poole & Brown, for complainant.

George J. Murray, for defendants.

SAGE, District Judge. I have examined the proofs and briefs presented upon the hearing of the petition for rehearing. I find that the proofs support the averments of the petition. The decree in the Wayne county circuit court of Michigan in the suit of Rufus H. Emerson and Zenas C. Eldrid, receivers, against George

T. Smith et al. is conclusive upon the proposition that George T. Smith (under whom the complainant herein claims), held the title to the patent in suit in trust for the George T. Smith Middlings Purifier Company, and that the complainants in that suit, as receivers of said company, were entitled to have the same assigned and transferred to them for the interest of the creditors of the George T. Smith Middlings Purifier Company. The decree ordered that George T. Smith, with his wife, Eliza B. Smith, and one Weadock, forthwith execute and deliver to said receivers the patents involved in said suit, including patent No. 267,098, on which this suit is based. Said parties, and each of them, were by said decree perpetually enjoined and restrained from assigning, transferring, or in any manner disposing of or using any letters patent, licenses, applications, or patent interests mentioned or described in said decree, which remains to this day unappealed from and in full force.

It further appears from the proofs that the assignment ordered as above was executed and delivered by said George T. Smith, Eliza B. Smith, and Weadock to said receivers, of the several patents set forth in said decree, including said patent No. 267,098, on the 7th of June, 1893, and recorded June 16, 1893, in the records of the United States patent office. The complainant had full notice of the rights of said George T. Smith Middlings Purifier Company and of said receivers. The objection that the decree goes beyond the averments of the bill is not well founded. The bill set out a contract between said George T. Smith and the George T. Smith Middlings Purifier Company, by which it appears that said purifier company became vested with the entire right and title to patents therein enumerated, together with the right to an assignment and transfer to it of all other patents which said George T. Smith should thereafter procure for improvements in milling or mill machinery. Said contract was executed on the 25th day of April, 1878.

It is further averred in the bill that the complainants, by virtue of the terms and provisions of said contract, became entitled to all the patents held in the name of George T. Smith, and all the rights and interests in patents obtained by him in connection with other persons; that, when obtained, they in equity became the property and rights of the George T. Smith Middlings Purifier Company, and they so continued up to the date of the assignment; and, further, George T. Smith thereafter held the legal title to all said patents in trust, for said purifier company. The prayer of the bill is that the defendants George T. Smith and others be required to answer and set forth all the patents and patent interests of every character, not only of patents mentioned as being in his name, and in which he had an interest, but all applications for patents pending; and that George T. Smith be required to discover what other and further applications for patents he then had, either at that time or at the time of any assignment made by him. Patent No. 267,098 is not specifically mentioned in the bill, but the general averments quoted are ample to include it. It is, however, specifically mentioned in the decree and in the deed of assignment and transfer made in pursuance thereof, as above set forth. Even if it had been

mentioned in the decree, and not in the bill, and the decree were erroneous, therefore, in so far as it included that patent, it could not be attacked collaterally in this or any other court, the Wayne county circuit court having had jurisdiction of the subject-matter and of the person. I do not deem it necessary to consider the questions arising upon the transfer by Jonathan Mills to the Cummer Engine Company, deeming the decree of the Wayne county circuit court and the assignment made thereunder a sufficient and complete defense to the bill. The petition for rehearing is sustained, and the bill will be dismissed at the costs of the complainant.

---

**ECONOMY FEED WATER-HEATER CO. v. LAMPREY BOILER FURNACE-MOUTH PROTECTOR CO.**

(Circuit Court of Appeals, First Circuit, February 1, 1895.)

No. 112.

**PATENTS—TIME FOR PAYMENT OF FINAL FEE TO PATENT OFFICE.**

Under Rev. St. § 4897, requiring payment of final fee to the patent office within six months from notice of the allowance of the patent, such fee may be paid within six calendar months from the date of the notice.

Appeal from the Circuit Court of the United States for the District of New Hampshire.

This was a suit by the Lamprey Boiler Furnace-Mouth Protector Company against the Economy Feed Water-Heater Company for infringement of a patent. There was a decree for complainant, and for an accounting (62 Fed. 590), from which defendant appeals.

In respect to the payment of the necessary fees to the United States patent office, the records of the office show that letters patent No. 421,588 were passed and allowed August 1, 1889, and that notice was sent on that day to the applicants and to their attorneys. The final fee of \$20 was paid January 29, 1890.

Rev. St. § 4897, requires payment of final fee to the patent office within six months from notice of the allowance of the patent. *Id.* § 4885, provides that "every patent shall bear date as of a day not later than six months after the time it was passed and allowed and notice thereof sent to the applicant or his agent; if the final fee is not paid within that period, the patent shall be withheld."

H. W. Boardman, for appellant.

The common-law or lunar month, of 28 days, is the month by which the six months named in Rev. St. § 4885, must be computed, and not a calendar month. *Walk. Pat.* § 125; *Rob. Pat.* § 585; 2 *Bouv. Law Dict.* 187, § 7.

John J. Jennings and Stephen S. Jewett, for appellee.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

**PER CURIAM.** We agree in this case with the conclusions reached by the court below, and we can add nothing to the full and

clear opinion of the presiding judge. As, in our opinion, the fee was paid within the six months required by statute (Guaranty Trust Co. v. Green Cove R. Co., 139 U. S. 137, 145, 11 Sup. Ct. 512), we do not think it necessary to pass upon the question whether the non-payment of the fee within the statutory period can be set up as a defense to a suit upon the patent. The decree of the circuit court is affirmed.

NOTE. In the case of Guaranty Trust Co. v. Green Cove R. Co., 139 U. S. 137, 11 Sup. Ct. 512, cited above, it was held that where a statute requires notice of publication "for four months," and there is no legislative definition, it will be taken to mean calendar months.

### NATIONAL FOLDING-BOX & PAPER CO. v. ELSAS et al.

(Circuit Court, S. D. New York. December 6, 1894.)

#### 1. PATENTS—ACTIONS FOR INFRINGEMENT—PRIOR DECISIONS.

The validity of a patent which has been a frequent subject of litigation, and invariably has been sustained, is not open to controversy in a circuit court.

#### 2. SAME.

On the question of infringement, where it appears that devices very similar to defendants' have been held to infringe in several cases, the decision granting a preliminary injunction in the case, directly on the point involved, and made after careful examination of defendants' device, should be followed on final hearing, especially where no injunction can issue, and a speedy review can be had.

#### 3. SAME.

The Ritter patent, No. 171,866, for an improvement in paper boxes, held valid, and infringing.

This was a suit by the National Folding-Box & Paper Company against Herman Elsas and David Keller for infringement of letters patent No. 171,866, granted to Reuben Ritter, January 4, 1876, for an improvement in paper boxes.

On motion by complainant for a preliminary injunction, the following opinion was rendered by Lacombe, Circuit Judge:

"A careful examination of the exhibits introduced by the defendants, as samples of the locking device in the boxes sold by them, leads me to the conclusion that the projection does not accomplish its purpose by hooking over the material at the end of the slot, but engages with the edge of the slot itself. The illustrative model, in which the slot is prolonged, makes this quite clear; and the slot is narrow enough to act substantially as a slit in bending the projection so as to give a straight edge engagement. I am unable to differentiate it, in action, from the device which was before the court in *National Folding-Box & Paper Co. v. American Paper Pail & Box Co.*, nor do I think defendants have shown such laches on the part of complainant or its predecessors as should defeat this application for a preliminary injunction. Motion granted."

Walter D. Edmonds, for complainant.

Arthur v. Briesen (E. E. Wood and Edward Boyd, on the brief), for defendants.

COXE, District Judge. The validity of the complainant's patent is no longer open to controversy in this court. It has been the fre-

quent subject of litigation and has, invariably, been sustained. *Box Co. v. Nugent*, 41 Fed. 139; *National Folding-Box & Paper Co. v. American Paper Pail & Box Co.* (on preliminary injunction) 48 Fed. 913, affirmed 51 Fed. 229, 2 C. C. A. 165; same, on final hearing, 55 Fed. 488; *National Folding-Box & Paper Co. v. Phoenix Paper Co.*, 57 Fed. 223.

Upon the question of infringement also the defendants are confronted by four circuit court decisions and one decision of the circuit court of appeals, holding that devices very similar in construction infringe the second claim of the Ritter patent. There is also the decision of this court directly upon the point involved. It is true that this decision was not made at final hearing, but upon a motion for a preliminary injunction; but it is also true that it was made by the judge who decided the original case, after "a careful examination of the exhibits introduced by the defendants as samples of the locking device in the boxes sold by them." He was clearly of the opinion that the defendants' flap did not hook into the angle of the slot and engage at a single point, but that there was a straight-edge engagement. In such circumstances the decorous and orderly administration of justice requires that the prior decision should be followed, and especially so in a case where no injunction can issue and a speedy review can be had.

The court has examined the complainant's title, in the light of the defendants' accusations, and is of the opinion that it is sufficiently established.

The patent having expired pendente lite the complainant is entitled to a decree for an accounting, with costs.

---

DE LEON v. LEITCH et al.

(District Court, E. D. Louisiana. February 11, 1895.)

No. 13,006.

1. ADMIRALTY—JURISDICTION—BOND FOR SALVAGE.

Where salvaged property is delivered by the salvors to the owners, upon their promise to execute a bond for salvage when requested, and such a bond is afterwards given, and dated back to a day before the delivery of the property, a court of admiralty has jurisdiction to entertain a libel in personam on the bond.

2. SALVAGE—AMOUNT OF ALLOWANCE.

The steamship M., on a voyage from New Orleans to Honduras, struck a reef off the coast of Mexico, and, being in great danger of going to pieces, was abandoned by the crew. On the following day, N. and D. went on board, brought ashore a quantity of specie, guarded it for three days, and then took it on a schooner to meet a steamer bound to Belize, put it on board such steamer, and brought it safely to Belize, incurring in these services considerable expense and considerable hardship and danger. *Held*, that an allowance to N. and D., as salvage, of one-third of the value of the specie, was proper.

This was a libel in personam by A. C. De Leon, executor of R. S. De Leon, against James Leitch and the firm of Lefebvre, Krug & Oswald, upon a bond given to secure payment of salvage. The bond in question is as follows:

## British Honduras.

Articles of agreement entered into at Belize, this eighth day of January, in the year one thousand eight hundred and eighty-nine, between James Michael Norich, of New Orleans, in the United States of America, and Reginald S. De Leon, of Puerto Cortez, in the republic of Honduras, of the one part, and the several persons or firms whose names are hereunto subscribed of the other part: Whereas, the steamship Macgregor, of Glasgow (J. S. Miller, master), having sailed from New Orleans on the 27th day of December last, bound on a voyage thence to Puerto Cortez, via Belize and Livingston, laden with a general cargo, and having on the evening of the 30th day of December, about 9:30 o'clock, accidentally struck on a reef at Ascension Bay, on the Yucatan coast of Mexico, and remaining there fast and immovable, and being in great danger of going to pieces and being abandoned by the crew for the night, and on the 31st day of December being still fast and in danger of breaking up, the parties hereto of the first part went on board the said vessel, and brought ashore a large quantity of specie which was laden on the said vessel, and buried the same in the sand, and guarded the same by day and by night until the third day of January, when they carried the same on board a schooner, and took it out to sea to meet the steamship Wanderer, which was expected to be on her voyage from New Orleans to Belize; and having, on the sixth day of January, fallen in with the said vessel, put the said specie on board of her, and brought it safely to Belize, where they arrived this day; whereby, or in consequence of the premises, the parties hereto of the first part have incurred considerable expenses, disbursements, and charges, and have encountered considerable risks and dangers to their lives, and have been put to considerable hardships and trouble, the amount or value whereof cannot at present be sufficiently ascertained, and which may form a charge on the said specie so saved, or may come under the denomination of salvage to which the said parties hereto of the second part, being respectively owners or consignees, or agents of owners or consignees, of the said specie so saved, may be liable to contribute: Now, these articles witness that, in consideration of the engagements and agreements of the said parties of the second part hereinafter contained, the said James Michael Norich and Reginald S. De Leon engage and agree with each of the said parties of the second part that they shall, and will deliver, or caused to be delivered, as soon as can be conveniently done, at the port of Belize, aforesaid, and on reasonable request, the respective amounts of specie so laden on board the said steamship Macgregor, and so saved belonging or consigned, respectively, unto the several parties of the second part, his or their factors, agents, or assigns, and permit them to receive, take possession, and remove the same according to their respective rights, positions, or ownerships thereof, in consideration whereof the said parties hereto of the second part do hereby for themselves, severally and respectively, and not jointly, personally engage and agree with the said James Michael Norich and Reginald S. De Leon, jointly and severally, to pay, or cause to be paid, unto the said James Michael Norich and Reginald S. De Leon, or unto their executors, administrators, or assigns, their proper and respective proportions of the said salvage in respect of their respective sums of specie so saved, and all legal charges and other expenses to which the said parties of the second part are or shall be respectively liable, or which the said specie ought to bear under the aforesaid circumstances, ratably and in fair proportions, according as the amount and proportions thereof may be ascertained and adjusted by any court of law having competent jurisdiction in the premises, or by private arrangement, among all the parties hereto. In witness whereof, the parties hereto have hereunto set their hands, the day and year first above written.

[Signed]

J. M. Norich.  
 p. p. R. S. De Leon,  
 A. C. De Leon.  
 Mutrie, Arthur & Currie.  
 Lefebvre, Krug & Oswald.  
 James Leitch.

W. J. McKinney,

Actg. Secy. on Behalf of the Government of British Honduras.

W. S. Benedict and R. De Gray, for libelant.

PARLANGE, District Judge. This is a libel in personam by the testamentary executor of one of two salvors, on a bond given to secure the payment of salvage. The original libel averred that the specie saved was delivered to the consignees, and that thereafter, the salvors having communicated with the consignees, the latter signed the bond. Under such allegations, it may be that libelant could not recover in this court. *Cutler v. Rae*, 7 How. 729; *Railway Co. v. Swan*, 111 U. S. 384, 4 Sup. Ct. 510. The libel was amended so as to aver that the bond was signed prior to and as a condition of the delivery of the specie. Subsequently, a further amendment was made to the libel, so as to aver that, prior to the delivery of the specie to the consignees, they agreed to give the bond. I am satisfied that the last amendment sets out the real facts. The receipts which the consignees gave when they received their specie, state that they agree to sign a bond when called upon to do so. The bond was doubtless postdated, but I do not see that such action was objectionable, under the circumstances. The specie was delivered under a written promise to sign a bond, and subsequently the bond was executed by all parties, dating it back to the date of the delivery. No one complains of this. Under the allegations of the second amendment to the libel and the facts which support them, the court has jurisdiction. *Coast Wrecking Co. v. Phoenix Ins. Co.*, 7 Fed. 236; *Maury v. Culliford*, 10 Fed. 388; *The John M. Chambers*, 24 Fed. 383; *L'Amerique*, 35 Fed. 835; *Olivari v. Insurance Co.*, 37 Fed. 894; *Sweeney v. Thompson*, 39 Fed. 121. See notes foot of page 166, *Ben. Adm.* (Ed. 1894). That a passenger, in a proper case, may recover salvage, is settled. *The Connemara*, 108 U. S. 353, 2 Sup. Ct. 754.

The total amount of specie saved was about \$21,244. Only two of the consignees who signed the bond are before the court,—James Leitch, for whom \$3,700 were saved; and the firm of Lefebvre, Krug & Oswald, for which \$1,288.25 in Mexican dollars, worth \$950 in American money, were saved. The services rendered were highly meritorious. The bond, signed by all the parties, recites that the salvors "have incurred considerable expenses, disbursements, and charges, and have encountered considerable risks and dangers to their lives, and have been put to considerable hardships and trouble." Under the circumstances, I consider that an allowance for salvage of one-third of the sums saved is just and proper. Of course, the libelant can recover but one-half of the salvage; the other salvor, Norich, not having sued. There will therefore be a decree in favor of libelant against James Leitch for one-sixth of \$3,700, or \$616.66 $\frac{2}{3}$ ; and against the firm of Lefebvre, Krug & Oswald for one-sixth of \$950, or \$158.33 $\frac{1}{3}$ , and costs.

Let W. B. Schmidt, the attorney in fact of Herman Krug, be notified of the rendition of the decree.

## GILCHRIST et al. v. LUMBERMAN'S MIN. CO.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1895.)

No. 36.

## 1. SHIPPING—CHARTER PARTY—BREACH—WAIVER.

Libelant chartered respondents' vessel to carry eight cargoes of iron ore from E. during a certain season of navigation, the charter allowing libelant four days to load after she reported at E. After she had taken seven cargoes, she was delayed by a cause which could not excuse her failure to make the eighth trip. But thereafter, when the season was nearly closed, and respondents did not wish to send her to E., because afraid she could not get a load before the close of the season, libelant requested them to send her, representing to them that there would be no difficulty in loading her. Relying thereon, respondents sent her, and on the fourth day after her arrival the season closed. Owing to the frozen condition of the ore at the time of the request and statement, she could not have been loaded in less than two weeks. *Held*, that libelant, by his request and misrepresentation, waived any right to hold her for her previous delay in arriving at E., and that failure to carry the eighth cargo must be attributed to the close of the season, or vis major, for which there was no liability.

## 2. SAME—SELF-INFLICTED LOSSES.

Respondents cannot recover damages of libelant on the ground that they were not permitted to take a cargo, which could have been loaded before the close of the season, from E., for other persons, as on the arrival of the vessel at E. they knew that it was impossible for libelant to load her with his iron before the close of the season, and therefore they were not obliged to wait, but were at liberty to take a cargo for other parties, and it was their own fault that they did not.

On rehearing. For former opinion, see 5 C. C. A. 244, 55 Fed. 681.

Before TAFT, Circuit Judge, and SAGE and SWAN, District Judges.

TAFT, Circuit Judge. This case has been once decided. The opinion is reported in 6 U. S. App. 607, 5 C. C. A. 244, 55 Fed. 681. In that opinion we reversed the decree of the circuit court awarding damages to the libelant and appellee, and remanded the case with instructions to dismiss both the libel and cross libel. A motion was subsequently made by the appellants to modify the order in this court so far as it directed the dismissal of the cross libel, and to direct a reference to a master to determine the damages due the appellants and respondents on their cross libel. The appellee and libelant also filed a petition for a rehearing on the merits. Both the motion and the petition must be denied.

The libel was filed to recover damages for the breach of a charter party of the schooner Foster to carry eight cargoes of iron ore from Escanaba, on Lake Superior, to the Lake Erie ports during the season of 1886. Seven cargoes were carried or provided for. The breach alleged was in the failure to carry the eighth. The eighth cargo should, by the contract, have been carried in November. The Foster was delayed nine days at Chicago, from the 17th to the 26th of that month, by the running aground of two vessels in the Chicago river. During this interval, the agent of the libelant requested the managing owner of the Foster to send her to Escanaba to carry the eighth



cargo. The latter did not wish to do so, because afraid that he could not get a load before the close of the season. The agent of the libelant assured him that if the Foster went she would be loaded. The ore which the libelant proposed to ship was soft or hematite ore. Unlike hard ore, this freezes in cold weather, and the process of loading it is then very laborious and slow. Hence, the anxiety of the Foster's owner to know whether if she went to Escanaba the libelant could and would load her. Relying on the statement of libelant's agent, the Foster did go to Escanaba, arriving there on the 26th; but the soft ore was frozen hard, and it was then impossible to load her in a less period than two weeks, which would keep the vessel in the dock until ten days after the close of navigation. It is undisputed that the ore was frozen hard on the 16th of November, and that the libelant's agent had the means of knowing this when he assured the agent of the respondents that if the Foster went to Escanaba she could be loaded. The contract provided that the libelant might have four days to load after the Foster reported at Escanaba. The season closed on November 30.

It may be conceded that the cause for the Foster's delay in the Chicago river, arising as it did while she was engaged in a trip not mentioned or contemplated in her contract with libelant, furnished no excuse for her failure to make the eighth trip. That trip, under the contract, should have been made in November; and, had she reached Escanaba early in that month, she could have secured a load, and carried it. When she was lying in the Chicago river, it was so late in the season that if she went to Escanaba there was every probability that she could not complete her contract, because of the difficulty in loading the ore, and that by going she would not only not save herself from liability in damages for failure to carry the eighth cargo that season, but would lose the time of the trip from Chicago to Escanaba, with the risk and labor attending it. If she did not go to Escanaba she would, of course, incur liability in damages for breach of the contract; but she could, as the evidence shows, use the time taken in going to Escanaba by shipping a cargo of grain from Chicago to Lake Erie ports. In this situation the libelant's agent requested the Foster to go to Escanaba, representing to her managing owner that there would be no difficulty in loading her. As a matter of fact, when this request and statement were made it was impossible for the Foster to secure a load from libelant and get down before the close of navigation, because the ore was frozen solid. The statement that the libelant could and would load her involved, therefore, a false representation, on the faith of which the Foster changed her position. If she had not a reasonable prospect of complying with her contract, she was not obliged to do a vain thing. Under these circumstances, it seems clear to us that the libelant is estopped to claim damages for the Foster's delay in reaching Escanaba. By requesting her to go so late, and by misrepresenting the important fact, knowledge of which would have prevented her going, the libelant effectually waived any right to hold her in damages for her previous delay in reaching Escanaba. But it

is said that when she did reach there the libelant still had, by the contract, four days to load, and that this period did not elapse until after the close of navigation, so that the frozen condition of the ore did not, in law, prevent the Foster from making the trip, but rather her own delay in reaching Escanaba. But, as we have said, this delay was waived by the request and statement of the libelant's agent, and respondents' subsequent failure to carry the eighth cargo must be attributed to the close of the season, or vis major, for which they were not liable. The stipulation in the contract by which the libelant was given four days to load does not affect the materiality of the misrepresentation as to the condition of the ore. It does not appear that, had the ore been unfrozen, the loading might not and would not have taken place in less than four days, and in time to have taken a trip down with a cargo. Certainly, if the owner of the Foster had known the condition of the ore, he would have been reasonably certain that he could not take the eighth cargo. In view of the impossibility of libelant's loading the Foster in four days, it is difficult to see how, in justice, it can rely on that stipulation to avoid the effect of the misrepresentation of its agent.

But, while we think that the course of the libelant's agent was such as to prevent the allowance of damages in its favor against respondents, we are equally clear that the respondents cannot establish any claim for damages against the libelant on their cross libel. They claim damages because they were compelled to lay up at Escanaba, and were not permitted to take a cargo of hard ore from Escanaba for other persons, and make a profit. When the Foster arrived at Escanaba, her master must have been at once advised that it was impossible for the libelant to load her with soft ore before the close of the season, because the ore was frozen hard. He was not obliged to wait, therefore, but was at liberty to leave Escanaba; and if, as the libel avers, he could have taken a cargo of hard ore for other parties from there, there was nothing to prevent his doing so. Instead of this, the evidence shows that the vessel was stripped and laid up two days before the season closed. Respondents cannot recover damages for losses which were self-inflicted. The motion to modify the decree and to refer to a master, and the petition for a rehearing, are both denied, and the mandate will issue at once to carry out the order of this court as originally made.